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CALIFORNIA REPORTER

35 PACIFIC REPORTER

100 Cal. 505

PATCHETT et al. v. PACIFIC COAST RY. CO. (No. 19,240.)

(Supreme Court of California. Dec. 26, 1893.)

LIMITATION OF ACTIONS—TRUSTS—INFANCY.

An action barred by limitation against a trustee is also barred against the beneficiaries, though they were under the disability of infancy, under Code Civil Proc. § 369.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by John A. Patchett and others against the Pacific Coast Railway Company to quiet title. Plaintiffs had judgment, and defendant appeals. Reversed.

Wilcoxon & Bouldin, for appellant. W. H. Spencer and Venable & Goodchild, for respondent.

BELCHER, C. This action was instituted in November, 1892, by John A. Patchett and his four children, to have their title quieted to a tract of land in San Luis Obispo county. The defendant corporation, by its answer, alleged title in itself to a strip 60 feet wide across the said tract, and pleaded in bar of the action the statute of limitations. The court below gave judgment against the defendant, from which it has appealed on the judgment roll.

The facts found are, in substance, as follows: The plaintiff John A. Patchett and one Amanda Patchett were husband and wife, and on December 9, 1880, were divorced. The land described in the complaint was community property owned by them, the title standing in the name of the husband, but no division or disposition of it was made by the decree. After the divorce, and on the same day, John A. executed to Amanda a deed of the said property, which was duly acknowledged and recorded on the day of its date. It recited "that whereas, the parties hereto have heretofore been husband and wife; and whereas, a decree of divorce has been this day made and entered in the superior court of the county of San Luis Obispo, state of California, dissolving the marriage between the parties, and awarding the care, custody, and control of the minor children of the parties hereto to said party of the second part; and whereas, certain property of the party of the first part was and is the community property of the parties hereto: Now, as a full and complete settlement of all property rights as between the parties hereto, and to make provision for the support and education of the said minor children of the parties hereto, and said party of the first part, in consideration of the premises and of one dollar lawful money of the United States to him in hand paid by the said party of the second part, has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm, unto the said party of the second part, and her heirs and assigns, forever, all those certain tracts, pieces, or parcels of land, [describing the property,] to have and to hold, all and singular, the said premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, forever, in trust for the use and benefit of herself and Mary Alice Patchett, now aged ten years, Benjamin E. Patchett, now aged nine years, Bertha Mabel Patchett, now aged five years, and Minerva Emma Patchett, now aged two years, the minor children of the parties hereto; to collect the rents, and to receive the rents, issues, and profits, of the said premises, and apply the same to the maintenance and support of herself and said minor children, until the youngest of said children has attained her majority; and, when the youngest of said children is of legal age, the said trustee to convey to each of said children the one-fifth (1-5) part or interest in and to the said premises, and every part thereof, and to have and take the one-fifth (1-5) part thereof to herself in fee, free from the trust aforesaid; the intention hereof being that the said property shall be kept together, managed, and controlled by the said party of the second part until the youngest of said children is eighteen years of age, and then divided equally between the said party of the second part and said children, share and share alike." On September 8, 1881, Mrs. Patchett, by a deed duly executed and recorded, and expressing a consideration of one dollar, conveyed to a railway company a right of way for a railroad across the said tract of land, the strip described being 60 feet wide, etc., and the same strip now claimed by the defendant. Shortly after the execution of the last-named deed the defendant succeeded to all the interest acquired by the grantee thereunder, and ever since 1882 it has had the said strip of land "fenced on each side, and during all said time has used the same for the purposes mentioned in said conveyance of September 8, 1881, placing valuable improvements thereon, and the entire length thereof, consisting of railroad ties and iron rails, over which, daily, the freight and passenger cars of said defendant are propelled by its steam engines, and has thus used, exclusively, continuously, openly, peaceably, and notoriously, the same, under a claim of right to said easement, and with the knowledge of all the parties to this action and said Amanda and one Wm. Sandercock, hereinafter named, since 1882, and has paid all taxes assessed against said easement and the railroad constructed thereon." Afterwards, Mrs. Patchett mortgaged her interest in the land, and the mortgage was foreclosed. At the sale under the decree of foreclosure, John A. Patchett became the purchaser, and thereby acquired all the interest of the mortgagor in the property, except in so far as it was affected by her conveyance of September 8, 1881. Mrs. Patchett continued to act under the deed to her of December 9, 1880, until May, 1890, when, by a decree of the superior court, she was removed from her trusteeship, and one William Sandercock was appointed in her place. The latter accepted the position, and acted as trustee, until June, 1891, when he resigned, and the plaintiff John A. Patchett was duly appointed trustee in his place and stead. At the time of the trial the children were of the ages, respectively, of 22, 21, 17 and 14 years.

Upon these facts the court found, as conclusions of law, that the deed made by Mrs. Patchett to the railroad company on September 8, 1881, was void and conveyed nothing, for the reason that the grantor was the trustee of the estate, and the conveyance was in violation of the terms of the trust, and also that the plaintiffs' cause of action was not barred, and an easement in favor of the defendant railway company had not been created by adverse possession and user, "because four of the cestuis que trustent, owners of the equitable estate in the land, were within the age of majority at the time of the entry of the defendant company, and during all the time of the occupation and user of the claimed way." The principal question for decision is, was the conclusion of the court that the action was not barred, and the defendant had acquired no easement by adverse possession and user, justified by the facts found?

That a private right of way over land is an easement and an interest in the land which may be acquired by limitation—in such case ordinarily called "prescription"—is a question which does not admit of debate, and in support of which no authorities need be cited. Here the findings show that everything was done by the defendant necessary to create a prescriptive right, if such right could be acquired against the minor children, for whom the title to four-fifths of the property was held in trust. Our Code provides that an executor or administrator, or trustee of an express trust, may sue without joining with him the persons for whose benefit the action is prosecuted. Code Civil Proc. § 369. There has been some conflict in the decisions as to the rights of minors in cases like this, but the weight of authority seems to be contrary to the conclusion of the court below. In a note to Moore v. Armstrong, 36 Amer. Dec. 68, it is said: "There is also diversity of opinion on the question as to how far the rights of an infant are affected when his property is in the hands of a trustee, executor, or guardian; and the tendency of the decisions is to support the position that when the right of action vests in an executor, guardian, or trustee, who is under no legal disability, the statute will commence to run despite the disability of the minor, and, if the claim is lost by the neglect of the representative to sue, the minor is barred;" citing numerous cases. So in Perry, Trusts, (4th Ed.) § 858, it is said: "It was said in one case that 'forbearance of the trustees in not doing what it was their office to have done should in no sort prejudice the cestui que trust;' that is, that if the trustee does not bring an action to recover the estate within the statutory period the cestui que trust is not barred. But this is not the rule of law. Lord Hardwicke said: 'The rule that the statute of limitations does not bar a trust estate holds only between cestui que trust and trustee, not as between cestui que trust and trustee on one side, and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the cestui que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.' * * * Where the trustee is barred, so is the cestui." And see, also, 13 Amer. & Eng. Enc. Law, p. 740, and cases cited. Following the rule thus declared, it was said by this court in McLeran v. Benton, 73 Cal. 342, 14 Pac. 879: "If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who, in all suits for the benefit of the estate, represented both the creditors and the heirs. Cunningham v. Ashley, 45 Cal. 493; Halleck v. Mixer, 16 Cal. 579. It would seem to follow, therefore, that when the executor is barred of his action the heir is barred, although the heir or devisee be laboring under a disability. Wilmerding v. Russ, 33 Conn. 68. The general rule is that when a trustee is barred by the statute of limitations the cestui que trust is likewise barred, even though an infant. Hill, Trustees, 267, 403, 504." If the law is correctly stated in the authorities above cited and referred to,—and we think it is,—then it is apparent that the court below was mistaken in its conclusions, and its judgment was erroneous. We advise, therefore, that the judgment be reversed and the cause remanded, with directions to enter judgment upon the findings in favor of the defendant corporation.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed and the cause remanded, with directions to enter judgment upon the findings in favor of the defendant corporation.

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100 Cal. 454

KENYON v. WESTERN UNION TEL. CO.

(No. 19,320.)

(Supreme Court of California. Dec. 21, 1893.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE — DAMAGES — NOMINAL DAMAGES—DE MINIMIS NON CURAT LEX.

1. In an action against a telegraph company for failure to deliver a message, by reason of which plaintiff failed to receive an appointment as deputy assessor, damages for loss of the salary he would have received are too speculative, since a deputy only holds office at the pleasure of the officer appointing him.

2. Where a complaint shows that plaintiff is only entitled to nominal damages, and such a judgment will not carry costs, and no permanent right will be determined, a demurrer is properly sustained under the maxim "de minimis non curat lex."

3. A judgment for defendant will not be reversed merely because plaintiff was entitled to recover nominal damages, where such a judgment would not entitle him to costs, and no permanent right is involved.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by A. S. Kenyon against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Callen & Neale, for appellant. Cassius Carter, for respondent.

HAYNES, C. Appeal from a judgment in favor of defendant upon its demurrer to plaintiff's complaint. The complaint, in substance, alleges that on January 2, 1893, the plaintiff delivered to the defendant at San Diego, for transmission and delivery, the following message: "Col. A. G. Gassen, 501 Geary Street, San Francisco: Rennie will appoint. You wire him, please. Urgent. A. S. Kenyon." That through the gross negligence of the defendant the address as received at San Francisco read, "Collag Massen," and that it was not delivered for 10 days thereafter, though defendant informed plaintiff on January 3, 1893, that it had been delivered. That said Rennie was then, and since, the city assessor of the city of San Diego. That Gassen was an alderman of San Diego. That he was fully advised and understood the contents and importance of the message. That plaintiff was an applicant for an appointment as deputy of said city assessor at a salary of $75 per month; and that, if said message had been promptly delivered, plaintiff would have received the said appointment; and that he had sustained damage in the sum of $375, for which sum he prayed judgment. The demurrer is that the complaint does not state a cause of action.

The negligence of defendant, and that plaintiff would have been appointed as such deputy but for such negligence, are sufficiently averred. Respondent claims, however, that the damages alleged are too remote, and that is said by respondent to be the ground upon which the demurrer was sustained. In his brief, counsel for respondent also insists that the character and importance of the message were not disclosed, and that hence it could not be inferred therefrom that the loss of the sender's appointment to an office, or other employment, might result from a failure to deliver it. Upon both these points the authorities are, or appear to be, conflicting; but upon both questions the facts involved in the cases are so various and diverse that a careful consideration of each is required before it can be certainly said that they are in point upon the one side or the other. That there was a breach of its contract on the part of the defendant is not disputed, nor can it be contended that the plaintiff is not entitled to recover all damages he sustained from the defendant's breach of contract, provided such damages are not too remote, and are capable of being ascertained with sufficient certainty. The case principally relied upon by appellant is Telegraph Co. v. Fenton, 52 Ind. 1. There the owner of a steamboat plying upon the Ohio and Mississippi rivers telegraphed from Cincinnati to Fenton, at Aurora, as follows: "Will you go on Argosy with me for one hundred and fifty dollars. Answer immediately." Fenton was a pilot, and the telegram was sent in consequence of a previous conversation, and meant that he would pay $150 per month. The delivery of the telegram was delayed, whereby Fenton lost the employment. The court held that the damages were neither remote nor speculative. In the case at bar it is not necessary to consider whether the damages claimed were too remote, since it is clear they were speculative and uncertain. The allegation is that plaintiff would have been appointed deputy, and that the salary paid a deputy in that office is $75 per month. But it is not alleged that the city assessor would have contracted to employ him for any definite length of time. A deputy is appointed to hold during the pleasure of the officer appointing him. Pol. Code, § 878. The power of appointing deputies is in the officer, and not in the man. Hubert v. Mendheim, 64 Cal. 220, 30 Pac. 633; Pol. Code, § 876. An appointment as deputy does not imply a contract for his employment for any length of time, nor otherwise than at the pleasure of the officer making the appointment. The allegation, therefore, that he would have received the appointment, is not an allegation that he would have been retained for any definite length of time; nor could such allegation be made. He might have received the appointment and been discharged the same day, either for cause or without cause; and, as damages or compensation must be measured by the loss sustained, where that loss cannot be ascertained damages cannot be recovered. In Telegraph Co. v. Fenton, supra, an answer which Fenton would have sent, accepting the offered employment, if the message had been delivered to him when it should have been, would have constituted a contract for at least one month's service at the specified sum of $150, and this much, at least, it was clear he had lost. It is therefore not necessary to discuss or decide whether the damages, if they were ascertainable, and were in fact sustained, were too remote, nor whether the defendant would otherwise have been relieved because not informed of the nature of the transaction to which the telegram related; since, if both these points were decided against the respondent, the plaintiff could still recover nothing more than nominal damages.

Appellant contends, however, that he was, at the least, entitled to nominal damages, and that, as the judgment was for defendant, he is entitled to a reversal. The failure to perform a duty required by contract is a legal wrong, independently of actual damage sustained by the party to whom performance is due; and in general, where a contract right is violated, the maxim "de minimis non curat lex" has no application, and nominal damages will be given. But where a judgment is erroneous only because it fails to give nominal damages, it will not be reversed unless nominal damages in the given case would carry costs. Suth. Dam. § 11, and cases there cited. If, however, as said by the author just cited, the object of the action is to determine some question of permanent right, the fact that he can only recover nominal damages will not prevent a reversal. In this case nominal damages would not entitle the plaintiff to costs, and would, therefore, not justify a reversal, even if it be conceded that the judgment is erroneous. But I think the judgment was right. The question arose upon demurrer. If the demurrer had been overruled, it must have resulted in an issue of fact and a trial, and in the end a judgment for plaintiff for nominal damages which would not even impose costs upon defendant. No question of "permanent right" existed between the parties to be settled by a trial and judgment, and, in view of these facts, I think the maxim above quoted was properly observed, and that the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

PACIFIC MUT. LIFE INS. CO. v. FISHER et al. (No. 19,361.)

(Supreme Court of California. Oct. 26, 1893.)

APPEAL—STAY OF PROCEEDINGS—NECESSITY OF BOND.

On appeal by a mortgagee from a judgment declaring the lien of the mortgage subordinate to certain mechanics' liens, and directing the sale of the mortgaged property to satisfy the liens, no undertaking save the ordinary one is necessary to stay the execution of the judgment; Code Civil Proc. § 945, requiring undertakings for the payment of any deficiency arising upon the sale of property, referring only to liens created by mortgage.

In bank.

Action by the Pacific Mutual Life Insurance Company against John C. Fisher and others to foreclose a mortgage. A number of actions to foreclose mechanics' liens on the mortgaged property were consolidated with it. There was judgment foreclosing the mortgage, but making the lien of the mortgage subordinate to certain of the mechanics' liens. Plaintiff appealed. Pending the appeal the lienholders threatened to sell the property, because plaintiff had given only the bond of $300 to cover costs on appeal, and no stay bond. Plaintiff petitioned the supreme court for a stay, on the ground that no stay bond was required. Petition granted.

PER CURIAM. The facts stated in the petition herein bring this proceeding within the rule declared in Painter v. Painter, (Cal.) 33 Pac. 483,[1] and upon the authority of that case the application of plaintiff and appellant for a stay of proceedings under the judgment appealed from must be granted. So ordered.

(4 Cal. Unrep. 377)

In re KOWALSKY. (No. 15,329.)

(Supreme Court of California. Dec. 22, 1893.)

ATTORNEYS AT LAW—MISCONDUCT—DISBARMENT.

The judge of department 9 of the superior court of San Francisco, who had directed a guardian not to pay out any of the trust fund except on order of the court, refused to grant an attorney an order allowing payment for services, because not properly itemized. This judge had, in fact, never had jurisdiction of the matter, and the attorney was so told by the judge of department 10, where the same was pending, and who promised to sign the order. The attorney thereupon, in good faith, obtained the money from the guardian, after telling him the facts. *Held* no ground for disbarment.

Proceedings to disbar Henry I. Kowalsky. Dismissed.

Robert Y. Hayne, for petitioner. Frank M. Stone, for respondent.

PER CURIAM. This proceeding was instituted here by a written accusation charging Henry I. Kowalsky, an attorney of this court, with certain professional misconduct, and praying that he "be removed from the office of attorney and counselor at law." Kowalsky filed a written answer to the accusation, and the proceeding was referred to Hon. Niles Searles, now one of the commissioners of this court, to take evidence in the matter, "and to report the facts adduced therefrom to this court." The commissioner took, in writing, the evidence introduced by the parties to the proceeding, and returned the same to the court. He also reported, made, and filed his findings of facts, which are as follows:

"Filed June 3, 1893.

"In the Supreme Court of the State of California.

"Proceedings to remove Henry I. Kowalsky from the office of attorney and counselor at law. (No. 15,329.)

"The undersigned, heretofore appointed a committee to take depositions in the above-entitled proceeding, and to report the facts deduced therefrom to the supreme court, begs leave to report that the parties appeared before him by their respective attorneys,—John A. Wright, Esq., appearing for and on behalf of the prosecution, and Frank M. Stone, Esq., on behalf of Henry I. Kowalsky, the accused; whereupon the testimony offered by the respective parties was received, reduced to writing, and is herewith reported to the court. From the testimony so taken, and from the admissions in the pleadings, and after argument of counsel for the respective parties, I find the following facts:

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[1] Code Civil Proc. § 945, provides that if the judgment appealed from direct the sale of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit any waste and that, if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

"(1) Henry I. Kowalsky is, and all the times mentioned in the proceedings herein was, an attorney and counselor at law, regularly admitted to practice as such attorney and counselor, in all the courts of the state of California.

"(2) On the 27th day of March, 1890, one P. J. Corbett, by an order of the superior court in and for the city and county of San Francisco, state of California, made in department No. 10 thereof, by Hon. Walter H. Levy, one of the judges of said court, and judge of said department No. 10, was duly appointed guardian of the person and estate of a certain minor named Henry MacDonald, and duly qualified as such guardian, giving a bond in the sum of one hundred dollars, being the amount fixed by the court, whereupon letters of guardianship issued to him, and he entered upon the discharge of his duties as such guardian, and continued so to act during the time hereinafter mentioned.

"(3) The minor, Henry MacDonald, at the time of the appointment of the said guardian, asserted himself, or was asserted by his mother, to be the son of one C. E. S. MacDonald, deceased, who was a man of large wealth, and whose estate was then in the course of administration in the said superior court, but the said claim of relationship was denied by the relatives of the said decedent; and the said minor, Henry MacDonald, was possessed of no property, and had no expectation of receiving any during his minority, unless he established, by process of law, his said disputed claim of relationship, and obtained a part of said estate.

"(4) Jeremiah D. Sullivan, Esq., an attorney at law, entered into an agreement with the mother and family of the said minor, Henry MacDonald, by the terms of which, in consideration of one-half of any sum or sums of money which might be recovered for said minor from the estate of C. E. S. MacDonald, deceased, he undertook to conduct, as an attorney, such proceedings as might be necessary to establish the right of said minor to said estate, or to an interest therein. Said Sullivan appeared as the attorney for P. J. Corbett in the matter of procuring for him letters of guardianship of said minor, and the said Corbett, as guardian, assented to the agreement between Sullivan and the family of said minor in reference to the services and compensation of said Sullivan. Some months later, said Jeremiah D. Sullivan, finding that the course of litigation necessary to establish the rights of said minor in and to the estate was likely to be protracted and laborious, employed the respondent, Henry I. Kowalsky, as associate counsel, to assist him therein, and the latter labored for a period of from four to seven months, assiduously, in the accomplishment of the object of his employment.

"(5) The proceedings to establish the claim of Henry MacDonald to be the son of C. E. S. MacDonald, deceased, and to be entitled to a share in his estate, were initiated and prosecuted in the superior court in and for the city and county of San Francisco, and in department No. 9 thereof, of which Hon. J. V. Coffey was and still is the judge.

"(6) The compensation of respondent, Kowalsky, for his services in the matter of prosecuting the claims of said minor, as agreed upon between said Sullivan and respondent, was to be one-half of that which he (Sullivan) might receive under his (the said Sullivan's) agreement.

"(7) Such proceedings were had in the superior court (department No. 9) that prior to October 3, 1892, the status of Henry MacDonald, as the son and heir of C. E. S. MacDonald, was established in his favor; but an appeal to the supreme court had been taken, or was about to be taken, and there being other litigation pending, involving a large share of the estate, it was deemed judicious to compromise the matters in issue, and it was accordingly agreed upon; and on the 3d day of October, 1892, the respondent, Henry I. Kowalsky, appeared before Hon. J. V. Coffey, judge of department No. 9 of the superior court, in company with P. J. Corbett, guardian, and, as attorney for said Corbett, presented a plan of compromise, and an order authorizing said Corbett, as guardian of Henry MacDonald, to settle and compromise the matters of difference touching the estate of C. E. S. MacDonald, deceased. The order was granted by the court, and a compromise made. The estimated value of the estate at the date of the settlement was, say, $120,000, of which Henry MacDonald, by the terms of the compromise, become entitled to, say, $40,000.

"(8) Prior to the 6th day of October, 1892, Hon. J. V. Coffey, judge of department No. 9 of the superior court, advised and instructed P. J. Corbett, guardian of Henry MacDonald, in the presence of Henry I. Kowalsky, to keep the funds of his ward, Henry MacDonald, intact, to deposit the same in bank, and not to make any payments therefrom except upon order of the court. The advice so given to Corbett was in unison with a practice which prevailed in the court of Judge Coffey, but which had not been, up to that date, published as a rule of his department of the superior court.

"(9) At the date of the directions so given by Judge Coffey to Corbett, the matter of the guardianship of Henry MacDonald was not, and never had been, pending in the department of Hon. J. V. Coffey, judge in department No. 9 of the superior court, but had been, was, and for some weeks thereafter continued to be, pending in department No. 10 of the superior court, presided over by Hon. W. H. Levy, Judge. Judge Coffey at that time supposed, and all the parties supposed, the matter of guardianship aforesaid was pending in his (Judge Coffey's) department.

"(10) On the 6th day of October, 1892, P. J.

Corbett had in his hands funds of the estate of his ward, Henry MacDonald, paid him by James C. Pennie, Esq., administrator of C. E. S. MacDonald, deceased, amounting to $7,000, less $500 paid to Henry I. Kowalsky by said Pennie, and receipted for as cash by said Corbett, guardian, which funds were on deposit in the German Savings and Loan Society's Bank, except the $500 paid to Kowalsky, as aforesaid. Jeremiah D. Sullivan had, at said last-mentioned date, paid out from his own funds, in the conduct of the case on behalf of Henry MacDonald, and in the support of said minor and his mother and family, the sum of $2,200.

"(11) On said 6th day of October, 1892, Henry I. Kowalsky was about to leave by an evening train for Los Angeles, and both he and said Sullivan were desirous of receiving, as fees and compensation on account of services and expenditures in the MacDonald case, the sum of $3,500, making, with the sum already received, the sum of $4,000. The parties, Corbett, Kowalsky, and Sullivan, met on that day at the office of the latter, when the subject of such payment was broached to Corbett, who was willing to make the payment, but desired an order of the court authorizing the same. An order was drawn, and at about 1 o'clock P. M. Kowalsky repaired with it to the city hall to procure an order of allowance, etc., for $4,000. Before leaving, it was suggested that, as the hour was becoming late, Kowalsky should, upon procuring the order, telephone to Sullivan, that Corbett might procure the funds from the bank before it closed. The order was presented by respondent to Judge Coffey in open court, and by him refused, because not itemized and verified, as required by the rules of his department. Kowalsky then left the court room of Judge Coffey en route for the clerk's office, to procure the data upon which to frame an itemized petition and order. On his way he called in at the court room of Judge Levy, to take leave of the latter before departing for Los Angeles, and, to the question of the latter of what brought him to the city hall, responded, 'To get an order from Judge Coffey in the MacDonald guardianship case,' and received for reply that the guardianship matter was in his (Judge Levy's) department and not in that of Judge Coffey. Kowalsky repaired to the clerk's office, verified the statement of Judge Levy, and then returned to Judge Levy, told the latter he was correct, and asked for the order, which Judge Levy, knowing of the services rendered, was willing to grant, but was then informed by Kowalsky that he had made a like application to Judge Coffey, and that it had been refused, giving the reason therefor. Judge Levy responded that he had no such rule in his department, but that, under the circumstances, he (Kowalsky) had better comply with the rule, and bring it up regularly in court when the order would be granted. Kowalsky then telephoned to Sullivan that the case was not in Judge Coffey's court, but in that of Judge Levy, and that it would be all right. P. J. Corbett, who had remained at Sullivan's office, thereupon repaired to the German Savings Bank, drew $3,500, and brought it to Sullivan's office. On the return of Kowalsky, he explained truthfully what had occurred at the city hall. Banking hours having closed, Corbett asked Sullivan what he was to do with the money. Sullivan replied that he and Kowalsky were good for it, and he could pay it to them, and they would get the order from Judge Levy. The money ($3,500) and Kowalsky's receipt for $500 were then handed over; Corbett receiving the joint receipt of Sullivan and Kowalsky for $4,000. A petition and order were then dictated by Kowalsky for the allowance by the court of the $4,000, and written out by a typewriter. The money was divided,—respondent, Kowalsky, receiving $1,500 and his receipt for $500 previously paid him, and Sullivan $2,000. Kowalsky then departed to make preparation for his intended trip of that evening for Los Angeles, wrote a note to Judge Coffey, explaining the mistake in supposing the matter to be in his department, and apologizing for the trouble, etc. He also saw Judge Levy in the evening before starting, and told him the money had been paid over. Kowalsky was absent thereafter for some ten days to two weeks.

"(12) Neither Sullivan nor Kowalsky sought or intended to cheat, defraud, deceive, or mislead P. J. Corbett, the guardian, in any way in the premises, but acted in good faith, believing, and having good cause to believe, that, upon presenting the petition and order in proper form in the court of Judge Levy, the said order would be granted, and the guardian authorized to make the payment to them of $4,000, and, had the same been presented in open court, it would have been allowed.

"(13) P. J. Corbett, the guardian, believed the order would be granted by the court upon presentation, and would not have made the payment but for such belief.

"(14) Immediately after Kowalsky left the office, Sullivan and Corbett repaired to the city hall with the petition and order allowing the payment of the $4,000. The court of Judge Levy was not in session, but Sullivan found Hon. W. H. Levy, the judge thereof, in his chambers, and presented to him the papers for an order of allowance, as aforesaid. Judge Levy declined to sign the order until it should be regularly brought to a hearing in open court.

"(15) The value of the services rendered by Sullivan and Kowalsky as attorneys in the case of Henry MacDonald, hereinbefore mentioned, were at least equal to the amount of $4,000, and probably greatly in excess of that sum; but no order of any court or judge authorizing the guardian to pay any sum of money to them, or either of them, had been obtained or made, prior to October 6, 1892, or prior to the payment of the money on said last-mentioned day.

"(16) The respondent Kowalsky has not, as charged, evaded or disobeyed any lawful or other direction of any judicial officer, except as hereinbefore stated in reference to the instructions of Hon. J. V. Coffey, as to deposit of trust fund in bank by the guardian, and as to the payment of the same out only on the order of the court. Such instructions having been given in a case in which Judge Coffey had then no jurisdiction, and to a guardian over whom he had no authority, it becomes a question as to the binding force and effect thereof.

"(17) The matter of the guardianship by P. J. Corbett of Henry MacDonald was prior to December 12, 1892, transferred to department No. 9 of the superior court, and on or about the last-mentioned date, the account of the said Corbett coming before the court for settlement, the item of $4,000 contained therein, on account of moneys paid to the respondent and Sullivan, was disallowed by the court, and charged to P. J. Corbett as guardian.

"Respectfully submitted,

"Niles Searles, Committee."

We think that the foregoing findings of the commissioner are fully justified by the evidence, and present a correct and fair statement of the facts in the case; and, after a careful consideration of the matter, we are satisfied that these facts would not warrant us in rendering any judgment against the accused. The prayer of the accusation is denied, and the proceeding dismissed.

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100 Cal. 466

PEOPLE v. GALLAGHER. (No. 20,972.)

(Supreme Court of California. Dec. 22, 1893.)

EMBEZZLEMENT—CRIMINAL LAW — CROSS-EXAMINING ACCUSED.

1. A company's secretary, authorized to draw and sign checks, (to be signed also by the vice president,) who, receiving from the vice president two blank checks, signed by him, to pay two certain bills, fills out said checks for much larger sums, draws the money from the bank, and absconds, obtains control of it "by virtue of his employment," within Pen. Code, § 508, defining "embezzlement by servants."

2. Since the checks were drawn against an existing balance, the bank had no option but to pay them, and the money embezzled was the company's not the bank's.

3. Defendant, accused of abetting B. in embezzling money drawn by B. from the bank on his employer's account, with which money they two had gone by train to S., testified that he had been with B. most of the day before the crime, and had agreed to meet B. near noon next day at a bar opposite the bank, with no special purpose; that they had agreed to go by a certain train to S.; that they did not agree to take the money with them; that defendant had never advised B. to take his employer's money, agreed with him to go off with it, nor consented to his doing so. *Held*, that the state could ask him, as "matters about which he was examined in chief," (Penal Code, § 1323,) whether, the day the money was drawn, he went with B. and the money to a neighboring city, helped B. to change part of it, returned with B. and the same money, and left B., and went to the depot with part of it.

In bank. Appeal from superior court, Alameda county; W. E. Green, Judge.

B. F. Gallagher, convicted of embezzlement, appeals. Affirmed.

W. F. Aram, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The appellant was convicted of the crime of embezzlement, and has appealed from the judgment, and from an order denying his motion for a new trial. The indictment charges that, at the county of Alameda, one Richard C. Beggs. a clerk, agent, and servant of the Oakland Consolidated Street Railway Company, a corporation, embezzled $8,500, the personal property of said company, and that the defendant, B. F. Gallagher, did aid and abet said Beggs in such embezzlement.

The first point made by appellant is that Beggs did not commit the crime of embezzlement, as charged in the information. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. Section 508 of the Penal Code is in the following language: "Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent or servant, is guilty of embezzlement." The crime of embezzlement is a statutory offense, and was unknown to the common law. It is said that in the common-law definition of "larceny" there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that, to sustain a charge of larceny, it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that when possession of goods was acquired by a bailee, no subsequent fraudulent conversion constituted larceny while the bailment lasted, save in a few excepted cases. It was to meet these defects in the common law that statutes have been passed in most if not all of the states of our Union, in some of which an offense is created known as "embezzlement larceny," and in others, as in our own statute, designating the offense as "embezzlement." The case at bar relates to the remedy for the first defect mentioned in the common law, viz. a case in which the personal property alleged to have been fraudulently converted had not been in the prosecutor's possession.

These preliminary remarks, with a view to the better understanding of the initial points in the case, and we proceed to a review of the contention of appellant, the underlying theory of which is that the money alleged to have been embezzled did not come into the control or care of Beggs by virtue of his employment as a clerk, agent, or servant. The uncontradicted evidence was to the effect that the Oakland Consolidated Street Railway Company, a corporation, was doing business at Oakland, in the county of Alameda; was indebted to two companies in several sums of money aggregating, say, $2,500; that Richard C. Beggs was secretary of the corporation, and as such secretary his duties were, among other things, to keep the books of the company, to receive all the coin due the company, and deposit it (except small sums kept to pay off discharged workmen) in the First National Bank of the city of Oakland; to draw and sign checks as secretary, which checks were also to be signed by the president or vice president; that the corporation had in the bank aforesaid some $8,000 to $10,000, and credit for an overdraft of $10,000; that on or about June 3, 1892, J. E. McElrath, vice president of the corporation, for the purpose of paying off the indebtedness of the corporation to the two companies aforesaid, and not knowing the precise amount thereof, signed and delivered to Beggs two checks payable to his (Beggs') order on said bank, leaving the amount to be paid thereon, and on each of them, in blank. The evidence is contradictory as to whether Beggs was to indorse the checks and deliver them to the creditors, or to draw the money thereon from the bank and pay them. As there was evidence to that effect, we must, in favor of the verdict, assume the latter theory to have met the approbation of the jury. On the 6th day of July, 1892, Beggs filled up the checks,—one for $4,000, and the other for $4,519.20,—signed them as secretary, drew the full amount thereof, aggregating $8,519.20, from the First National Bank, converted $1,300 thereof into currency, left $2,500 with his wife, and fled with the residue to the northern part of the state, where he was arrested two or three days later, and thereupon confessed his guilt. The connection of defendant with the transaction is not here mentioned, for the reason that the contention under this head relates only to the receipt of the money by Beggs in the course of his employment. The argument that the money received by Beggs was that of the bank, and not that of his corporate employers, cannot be maintained. The corporation had funds in the bank. The checks were duly signed by the authorized officer of the corporation, and countersigned by Beggs, its secretary. Under such circumstances, it was not only the privilege but the duty of the bank to pay the checks to Beggs, who was the payee and holder thereof, upon presentation, and, when paid the amount of payment, was a proper charge against the corporation. This being so, the money, when received by Beggs, was as much the property of the corporation as though collected by the former for it upon a lawful account against any other debtor of the corporation. It is further urged that Beggs had no authority to draw the money from the bank, and hence it did not "come into his control or care by virtue of his employment," within the purview of the statute. The earlier English authorities are not uniform on this proposition. In Rex v. Snowley, 4 Car. & P. 390, the prisoner was hired to perform certain services, and was authorized to receive not less than 20 shillings in each case; in a single instance, he charged only 6 shillings, which he received, and did not account for. Held, that there was no embezzlement of the 6 shillings, inasmuch as it was his duty to take no sum less than 20 shillings, and therefore the 6 shillings were not received by the prisoner in the course of his employment. There are other English cases of like import, while perhaps an equal number of cases in the same courts hold a contrary doctrine. Bishop, in his work on Criminal Law, in commenting upon Rex v. Snowley, uses the following language: "That in reason, whenever a man claims to be a servant while getting into his possession, by force of this claim, the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisdiction, apply in the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing from another under a claim of agency, he cannot turn round, and tell the principal, asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" Bish. Crim. Law, (3d Ed.) § 367. In the seventh edition of the same work, like language, with some additions, is used, at section 364 of volume 2. In Ex parte Hedley, 31 Cal. 109,—a case involving the same question, and in many respects similar to the one at bar,—this court quoted with marked approval the foregoing extract from Bishop, and, in an opinion regarded as conclusive of the question here, held that if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized, and converts the same to his own use, with intent, etc., it is money received "in the course of his employment" as agent. The evidence shows that it was within the course of the employment of Beggs to draw, upon like checks with those in question, the money of the corporation from bank, and to pay its debts. In the present instance he held the two checks with authority to fill them up in amounts aggregating about $2,500, and, according to his evidence, to draw the money, and pay the creditors of the corporation, or, according to the evidence of the vice president, to indorse and deliver them to the creditors. It was as the secretary, and in the course of his employment as such, that he received the checks and filled them up, but in a manner different from his instructions, in that he filled them for larger amounts than he was authorized. Under such circumstances, he comes within the rule laid down by Bishop, supra, as interpreted in Ex parte Hedley, supra.

Appellant further insists that there is no evidence whatever that defendant aided and abetted in the appropriation and conversion of the money. In the light of the testimony, this claim seems somewhat extraordinary. There was testimony tending to show that, by previous appointment, defendant repaired to a saloon in the vicinity of the bank, while Beggs procured the money. That they immediately met, and came to San Francisco with the funds; procured a private room at the Lick House, where defendant registered under a fictitious name. That he procured currency for $1,300 of the coin; took all of the funds, except $2,500, in a valise to the Oakland station; procured tickets for himself and Beggs to Sacramento, paying therefor from the appropriated fund; had access to and carried the money at least a portion of the time, and when arrested had fifty or sixty dollars of the money on his person,—coupled with the fact that they did not pursue the usual course of travelers, in procuring through tickets to their destination, but only for short distances, and in various ways acted unlike men with money in hand honestly acquired, intent upon a journey, taken in connection with the statements of defendant when arrested, and subsequently, lead irresistibly to the conclusion that the two men were particeps criminis. Waiving, therefore, the evidence that it was the defendant, who, previous to the commission of the crime, had "advised and encouraged" it, we think the evidence against defendant was ample to warrant a conviction. The very fact that the embezzlement was determined upon before the money was drawn from the bank detracts nothing from the guilt of defendant as an aider and abetter, under such circumstances. Mere intention to commit a crime does not constitute an offense. Had Beggs, after procuring the money from the bank, honestly appropriated it to the legitimate uses of his employer, then, although the amount was in excess of the sum he was authorized to draw, his offense would have been incomplete. It was the subsequent wrongful appropriation of the funds that constituted the crime, and in this the defendant participated, under circumstances clearly indicating guilty knowledge and criminal intent. He was not simply an accessory after the fact, but a co-worker in the performance of the acts constituting the corpus delicti.

The defendant offered himself as a witness in his own behalf, and testified that he was not sure whether he saw Beggs on the Saturday next before the 6th of June or not, but that on the following Sunday he did see him; that he met him about 1 or 2 o'clock on that day, and was with him until 11 o'clock in the evening; that when they separated that night they made an appointment to meet on the following day, Monday, June 6, 1892, between 11 and 12 o'clock in the morning, at a certain saloon in Oakland, across the street from the First National Bank; that there was nothing said about Beggs drawing money from the bank; and that there was no particular purpose for which they were to meet. He also testified: "I did not on this Saturday just referred to, or at any other time, or ever, advise him to take the funds of the bank or corporation of which he was secretary, and appropriate them to him own use, nor did I, then or ever, suggest to him that he might do that, or that he and I might do that, or that we might go to Canada, or to some place, or that we would divide the funds equally after we got away. I did not ever, at any time, advise him to draw this money from the bank, and go off with it, nor did he ever suggest doing so, and I consent to it, nor did I ever agree with him to go off with the money of the bank, or of the corporation on deposit in the bank." Upon his cross-examination he was asked: "Q. Did not you and Beggs, at or previous to the time you met in the saloon, on the 6th day of June, 1892, agree to take this $8,500 which Beggs had drawn out of the bank, and go to San Francisco? A. No, sir. Q. Did you not further agree that you should take this money to San Francisco, and change it into currency? A. No, sir. Q. And did you not agree that after the money was changed into currency you should take the train which goes at seven o'clock towards Portland, Or., and take the money with you, and go to Sacramento? A. He spoke about going to Sacramento on the seven o'clock train. Q. I am asking you if you did not agree with him to do that before one o'clock of June 6th? A. We agreed to go to Sacramento, yes, but did not agree to take the money." The counsel for the prosecution then asked the following questions: "Q. I will now ask if you did not go to San Francisco with Mr. Beggs on Monday afternoon, Monday, the 6th day of June, 1892, and take with you $8,500 which Mr. Beggs had drawn from the First National Bank of the city of Oakland, belonging to the First Oakland Consolidated Street Railway Company?" to which the witness answered, "Yes." "Q. Did you not, when you arrived in San Francisco, assist Mr. Beggs in changing about $1,300 of that money into currency? A. I changed $1,300 of that money into currency. I did not do so in order to make it easier for Mr. Beggs and myself to flee with this money. Q. Did you not return to Oakland, bring back this same money with Mr. Beggs, and leave Mr. Beggs somewhere near Oakland Point, and you go to the Sixteenth street station, taking with you $6,000 of this money? A. We returned to Oakland, and I went to Sixteenth street station with the money, at Begg's dictation." These last three questions were objected to by the defendant's counsel upon the ground that they were not proper cross-examination, not having reference to any matter testified to by the witness in his examination in chief. The court overruled the objection, and, upon the witness declining to answer the questions on the further ground that the answers would tend to criminate him, the court peremptorily ordered him to answer, and thereupon the above answers were given. These rulings of the court were properly excepted to, and are now assigned as error.

We are of the opinion that the court did not err in overruling the objections. Section 1323 of the Penal Code provides: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." The effect of the latter clause of the above is to take from the court any discretion which it might ordinarily exercise in allowing the range of a cross-examination to extend beyond the matter brought out upon the direct examination, (see People v. Rozelle, 78 Cal. 84, 20 Pac. 36,) and to prevent the prosecution from questioning the defendant upon the case generally, and in effect making him its own witness, (People v. O'Brien, 66 Cal. 602, 6 Pac. 695.) The statute does not, however, place any limitation or restriction upon the extent or character of his cross-examination "as to all matters about which he was examined in chief," and upon those matters he may be cross-examined as fully as any other witness. Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain or qualify or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination. The "matter" about which the defendant had been examined in chief was whether he had co-operated or acted in concert with Beggs in appropriating to his own use and converting the money in question; and, although he had stated in categorical terms that he had not done so, his answers were not conclusive in his favor, nor did they prevent the prosecution from showing through the medium of a cross-examination that they were false; and for this purpose the prosecution was not limited to a repetition of the questions propounded upon the direct examination, or to asking him whether his answers to those questions were correct or not. Neither was the right of cross-examination limited to the mere questions that his counsel had asked him upon the direct examination, or to the replies which he had made to those questions, but it extended to the entire matter "about" which he had been examined in his own behalf, viz. whether he had given to Beggs any advice or suggestion or aid in appropriating the money. By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify, and as to those matters he opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony, as fully as any other witness who might have given the same testimony. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false. In People v. Rozelle, 78 Cal. 84, 20 Pac. 36, it was held that the defendant might be cross-examined upon a letter which he had written, and about which no questions had been asked him upon the direct examination, upon the theory that the letter tended to contradict the denials which he had made on his direct examination. The statute of Missouri authorizing the defendant to be a witness in his own behalf contains a restriction upon his cross-examination in the same language as our own. In State v. McKinzie, 102 Mo. 620, 15 S. W. 149, there had been evidence on the part of the prosecution tending to show that the defendant had provoked a controversy by striking the deceased with a cane, and the defendant offered himself as a witness, and testified in his own behalf that he had no cane with him at the time of the killing, nor did he strike the deceased with a cane. Upon his cross-examination he was asked whether he did not have a cane with him in a certain saloon which he and the deceased had left a short time before the killing. This question was objected to upon the ground that the defendant had only been questioned about what occurred after he left the saloon, and that he could not be questioned as to what had occurred prior thereto; but the court held that the question was proper cross-examination, upon the ground that he had been asked about having a cane with him and using it in the homicide, and that his possession and use of the cane were the matters referred to in the examination in chief, and that he might be cross-examined fully with reference to such possession and use. The testimony of the defendant that he had been with Beggs during the greater portion of the preceding day, and until a late hour in the night, and that they had parted with an agreement to meet in a saloon across the street from the bank between 11 and 12 o'clock on the next day without any particular purpose for so meeting, taken in connection with his testimony that they had agreed to go to Sacramento by the 7 o'clock train, made the questions proper cross-examination for the purpose of throwing discredit upon the accuracy of his statements that they did not also agree to take the money with them, and that he had never advised Beggs to take the funds of the corporation of which he was the secretary, and had never agreed with him to go off with the money, or consented to his doing so. If the defendant and Beggs did in fact, on the 6th of June, after they had met at the saloon according to their previous appointment, go to San Francisco together, with this money, and after their arrival there the defendant changed a portion of it into currency, and thereafter returned to Oakland, and went to the Sixteenth street station with this same money, where he met Beggs, and they thereafter took tickets and went to Sacramento, taking this money with them, these facts would tend to show concerted action and a prior agreement between them to do the acts. For this purpose it was proper to permit the prosecution to show these facts by the cross-examination of the defendant. We find no error in the record, and the judgment and order are affirmed.

(100 Cal. 478)

PEOPLE v. CROWLEY. (No. 21,028.)

(Supreme Court of California. Dec. 23, 1893.)

BURGLARY—INDICTMENT AND PROOF—DEFENDANT AS WITNESS — CROSS-EXAMINATION — IMPEACHMENT—SUFFICIENCY OF EVIDENCE.

1. One may be convicted of attempted burglary under an indictment alleging an attempt to enter a house with intent to commit larceny, though the proof shows an attempt to enter with intent to commit robbery.

2. Though Pen. Code, § 1323, authorizes the cross-examination of defendant in a criminal case only as to matters about which he was examined in chief, still, under Code Civil Proc. § 2051, providing that, for the purpose of impeaching "a witness," it may be shown by the examination of the witness that he has been convicted of a felony, a defendant in a criminal case may, on cross-examination, be asked if he has been convicted of a felony.

3. In a criminal case the sufficiency of the evidence cannot be reviewed, where it does not appear by the bill of exceptions that the point was raised below.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Phil. Crowley was convicted of attempted burglary, and appeals. Affirmed.

J. Q. White, J. E. Pemberton, Dist. Atty., Carroll Cook, and Geo. A. Sturtevant, for appellant. W. H. H. Hart, Atty. Gen., for the People.

McFARLAND, J. The appellant was informed against, and convicted of the crime of an attempt to commit burglary; and he appeals from the judgment, and from an order denying a new trial. There are only two points made by appellant which need special notice,—which points, by the way, are not discussed in the brief of respondent.

1. The charge is that appellant feloniously attempted to enter the house of one Patrick Kenny with intent to commit larceny; and it is contended that the court erroneously refused to give an instruction to the jury to the effect that if he attempted to enter the house forcibly, with the intention "of forcibly taking personal property from the immediate presence or possession of said Patrick Kenny, and against his will, and by means of force or fear," then he could not be convicted of the crime charged in the information. We do not think that the court erred in this ruling. A charge that the attempted entry was with intent to commit a certain offense would not be sustained by proof of an intent to commit an entirely different sort of offense; as, for instance, the charge of intent to commit larceny would not be sustained by proof of an intent to commit rape. But larceny and robbery are generically the same,—the one being merely an aggravated form of the other. Each is the felonious taking of the personal property of another, although in robbery the felonious taking is accomplished by force or threats. The text-books speak of robbery as "an aggravated species of larceny." 2 Russ. Crimes, p. 101. In East's Pleas of the Crown, the author, after speaking of certain larcenies from the person, says, "The next species of aggravated larceny from the person is robbery;" and, indeed, the distinction between certain larcenies from the person and robbery is often hard to draw. It has been held here that robbery necessarily includes larceny, and that under an indictment for the former there may be a conviction of the latter. People v. Jones, 53 Cal. 58; People v. Gilbert, 60 Cal. 111. In People v. Jones, supra, the court say that "an indictment for robbery must aver every fact necessary to constitute larceny, and more." This being so, if the appellant had the intent to commit robbery, that intent included all the elements of an intent to commit larceny. The information in the case at bar, therefore, sufficiently complies with the reason of the rule that a defendant must be informed of the charge against him. We have been referred to no case to the contrary.

2. The information charges that appellant had been previously convicted of a felony, and by his plea appellant confessed

the prior conviction. While on the stand as a witness for himself, the appellant testified to some things which occurred on the night of the alleged burglary, and on cross-examination he was asked by counsel for the prosecution if he had not been previously convicted of a felony. Appellant objected to the question, and his objection was overruled, and he contends that this ruling was erroneous. The first legislation about the testimony of a defendant in a criminal case, except the general provision that he could not be compelled to testify against himself, was that on a preliminary examination he might make a statement, if he so desired; but he could not be asked any question, except by the magistrate, who could ask him only a few questions expressly enumerated in the statute. Hitt. Gen. Laws, pars. 1742–1746. It was afterwards enacted that on the trial of a person charged with crime "the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury." When the Codes were adopted, section 1323 of the Penal Code simply provided that "a defendant in a criminal action or proceeding to which he is a party is not, without his consent, a competent witness for or against himself." Thus far there was no provision about the cross-examination of the defendant when he offered himself as a witness, although it was always provided that he could not be compelled to testify against himself. In some of the states he is allowed to make a statement before the jury, but cannot be cross-examined at all. But in 1874 the present statutory law upon the subject was enacted by an amendment to said section 1323 of the Penal Code, which made it read as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. But if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief."

The proper construction of section 1323, as it now stands, has not been definitely settled. In People v. Rozelle, 78 Cal. 84, 20 Pac. 36, there is some general language in the opinion of the majority of the court to the effect that the same rule applies to a defendant as to other witnesses, but that language is immediately qualified in the next sentence. The only thing decided there was that after a defendant, as a witness, "had denied, in general terms, that he aided, abetted, counseled, or encouraged the commission of the offense charged," he might be asked on cross-examination if he had written a certain letter showing that he had so aided, etc. Of the cases cited in the opinion, People v. McGungill, 41 Cal. 431; People v. Dennis, 39 Cal. 634; People v. Reinhart, Id. 449; and People v. Russell, 46 Cal. 121,—were all decided before section 1323 was enacted, and therefore afford no aid in its construction. In People v. Beck, 58 Cal. 212, there was no question as to the cross-examination of a defendant, the only thing there decided being that he could be impeached as a witness by showing his bad character for truth. People v. Johnson, 57 Cal. 571, which will be noticed hereafter, is in point as to one phase of the question. We have been referred to no case decided since the present condition of the statutory law on the subject, which holds that the cross-examination of a defendant may be as wide as that of any other witness. On the other hand, in People v. O'Brien, 66 Cal. 602, 6 Pac. 695, Morrison, C. J., delivering the opinion of the court, after quoting section 1323 as it now stands, says of a defendant in a criminal action, that "when he is called on his own behalf, and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination in chief," and that "such is the express language of the statute." It is not correct to say that section 1323 merely states the common-law rule as to the cross-examination of witnesses generally; for witnesses under the general rule can, for various purposes, be asked concerning matters about which they had not been examined in chief. 2 Phil. Ev. p. 895 et seq. And in People v. O'Brien, 96 Cal. 171, 31 Pac. 45, the court say that, "so far as the defendant is concerned, the court is not allowed that discretion as to the extent of the scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses." But, with respect to the precise point made in the case at bar, this court, in People v. Johnson, 57 Cal. 571, ruled against the contention of appellant. In that case the defendant was asked on cross-examination if he had not been convicted of a prior felony, and it was held that the trial court had not erred in allowing the question. The decision was based upon the ground that section 2051, Code Civil Proc., is the governing section as to such question; and that section provides that, for the purpose of impeaching "a witness," it "may be shown by the examination of the witness * * * that he had been convicted of a felony." Counsel for appellant contends very forcibly that, as in a case like the one at bar, the part of the information charging a prior conviction cannot be read to the jury, there should be no evidence allowed on that subject, and that such rule cannot be evaded through the form of cross-examining the defendant. But those were the very facts presented in People v. Johnson, and upon the authority of that case we must hold that the contention of appellant cannot be maintained.

Counsel for appellant makes the point in his brief that the verdict is not sustained by the evidence, but no such point appears in the record. The bill of exceptions shows upon its face that it does not contain all the evidence. Only enough of the evidence to illustrate the points made is presented. It is true that in a criminal case it is not necessary for the appellant to state the particulars in which the evidence was insufficient to sustain the verdict, but it must appear somewhere in the record that the point of the insufficiency of the evidence was made. Where no such point is made, the prosecution is not called upon to see to it that all the evidence is put into the bill of exceptions. In the case at bar it does not appear from the bill of exceptions that insufficiency of the evidence to sustain the verdict was one of the grounds upon which the motion for a new trial was based. The point, therefore, is not before us.

Since writing the above our attention has been called to the fact that appellant, under a suggestion of diminution of the record, has filed here a certified copy of a motion for new trial. But a notice of motion for a new trial is no part of the judgment roll, and can be made part of the record only by a bill of exceptions. However, we have examined the evidence; and, while it is clear that neither party intended that all the evidence should be put into the bill of exceptions, still we think that there is sufficient of it to support the verdict. We do not think that either of the other points made by appellant is tenable, or requires special notice. In People v. Gallagher, 35 Pac. 80, (No. 20,972, this day decided,) the right to cross-examine a defendant is quite fully discussed. The judgment and order appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

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100 Cal. 623

TREAT v. DORMAN et al. (No. 15,391.)

(Supreme Court of California. Dec. 30, 1893.)

MORTGAGES—LIEN—GROWING CROPS.

A mortgage of land, with the rents, issues, and profits thereof, is a lien on the crop growing when suit is begun to foreclose, superior to a junior chattel mortgage on said crop.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Action by Webster Treat against Asenath Dorman and the Earl Fruit Company to foreclose a mortgage. Decree for complainant. The Earl Fruit Company appeals from part of the decree. Affirmed.

Holl & Dunn, for appellant. W. S. Tinning and Cary Howard, for respondents.

SEARLS, C. This action was brought to foreclose a mortgage for $35,000 and interest, executed July 8, 1891, in favor of plaintiff, by Emery D. Howe and Ellen D. Thurber, upon a ranch situate in Contra Costa county. The mortgage purported to convey the land, etc., with the "rents, issues, and profits thereof," and was acknowledged and duly recorded July 10, 1891. The Earl Fruit Company (a corporation) held a subsequent chattel mortgage, executed in due form, July 20, 1892, upon the "crops of fruits and grapes now growing and to be grown, during the seasons of 1892 and 1893," upon the same ranch, and which was recorded July 21, 1892. The Earl Fruit Company was made a defendant in the action, and filed an answer and cross complaint, in the latter of which it set up its chattel mortgage, and averred there was due thereon $882.65, for which sum it prayed judgment against the mortgagor defendants, and that it be declared a lien upon the fruit and grape crops of 1893; and prayed, further, that, if plaintiff's mortgage be declared a lien, the premises be sold separately from the fruit and grape crops of 1893, and that the said fruit and grape crops be next sold, and the proceeds thereof, after the payment of any deficiency due the plaintiff, be paid to this cross complainant upon the said indebtedness, etc. On the application of the plaintiff, a receiver was appointed in the case January 19, 1893, to take charge, etc., pending the litigation. The court, upon a trial of the cause, found in favor of the plaintiff, and also in favor of the Earl Fruit Company, and entered a decree for the sale of the real property to satisfy the plaintiff's mortgage; found the lien of plaintiff's mortgage on the fruit crop of 1893, prior to the chattel mortgage; and decreed the proceeds thereof to be applied—First, to satisfy any deficiency due plaintiff after a sale of the real property; and, second, to the satisfaction of the sum found due said Earl Fruit Company, and secured by said chattel mortgage. The Earl Fruit Company appeals from so much of the decree as requires the receiver to pay, out of the proceeds of the crop of 1893, the deficiency, if any, due to plaintiff, and the residue to said company, etc. The appeal is presented on the judgment roll.

It is not often that a party appeals from a judgment granting him all that he asked, and yet in this case just that thing has happened. The contention of appellant is that it is entitled, under section 580 of the Code of Civil Procedure, to any relief consistent with the case made by its cross complaint, and embraced within the issue. This is true. Still, every intendment is in favor of the regularity of the judgment, and where, as in the present case, the cause comes up on the judgment roll, with no bill of exceptions or statement, and nothing to show that appellant ever even asked for any other or further relief than that which he prayed for and received, it is not perceived on what principle he can be heard to complain. Waiving all this, however, and the judgment appealed from should be affirmed. The prior mortgage of the plaintiff, in express terms, was made to cover the "rents, issues, and profits" of the mortgaged premises. In Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414, as here, the mortgage was made to cover the rents, issues, and profits, and, as here, a receiver had been appointed, during the pendency of the action, who had harvested and sold a crop grown upon the land, and held the proceeds. At the foreclosure sale the mortgaged premises did not bring a sum sufficient to satisfy the debt secured by the mortgage, and the plaintiff applied for an order that the money received from the sale of the crop be applied to the payment of the deficiency; and this court held that, under the mortgage thus worded, "not only the land described in the complaint, but the rents, issues, and profits thereof, were mortgaged, so that the crop which the receiver took possession of was a part of the mortgaged property." The contest there was between the mortgagee and mortgagor, but, upon principle, the lien which is valid as against the mortgagor is equally valid as against a subsequent mortgagee with notice. In the present case the plaintiff had an abstract right to have the entire property sold, and its value would have been enhanced by so much as the value of the growing crops of grapes and fruit; but as between plaintiff and defendant, the latter of whom had a lien on the crops only, it was proper, at the request of the latter, to segregate the crops in order that the surplus, if any, after satisfying the sum secured by the mortgage to plaintiff, might be applied to the extinguishment of the subsequent mortgage to defendant. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(100 Cal. 493)

LOVEREN v. LOVEREN. (No. 15,343.)

(Supreme Court of California. Dec. 23, 1893.)

DIVORCE—ALIMONY PENDENTE LITE.

Money raised on the wife's own credit, and paid for expenses already incurred, is not reimbursable pendente lite, at the court's discretion, as money necessary to enable her to prosecute the action. Civil Code, § 137.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

In the suit of Mary J. Loveren against S. S. Loveren for a divorce, defendant appeals from an order for alimony pendente lite. Reversed.

J. N. Gillett, J. F. Coonan, and E. W. Wilson, for appellant. Chamberlin & Wheeler and Frank McGowan, for respondent.

FITZGERALD, J. This is an appeal from an order made by the court below during the pendency of an action for divorce requiring the defendant to "pay the plaintiff the sum of $799.68 for the purpose of defraying the costs and expenses of this action incurred by her up to this date." The only question to be determined here involves the power of the court to make such order. The power of the court to grant alimony pendente lite in an action for divorce is derived solely from that part of section 137, Civil Code, which reads as follows: "While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife * * * to prosecute or defend the action." The plain object of this statute was to empower the court during the pendency of an action for divorce, upon a proper showing made by the wife for that purpose, to compel the husband to provide her with the means necessary to enable her to prosecute or defend the action. If the expenses of the action have been incurred or paid by her with means derived from her separate estate, or upon her credit, then there can be no necessity for an allowance by the court to enable her to do that which she has already done, and without such necessity the court has no authority under the statute to make such an order. And no better evidence can be adduced of her ability in this respect than the fact that she has been able, as the record shows, to incur these expenses and to pay them with money borrowed by her entirely upon the strength of her own credit. Expenses so incurred and paid may be, where it is proper to do so, taxable as costs in the case, but they cannot be made the basis of an order, within the meaning of this statute granting an allowance therefor, and compelling the husband to pay them. Such an allowance can only be granted as to expenses necessary to be incurred in the future prosecution or defense of the action, and cannot be made for the payment of past expenses, except where such payment is necessary to be made in order to enable the wife to further prosecute or defend her case. Section 1769 of the New York Code, which is substantially the same as section 137 of our Code, above quoted, was so construed by the court of appeals of that state in Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735. The appeal in that case was also from an order granting an allowance pending an action for divorce to pay expenses previously incurred. This case was subsequently approved in McCarthy v. McCarthy, (N. Y. App.) 33 N. E. 550. In Bohnert v. Bohnert, 91 Cal. 430, 27 Pac. 732, which was an action for divorce, the appeal was taken by the husband from two orders made after judgment. The first order was for an allowance of "$87.50, to be paid out forthwith as expenses for transcribing the testimony on the part of the defendant already incurred." It appears that the allowance for past unpaid expenses for transcribing the testimony referred to was necessary to be made, in order to enable the wife to further prosecute or defend her case in perfecting her appeal to this court. This allowance was clearly authorized by the statute. The second order appealed from required the husband to "pay to the clerk of said court the amount of $269.90 to be by said clerk retained, and to await further action herein." This order was affirmed by the court, on the ground that the husband was not injured by it. That case is neither in conflict with the views herein expressed nor with the New York cases cited; but is, so far as it goes, in line with them. The order appealed from herein shows upon its face that the allowance was made to pay expenses theretofore incurred; and, as it does not appear, and is not claimed, that it was made upon the ground that it was necessary to enable the wife to further prosecute or defend the action, it follows that the order should be reversed. So ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

100 Cal. 523

PEOPLE v. KRUGER. (No. 21,023.)

(Supreme Court of California. Dec. 26, 1893.)

BURGLARY—INSTRUCTIONS AS TO DEGREE—IMPEACHING WITNESS.

1. One jointly indicted with defendant for burglary, and who had pleaded guilty, as a witness for the state testified that defendant had nothing to do with the robbery. *Held* that, for the purpose of laying a foundation for showing that he had made contradictory statements, the state was properly allowed to ask him if, when he pleaded guilty, he did not, in the presence of the court, its officers, and others, state that defendant was one of the parties to the robbery, there being no purpose to impeach him by his written testimony, so that it should have been first read to him.

2. It being clear that a burglary, if committed at all, was in the nighttime, there can be no injury in an instruction that, if defendant is found guilty, it should be of burglary in the first degree.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Adolph Kruger was convicted of burglary, and appeals. Affirmed.

Robert Ferral, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The information charges appellant, jointly with one Oman, with the crime of burglary. He was convicted, and appeals from the judgment, and from an order denying a new trial.

Oman, who had pleaded guilty, was called as a witness for the prosecution, and testified that appellant had nothing to do with the commission of the alleged crime. The prosecuting attorney was allowed, on the ground of surprise, to ask the witness if, at the time he pleaded guilty, he had not stated, in the presence of the court, the clerk, the shorthand reporter, the prosecuting attorney, and others, that appellant was one of the parties who committed the crime, and had climbed over the roof through the skylight, etc. To this, counsel for appellant objected, not upon the ground that it was not a genuine case of surprise, but upon the ground that, if he made such a statement, he should first have the testimony read to him. We do not think that the court erred in overruling the objection. The purpose was not to impeach the witness by a written instrument, but simply to lay a foundation for showing that he had made contradictory statements. It does not even appear that the statement referred to was in the shape of testimony.

Objection is made to the last paragraph of the court's charge to the jury, to the effect that if the jury were convinced from the evidence, beyond a reasonable doubt, that appellant was guilty of the crime charged, then their verdict should be, "Guilty of burglary in the first degree." It is true that a court should not often hazard such an instruction; but it is so clear in the case at bar that the burglary charged was committed, if at all, in the nighttime, that no possible injury could have been done by the instruction. The instructions, as a whole, stated the law applicable to the case correctly, and were not at all unfavorable to appellant.

The most direct evidence against appellant came from accomplices, but we think that their testimony was sufficiently corroborated. There are no other points made by appellant. Judgment and order affirmed.

We concur: DE HAVEN, J., FITZGERALD, J.

100 Cal. 511

MURRAY v. GLEESON. (No. 15,395.)

(Supreme Court of California. Dec. 26, 1893.)

DISMISSAL—FAILURE TO SERVE SUMMONS.

Under Code Civil Proc. § 581, subd. 7, which provides that an action shall be dismissed "unless summons shall have been issued within one year, and served, and return thereon made within three years," it is error to dismiss an action, because the summons was not served within one year after suit brought.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by William F. Murray against John Gleeson to foreclose a mortgage. From a judgment dismissing the action, plaintiff appeals. Reversed.

J. W. Harding, for appellant. A. H. Griffith and G. W. Bowie, for respondent.

BELCHER, C. This is an action to foreclose a mortgage on real property. The complaint was filed and the summons issued on December 26, 1891. The summons was served upon the defendant on April 3, 1893, and on the 12th of that month defendant served notice upon the plaintiff that he would, on May 1, 1893, move the court to dismiss the action on the ground that the summons was not served within the time required by law. At the time named the motion was heard by the court, and taken under advisement until the 15th of the same month, when the motion was granted, and judgment entered dismissing the action solely "on the ground that the summons was not served within one year after the commencement of the action." From this judgment the plaintiff appeals.

The action of the court was based upon subdivision 7 of section 581, Code Civil Proc., which was added to the Code by an amendment made in 1889, and reads as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion, or on the motion of any party interested therein, whether named in the complaint or not, unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." The respondent contends that this language, when properly construed, means that the summons must be both issued and served within one year after the complaint is filed; and whether this be so or not is the only question presented for decision. Prior to the amendment in question, the statute provided that the summons must be issued within one year after filing the complaint, but there was no express limitation as to the time within which service and return must be made. It was, however, held that the service must be made within a reasonable time, and, if not so made, that it was ground for a dismissal of the action. Grigsby v. Napa Co., 36 Cal. 585; Carpentier v. Minturn, 39 Cal. 450; Eldridge v. Kay, 45 Cal. 49; Lander v. Fleming, 47 Cal. 614; Diggins v. Thornton, 96 Cal. 417, 31 Pac. 289. In the case first cited the summons was served about two years and eight months after it was issued. A motion to dismiss the action for want of prosecution was made and granted on the ground that the delay was unreasonable. On appeal the order was affirmed. In the case last cited the complaint was filed about nine years before the summons was served. A motion to dismiss was made and denied. On appeal it was held that the delay was grossly unreasonable, and was ground for dismissing the action, in the absence of a showing of the proper exercise of diligence in the service of the summons. The order was reversed. If respondent's construction is correct, then, while the summons must be issued and served within a year, the return may be delayed for two years or more thereafter. But this, in our opinion, is not the meaning of the statute, and was never intended by the legislators who passed it. Section 406, Code Civil Proc., provides that the summons may be issued at any time within one year after the complaint is filed. It may therefore be issued on the last day of the year, and at that time the defendant may be at a distance, or may conceal himself to avoid service. When the defendant is found and actually served, the court acquires jurisdiction of his person, and thereafter no great length of time can be required for making the return. To construe the statute, therefore, as requiring the service to be made within a year, and the return within three years, would be unreasonable and absurd. In our opinion, one of the obvious purposes in adopting the amendment was to fix three years as the limit of time beyond which no service or return could be made, thus meeting and removing an uncertainty which had before existed. The question, however, as to whether there has been reasonable diligence in making the service within the time limited is left an open one, to be considered and decided by the court upon the facts of each particular case. See Kreiss v. Hotaling, (Cal.) 33 Pac. 1125. It follows that the court erred in granting the defendant's motion, and that the judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

(4 Cal. Unrep. 408)

McHARRY v. STEWART. (No. 15,187.)

(Supreme Court of California. Dec. 30, 1893.)

HOMESTEAD OF WIFE AND HER CHILDREN—CONVEYANCE OF PART BY WIFE TO HUSBAND—TITLE OF HUSBAND—GOVERNMENT LAND CONTESTS—QUESTIONS DETERMINED ON APPEAL—REVIEW BY STATE COURT.

1. Code Civil Proc. § 1468, provides that, if deceased left also a minor child or children, one-half the real estate of which deceased died seised shall "belong" to his widow, and the remainder to the child or children. Section 1485 provides that persons succeeding to the title of "successors to homesteads" have all the rights of the persons whose interests they acquire. *Held*, that a wife, having minor children by a former, deceased husband, could convey to her second husband a certain 60 acres of 175 acres of land which were set apart to her and her children as a homestead out of the lands of her deceased husband.

2. Code Civil Proc. § 764, provides that when it appears, in an action of partition, that one or more of the tenants in common has conveyed in fee to another person a specific part of the common land, the land so conveyed shall be allotted in partition to such purchaser, etc., if such tract can be so allotted without material injury to the other cotenants. *Held*, that such purchaser's right to file upon an "adjoining farm homestead" under Rev. St. U. S. §§ 2289, 2290, cannot be defeated by the possibility that, on the partition, other land not adjoining that filed upon may be allotted him, instead of the specific part conveyed to him.

3. Rev. St. U. S. § 2273, provides that all questions as to the right of pre-emption, arising between different settlers, shall be determined by the register and receiver of the district within which the land is situated, and for "appeals from the decision of the district officers." *Held* that, in the absence of any statute limiting the power of the commissioner of the land office and secretary of the interior on appeal, the power will not be denied to the commissioner and secretary to decide questions arising on evidence, which were not decided by such district officers.

4. Where the secretary of the interior, in a land contest, decided on the evidence that the residence of a claimant of land as an "adjoining farm homestead," under Rev. St. U. S. §§ 2289, 2290, on his own land adjoining the tract claimed, was not such as to entitle him to such tract, the supreme court of California has no jurisdiction to review such question in ejectment against such claimant by one claiming the same land under the pre-emption laws of the United States.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action of ejectment by Daniel S. C. McHarry against James Stewart. From a judgment for plaintiff, defendant appeals. Affirmed.

Theo. Wagner and G. W. Bowie, for appellant. Charles E. Wilson and Wm. Wells, for respondent.

HAYNES, C. The complaint is in ejectment, in the usual form, and the plaintiff's title is evidenced by a patent from the United States. Defendant answered, denying all the allegations of the complaint except that alleging defendant's possession, and filed a cross complaint setting out facts upon which he claims that plaintiff should be adjudged a trustee of the legal title for his benefit, and be required to convey the same to him. Plaintiff's demurrer to the cross complaint was sustained, and judgment thereon, as well as upon the issues raised by defendant's answer, which were tried by the court, was rendered against the defendant, who now appeals from the judgment; and the only question presented is as to the sufficiency of the cross complaint.

On December 10, 1883, the defendant filed upon the demanded premises as an "adjoining farm homestead," under sections 2289 and 2290, Rev. St. U. S., defendant then claiming to be the owner of about 60 acres of adjoining lands, upon which he resided. On December 13th of the same year, the plaintiff, claiming a residence upon a subdivision of government lands adjoining the demanded premises, filed a pre-emption claim including the demanded premises. Upon these conflicting claims, a contest arose before the local land office, and testimony was taken. The cross complaint sets out the facts which defendant claims were proven upon the hearing, and, by exhibits attached thereto, sets out the decision of the register and receiver thereon, the decision of the commissioner of the general land office upon appeal, the decision of the secretary of the interior upon appeal from the commissioner, and also the decision of the secretary upon a petition for review. The land which defendant claimed to own, and upon which he claimed to reside at the time he filed upon the demanded premises, was formerly a part of the Pinole rancho, in which one James McClellan owned an undivided interest, which, after his marriage, was set off to him in that part of the rancho adjoining the demanded premises. McClellan died in December, 1871, leaving his widow, Getta, and two minor children, surviving him. In February, 1876, a homestead containing 175 acres was set apart by the probate court, for the use of the widow and minor children, in that part of the land partitioned to McClellan which adjoined the demanded premises. Afterwards, in March, 1876, the widow married the defendant, Stewart. On October 2, 1882, Mrs. Stewart conveyed to her husband (the defendant) a portion of the homestead, containing about 60 acres, adjoining the demanded premises, the children being still minors. Upon these facts, and without considering the other evidence before them, the register and receiver held that defendant acquired no right or title by his purchase from his wife, and therefore was not entitled to an "adjoining farm homestead" under the statute, and awarded the land to McHarry. On appeal to the commissioner, this decision was reversed, and the land was awarded to Stewart; and, upon appeal to the secretary, the commissioner's decision was reversed, and the land again awarded to McHarry. The evidence taken before the register and receiver principally related to two points, viz. Stewart's ownership and title to the land conveyed to him by his wife, and his residence thereon. It is conceded that, after Stewart filed upon the demanded premises, his residence was principally at Martinez, where he had gone into business. He claimed, however, that he left the land in consequence of assaults made upon him by the McHarrys, and threats which put him in fear. The register and receiver did not pass upon this evidence, but rested their decision solely upon want of title to the adjoining lands, while the commissioner held his title sufficient, and that his absence from the land was excused by the acts of McHarry. The secretary held against Stewart on both points. So far as questions of fact are concerned, all courts are bound by the decision of the land department, unless such decision has been obtained by fraud or imposition. In this case we find nothing to justify a review of questions of fact. Shanklin v. McNamara, 87 Cal. 371, 26 Pac. 345; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, and cases there cited. The principal questions are therefore—First, whether Stewart's ownership and title were sufficient to entitle him to an additional farm homestead; and, if that is answered in the affirmative, second, whether his residence on the land conveyed to him by his wife was such as the law required for the purpose of securing such additional homestead.

The land set apart by the probate court as a homestead was the separate property of the deceased, James McClellan. Such homesteads, when not community property, can only be set apart for a limited time. The estate in the lands so set apart vests, however, in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the court, and at the expiration of the time limited for its existence is subject to partition as though no homestead had been created. Section 1468, Code Civil Proc., (act of March 24, 1874, as well as the act of 1881,) provides: "If the deceased left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children if there be more than one." In Estate of Moore, 57 Cal. 444, it was said: 'The right to have a homestead set apart is no estate, either in law or in equity." It was accordingly there held that the deed of the widow, made before the homestead was set apart, did not nor could convey away the right to a homestead; but it was not held that the deed was not operative to convey all her interest in the estate which she took by succession, such interest being subject to the power of the court to set apart a homestead. Her grantee therefore took the estate, and was the owner of it, but subject to the homestead afterwards set apart by the court. If this were doubtful under the provisions of the Code above referred to, section 1485, Code Civil Proc., makes it clear. It is there provided: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." The obvious intent of this section is to confirm to purchasers of the estate all the rights and interests which the grantor had or could enjoy, subject to the homestead right, and, at the termination of the homestead, the unincumbered estate. The words "successors to homesteads" certainly imply this. Stewart therefore had title to the land, and was the owner. But it is contended by respondent—and the secretary of the interior seems principally to have relied thereon—that he took but an undivided interest in the homestead, and, when the land came to be partitioned, the land set off to him might not adjoin the demanded premises. Section 764, Code Civil Proc., provides, among other things, as follows: "Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be alloted and set apart in partition to such purchaser, his heirs or assigns, or in such manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance." To defeat Stewart's right upon this ground, it must be assumed that partition cannot be made so as to give him the part of the land conveyed to him, or some part of it, adjoining the public lands in question, or that the bare possibility of such result is sufficient to defeat the right to an adjoining homestead. It will hardly be contended that, if Stewart's ownership and title were otherwise unquestioned, the existence of a mortgage upon it would defeat his right to an additional homestead, because his title, at some time in the future, might be taken away by foreclosure and sale; yet respondent's contention, carried to its logical conclusion, would seem to lead to that result. The contingency in question does not destroy or affect Stewart's ownership for the purposes of the homestead right, and the register and the receiver and the secretary erred in so holding.

The question of Stewart's residence is one of greater difficulty. It may be conceded that the cross complaint shows that his residence upon the land purchased from his wife was not continuous; but facts are alleged which, if satisfactorily proved, would excuse his absence from it. The cross complaint, however, sets out in full, as exhibits, the decision of the commissioner of the general land office in his favor upon that question, and the decision of the secretary of the interior reversing that decision, thus presenting the question of the jurisdiction of the court to re-examine it. It is contended by appellant that all the questions presented by the contest before the register and receiver, upon which evidence was introduced, should have been decided by them, and that the commissioner and secretary had no power to pass upon questions of fact not passed upon by the register and receiver; that it was the duty of the commissioner, when he reversed those officers upon the only question passed upon by them, to send the case back with instructions to pass upon all the other questions. And this contention is placed by appellant upon section 2273, Rev. St. U. S., which provides that "all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated," and which provides for "appeals from the decision of the district officers" to the commissioner; and this right to have all the questions of fact decided by the local officers, he insists, is an important and substantial one, as the weight to be given the testimony of the different witnesses can be better estimated by them than by those who had no opportunity to observe the witnesses while giving their testimony. Prior to the act of July 4, 1836, (5 Stat. 107,) there seems to have been no express power given to the commissioner of the general land office to revise the decisions of the local land officers; but where an entry was made on ex parte affidavits, which were impeached before the commissioner by another claimant, the course was to return the proofs to the local office, and direct that the parties be notified, and after proofs taken to report the proceedings to the general land office, with their opinion as to the effect of the proof. See Barnard's Heirs v. Ashley's Heirs, 18 How. 44. By section 11 of the act of September 4, 1841, (5 Stat. 456,) all questions arising between different settlers were required to be "settled by the register and receiver of the district within which the land is situated, subject to an appeal to, and a revision by, the secretary of the treasury;" and by the act of June 12, 1858, (11 Stat. p. 326, § 10,) the latter clause of section 2273, Rev. St., was enacted. The power of the commissioner and secretary upon appeal to decide all questions arising upon the evidence taken by the register and receiver is not limited in any of the statutes relating to appeals, and the practice of so deciding all questions upon appeal is too well settled to justify us in denying them that power. That the error of law committed by the register and receiver, and affirmed by the secretary of the interior, had a far-reaching effect cannot be disputed. Stewart had been in possession of the demanded premises many years before the township plat was filed, and the same was fenced in with the land upon which he resided, and he filed his adjoining homestead claim thereon the day the township plat was filed. No question seems to have been made as to his place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter. That being true, McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart. But if Stewart, by reason of his failure to reside on the adjacent land, was not entitled to it, the question whether McHarry was entitled was one between him and the government, in which appellant is not concerned. The question of residence being one of fact, and having been litigated before the land department, we would not have jurisdiction to examine it, even if the evidence was before us, in the absence of a clear showing that the decision was procured by fraud or imposition, and we find no such allegation of fraud or imposition in the cross complaint as would justify the submission of the question of residence to a court of justice.

It is argued by appellant, however, that in the case of an adjoining homestead, the requirements of the law applicable to other homesteads upon the public lands do not apply. The rulings of the land department have been otherwise, and we think correctly. Carnes v. Smith, 10 Dec. Dept. Int. 100; Box v. Cochran, 3 Dec. Dept. Int. 394. Residence upon the public land filed upon is excused because that, with the land owned, is regarded as one homestead, and residence upon any part is sufficient; but residence is essential to a homestead of either kind. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PATERSON, J. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

HARRISON and GAROUTTE, JJ. We concur in the judgment upon the ground that the decision of the land department that Stewart was not residing upon the premises at the time he made the homestead entry is a conclusive determination against his claim to the land. Whether the conveyance by the widow of McClellan of her interest in a portion of the premises that had been set apart as a homestead for the benefit of herself and her minor children during the existence of the homestead transferred to her grantee any title therein is a question which does not arise in this case, and is of too much importance to be unnecessarily determined. See Gagliardo v. Dumont, 54 Cal. 496; Phelan v. Smith, (Cal.) 34 Pac. 667.

100 Cal. 484

MULCAHY v. BUCKLEY. (No. 14,669.)

(Supreme Court of California. Dec. 23, 1893.)

MECHANICS' LIENS—PLEADING—INFORMATION AND BELIEF—PUBLIC RECORDS—ATTORNEY'S FEES—FINDINGS.

1. Code Civil Proc. § 437, permitting a defendant who has no information or belief sufficient to answer an allegation of the complaint to place his denial on that ground, does not authorize such a denial of a public record to which he has access, he having the means of information.

2. Under Code Civil Proc. § 1195, providing that in actions to enforce mechanics' liens the court must allow as part of the costs the money paid for filing and recording the lien, and reasonable attorney's fees, averment of the amount thereof in the complaint is not necessary.

3. The allowance being for attorney's fees "in the superior and supreme court" does not include the amount paid for preparing claim of lien.

4. In an action on a contract for doing work and furnishing material for the reasonable value, an answer denying conjunctively that plaintiff agreed to do the work "and" furnish the material, and denying that he did "all" the work, raises no substantial issue.

5. A finding that plaintiff agreed to do certain work and furnish certain material, and that, in pursuance of the contract as in the complaint mentioned, he did the work, and furnished the material, is a substantial finding as to the agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by James Mulcahy against C. F. Buckley to enforce a mechanic's lien. Judgment for plaintiff. Defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. This is an appeal from a judgment enforcing a mechanic's lien for the value of labor performed and materials furnished in repairing and altering certain buildings and structures on two lots of the defendant, situate in the city and county of San Francisco, and comes here on the judgment roll without any bill of exceptions. The cause was tried by the court without a jury, and the only points made by appellant are that the court erred in that it failed to find on certain alleged issues.

1. In paragraph 8 of the complaint it is alleged in due form that plaintiff filed and recorded his claim of lien in the recorder's office in the city and county of San Francisco, "in the words and figures following," (here follows a copy.) The only answer to this paragraph of the complainant is that defendant "has no information or belief upon the subject sufficient to enable him to answer the allegations or any allegation contained in paragraph eight of said complaint; and, placing his denial upon that ground, he denies each and every allegation in said paragraph contained." The court disregarded this part of the answer, holding that all the material allegations of the eighth paragraph of the complaint should be deemed admitted; but appellant contends that this answer was sufficient to put in issue every material allegation of the paragraph to which it relates. I think the court did not err in this respect. Section 437 of the Code of Civil Procedure provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." But a defendant is not at liberty to answer an allegation in this form, when he may be presumed to know, or when he is aware, before answering, that he has the means of ascertaining whether or not such allegation is true. In this case it appears, at least, that the defendant knew before answering that he could certainly ascertain whether or not plaintiff had recorded his claim of lien as alleged in the complaint by examining a public record in the city and county in which his lots, upon which the lien is claimed, were situated. Hathaway v. Baldwin, 17 Wis. 616; Goodell v. Blumer, 41 Wis. 444. I am unable, however, to find that the provision of the Code above quoted has ever been held inapplicable to a case in which the defendant was merely conscious of having the means of obtaining knowledge as to whether the allegation denied was true; nor have I found anything to the contrary. The question seems to be open in this state. The case of Read v. Buffum, 79 Cal. 77, 21 Pac. 555, cited by appellant, is not in point. In that case the allegation denied for want of information or belief was that of an assignment to plaintiff of the account on which the action was brought, and there is nothing indicating that defendant had any knowledge or means of ascertaining whether the account had been assigned to plaintiff or not, and that the question was not mooted. The corresponding provision in the Codes of other states generally is that a denial of "any knowledge or information" of the allegation controverted, "sufficient to form a belief," without expressly denying it, will raise an issue. Speaking of these, Mr. Bliss, in his work on Code Pleading, (section 326,) says: "The obligation to verify the pleading implies an obligation to state the truth; hence the permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's

knowledge,—as, an act done by himself and within the period of recollection, or where he has the means of information,—a denial of information in the language of the statute would be clearly false or evasive, and such an answer should be disregarded." In Goodell v. Blumer, 41 Wis. 444, the complaint alleged the execution and recordation of a deed, and set it out in haec verba. The defendants traversed the allegation by averring "that they have not sufficient knowledge or information to form a belief, and therefore deny the same." The court, by Cole, J., said: "It seems to us that when a party is pointed to the record of an instrument in the pleadings, he is not permitted to answer that he has no knowledge or information sufficient to form a belief whether there is such an instrument or not. There is a public record which he can consult, and which it was intended he should resort to in order to inform himself upon the subject, [citing cases.] The principle of these decisions is that a party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact. We therefore hold that the answer practically admitted the execution of the deed of Samuel Stout and wife to the plaintiff, and that no proof of it was necessary." The practice act of 1851 of this state (section 46) authorized the traverse of an allegation by denial "of any knowledge thereof sufficient to form a belief;" but this was repealed in 1854, and was not re-enacted until it was incorporated in section 437 of the Code of Civil Procedure, in July, 1874. In speaking of the repeal of this provision of the practice act, Mr. Justice Field, in Curtis v. Richards, 9 Cal. 38, said: "In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances defendants became critical in their judgments as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854 the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case." In the interim between 1854 and 1874 there were but two forms in which the allegations of a verified complaint could have been controverted so as to raise an issue: First, positively, when the facts were within the knowledge of the defendant; and, second, upon information and belief, when the facts were not within his personal knowledge. During that interim, and since, it has been decided that an allegation of a verified complaint could not be controverted on information and belief when the alleged fact was presumably within the knowledge of the defendant, nor when the defendant had the means of ascertaining whether or not it was true. San Francisco Gas Co. v. San Francisco, 9 Cal. 467; Loveland v. Garner, 74 Cal. 298, 15 Pac. 844. In the first of these cases Mr. Justice Field said: "But the statute imposes upon the defendant, if a natural person, and, if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form." Is not the same duty imposed upon a defendant who proposes to deny an allegation on the ground that he has "no information or belief?" I think it is, under the circumstances and facts disclosed by the record upon which this appeal is presented. Beyond this it is unnecessary to express an opinion.

2. In paragraph 10 of the complaint it is alleged that plaintiff had paid, as necessary expenses, $25 for preparing his claim of lien, and $3.25 for recording it; and that $250 would be a reasonable attorney's fee for prosecuting his suit in the superior court. This paragraph also was denied on the ground that defendant had no information or belief in regard to it; and it is claimed that the court improperly disregarded this denial, and made no finding on the issue raised by it. As a conclusion of law, the court found that plaintiff was entitled to a lien "for said sum of $691.20, together with the further sums of $100 attorney's fee and $28.25 for preparing and recording said lien." Section 1195 of the Code of Civil Procedure provides that in actions to enforce liens of mechanics "the court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established," etc. The averments in the complaint as to what had been paid by plaintiff for filing and recording the claim of lien, and as to what sum would be a reasonable attorney's fee, were unnecessary. The right to recover these, like the ordinary right to recover costs, was a necessary incident to the judgment establishing plaintiff's lien, and did not depend upon any averment in the complaint, except such as were necessary to establish the lien. Carriere v. Minturn, 5 Cal. 435; Rapp v. Gold Co., 74 Cal. 532, 16 Pac. 325; Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231. In this last case this court, upon affirming the judgment foreclosing a mechanic's lien, directed the court below "to allow plaintiff, under section 1195 of the Code of Civil Procedure, a reasonable fee for services of its attorney in this court." As to the averment in the tenth paragraph of the complaint that plaintiff had paid $25 for preparing his claim of lien, I think he was entitled to recover nothing upon it, in any event, whether it was denied or not. That averment should have been stricken from the complaint, and probably would have been, had defendant moved the court

to strike it out. The attorneys' fees paid by a party can be recovered from the defeated party only in exceptional cases, of which it is true an action to enforce a mechanic's lien is one; but the exception provided for in this class of cases does not extend to fees for services not pertaining to such action "in the superior" or "supreme court." The preparing of a claim of lien to be recorded is no more nearly related to an action to foreclose the lien than is the drafting of a contract for the performance of the labor upon which such action may be partly founded.

3. It is contended that the court failed to find the contract set forth in the complaint. It is alleged in the complaint that "plaintiff entered into a contract with said defendant, under and by which said plaintiff agreed to perform the labor and furnish the brick, lumber, lime, cement, hardware, and other materials necessary to repair and alter both of said above-described buildings or structures and premises in the following particulars." Here follows a minute description of the repairs and alterations to be made, namely, to build a brick wall and fence on the rear line of such lots, and a division fence between them; to construct entrances in said brick walls, and hang doors thereon; to build stairs on each of said above-described buildings or structures; to repair windows and sinks therein; to build a shed attached to one of the buildings; to put down plank walks and repair sidewalks on each side of said lots; and that defendant agreed to pay plaintiff for all of said work and materials the reasonable value thereof. Also alleged that plaintiff fully performed the contract on his part, and that the reasonable value of the work done and materials furnished was $691.20. The answer "denies that at any time plaintiff entered into a contract with defendant, under or by which plaintiff agreed to perform the labor *and* furnish the brick, lumber, cement, hardware, *and* other materials necessary to alter the buildings or structures *and* premises described in said complaint;" but "admits that plaintiff and defendant did enter into a contract for the performance of the brickwork and the furnishing of the materials for such brickwork required in the alteration and repair of the *premises described in said complaint.* Admits that, pursuant to said contract, said defendant did perform said brickwork and furnish said materials required in the alteration and repair of said premises:" But "denies that, *pursuant to said or any contract,* plaintiff performed any work or furnished any materials required in the alteration or repair of said premises, other than said brickwork and said materials required in the performance of the same; denies that, *under or according to the terms of any agreement* between plaintiff and defendant, plaintiff furnished *all* the materials to be used, or which were actually used, in the alteration or repair of both or either of the buildings described in said complaint, or performed *all* the labor necessary to complete the same; denies that the reasonable market value of the labor performed and materials furnished by plaintiff in the alteration and repair of said buildings are or were *the sum of* $691.20; denies that there is or was due from defendant to plaintiff *the sum* of $691.20, or any greater sum than $——;" but does not deny that plaintiff did the work and furnished the materials as alleged in the complaint. The court found "that plaintiff entered into a contract with defendant, under and by the terms of which plaintiff agreed to perform the labor, furnish the brick, lumber, lime, hardware, and other materials necessary to repair and alter the buildings situate on the premises in the complaint mentioned; that, in pursuance of said contract and agreement *as in the complaint mentioned, and with defendant's knowledge and consent,* plaintiff did perform the labor upon said premises and did furnish brick, lumber, lime, cement, hardware, and other materials necessary to repair and alter the buildings situated on the premises in the complaint mentioned;" and further found that the value of the labor done and materials furnished, as aforesaid, "is and was the sum of $691.20." (The italicizing in the above quotations is not in the originals.) If the whole substance of the agreement alleged in the complaint was not expressly admitted in the answer, it is obvious that the qualified and copulative denials relating to the contract were insufficient to raise a substantial issue. Besides, I think, the agreement alleged was substantially found. I think the judgment should be modified by deducting therefrom $25, which was allowed for preparing plaintiff's claim of lien, and, as so modified, should be affirmed; neither party to recover costs of the appeal.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by deducting therefrom $25, which was allowed for preparing plaintiff's claim of lien, and, as so modified, is affirmed; neither party to recover costs of the appeal.

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100 Cal. 500

PORTER et al. v. ARROWHEAD RESERVOIR CO. (No. 19,245.)

(Supreme Court of California. Dec. 24, 1893.)

CONTRACTS—BREACH—DEFAULT IN PAYMENT—RESCISSION—QUANTUM MERUIT.

Default in a payment on a contract for work is a breach justifying a rescission and action of quantum meruit by the contractor.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by W. R. Porter and W. E. Van

Slyke against the Arrowhead Reservoir Company. Judgment for defendant. Plaintiffs appeal. Reversed.

C. W. C. Rowell and E. E. Rowell, for appellants. Willis & Cole, for appellee.

GAROUTTE, J. Appellants brought an action of quantum meruit to recover $4,207.04 for labor performed in the building of a wagon road. The defendant filed an answer denying the allegations of the complaint, and also filed a cross complaint alleging, among other things, that plaintiffs had entered into a contract in writing to build a certain wagon road for the sum of $6,000; that plaintiffs entered upon the construction of said road under the contract, and performed labor thereunder until about September 3, 1891; that at such time plaintiffs, without right, and without the consent of the defendant company, ceased work and abandoned said contract; and defendant asked for damages for such alleged breach. Plaintiffs answered the cross complaint, admitting the contract, and that the labor performed was done thereunder, but alleged a rescission thereof by them upon the 3d day of September, 1891, by reason of default on the part of defendant to make a partial payment upon the work, as covenanted in said contract. As disclosed by the writing, the contract price of $6,000 was to be paid as follows: "On the first day of each and every month after beginning of work on said road, in the following manner and proportions, to wit, that, as the amount of work done previous to said first day of the month shall bear according to the lineal feet of the construction of said road to the whole distance between the terminal points mentioned in this contract, which amount is to be ascertained by the engineer of the company, and the payments to be made in such proportion less ten per cent. of said sum due on the first day of each and every month." Judgment was rendered for defendant in the sum of $610.18 and costs of suit, and this appeal is from such judgment, and the order denying a new trial.

The brief of respondent is composed, to a great extent, of the opinion of the learned judge of the trial court, and his position as to the law of the case is there fully and forcibly set forth. We will not enter into a detailed review of the alleged errors relied upon for a reversal of the judgment, for we think the views of the trial court upon the principles of law here involved are not sound, and that a new trial must be ordered for that reason. The error of the court has arisen from a misconception of the legal principles declared in the somewhat historical case of Cox v. McLaughlin, reported in various volumes of our reports,—among others, 54 Cal. 605, and 76 Cal. 60, 18 Pac. 100. We quote from the views of the trial judge, as indicated in his opinion, found in the respondent's brief: "It is evident, without citation of authority, that the plaintiffs' right to maintain this action on a quantum meruit depends on the abrogation of the contract referred to between the plaintiffs and the defendant corporation. If that contract existed, and was in force, it would be a direct answer to plaintiffs' claim to recover in the present form of action. To effect the abrogation of the contract, in the light of the facts presented in this case, there must have been some such substantial violation of its terms on the part of the defendant as would have authorized the plaintiffs to rescind; and such violation must, under the authority of Cox v. McLaughlin, have amounted to either actual or technical prevention." And, again: "After a careful review of the testimony, I am of the opinion that there was no showing of any prevention, either actual or technical, on the part of the defendant, as regards the plaintiffs."

Prior to the decision of Cox v. McLaughlin, reported in 76 Cal., 18 Pac., supra, this court repeatedly and always held that, unless McLaughlin's prevention of the execution of the contract by Cox was alleged and found as a fact, plaintiff was not entitled to recover on the contract; and the court further held that a mere failure or refusal to pay an installment upon the contract price as it became due was not a condition precedent in the contract, was not prevention, and did not authorize the plaintiff to abandon the work, and recover the profits he would have made if the work had been completed under the contract. Under the last decision (76 Cal., 18 Pac.) the complaint had been amended. The contract was no longer relied upon, and for the first time the action was before the court upon a quantum meruit, and it was then sustained. There was no question of "prevention" involved in the case upon that appeal. That element is not considered in the opinion of the court; but a failure to pay an installment of the money due was necessarily held a breach of the contract, for without a breach there could have been no action of quantum meruit, and necessarily no recovery had thereon. There is a wide distinction between "prevention" upon the part of the employer of the further carrying on of the work, and other breaches of the contract. The law says breaches amounting to prevention must be of conditions precedent, and the payment of an installment upon the contract price is not such a condition, as Cox v. McLaughlin repeatedly decides. At the same time, that case conclusively holds that a default in payment is such a breach as to justify a rescission and an action of quantum meruit, and that long litigation was concluded upon that principle. There is no question but that nonpayment, as agreed upon, is a breach of the contract, of some character; and Justice McKinstry said in the 54th Cal., supra: "Assuming that the failure to pay, as alleged, constituted a breach of the contract, the plaintiffs could have treated the specific contract as rescinded, and have brought suit upon the implied promise of defendant to pay the value of the work actually done." And in the very case of Palm v. Railroad Co., 18 Ill. 219, from which Justice McKinstry quotes in extenso to establish that nonpayment does not amount to prevention, the Illinois court said: "'The contract provides for no other penalty or liability, and the law imposes no other, except, perhaps, that this violation of the contract by the defendant, in failing to make the payment, may justify the plaintiff in treating the contract as rescinded, and in suing for the amount due, in an action for goods sold and delivered." In Schwartz v. Saunders, 46 Ill. 18, the owner failed to pay the contractor in the erection of a building an installment of the contract price, when due, and the court said: "That he had a right to abandon the work, under the circumstances, seems a proposition so plain as to require no argument." A failure to pay an installment of the contract price, as provided in the contract, is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, cease work, and recover the value of the work already performed. As we have seen, Cox v. McLaughlin is authority to support this principle, and there is also ample precedent from the decisions of the courts of other states. Canal Co. v. Gordon, 6 Wall. 561; Evans v. Railroad Co., 26 Ill. 189; Preble v. Bottom, 27 Vt. 249; Dobbins v. Higgins, 78 Ill. 440; Shaw v. Turnpike, 3 Pen. & W. 445; Reybold v. Voorhees, 30 Pa. St. 116; School Dist. v. Hayne, 46 Wis. 511, 1 N. W. 170.

From the foregoing views, it follows that, to entitle the plaintiffs to recover in the present action, it is only necessary that they prove a substantial failure upon the part of defendant to comply with its agreement as to the payment of an installment upon the contract price, and, in addition thereto, that they rescinded the contract by reason of such failure, and upon these lines a new trial should be had. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: PATERSON, J., and HARRISON, J.

(100 Cal. 514)

WILSON v. SAMUELS et al. (No. 15,333.)[1]

(Supreme Court of California. Dec. 26, 1893.)

CONTRACTS—VALIDITY — CONSIDERATION — INTERPRETATION—SUPPLYING BLANKS—PERFORMANCE.

1. Creditors of an insolvent contractor held liens for materials furnished to erect a building, and agreed with him, in writing, to assign their liens to the owner of the building if he would pay the money still due, before a certain day, by first paying in full the claims for labor, and then dividing the remainder proportionately among all other lien claimants. *Held*, that the agreement was valid, and binding on each signer, as the contract of each was a sufficient consideration for the contracts of the others.

2. The fact that blank spaces as to the amount due were left in the agreement did not render it incomplete, since they could be supplied from the agreement.

3. A signer could not recover in an action to enforce his lien against the contractor and owner, where the owner had paid out the money due to the contractor, as authorized by the agreement, except the pro rata share of such signer, which was tendered, but refused, and, on the bringing of action, was deposited with the court.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. H. Wilson against D. Samuels and W. A. Van Dervort to foreclose a mechanic's lien. From a judgment for plaintiff, and an order denying a new trial, Samuels appeals. Reversed.

Naphtally, Freidenrich & Ackerman and Alex. G. Eells, for appellant. Geo. D. Collins, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of the plaintiff in an action to foreclose a mechanic's lien, and from an order denying defendants' motion for a new trial. Defendant Samuels was the owner of a lot of land in San Francisco. He entered into a written contract with W. A. Van Dervort, the other defendant, by the terms of which the latter was to construct for him certain buildings upon said lot. The contract was duly filed with the recorder of the city and county. Plaintiff, Wilson, furnished materials and labor to the contractor for and in the construction of the buildings, for which there was due him $1,200. For this amount he filed a mechanic's lien against the buildings at the proper time, and in due form. There was due the contractor from Samuels, on account of the contract, $6,312. Twelve other liens were filed, for amounts aggregating $8,875.69, on account of materials furnished; also, liens for labor, aggregating $310.50. There were therefore liens filed, exclusive of the labor liens, and including that of plaintiff, amounting to $10,075.69. The contractor, Van Dervort, seems to have been insolvent. Before the liens were filed, the creditors met, and endeavored to adjust their claims so as to avoid the expense and necessity of filing liens, but failed in their efforts. After the liens were filed, the lienholders met again, and learned the exact amount due from defendant Samuels on the contract, except that there was thought to be something due on account of extra work on the building; but the precise amount thereof, if anything, was not known. The amount of the several liens was also reported to the meeting. Thereupon, an agreement in writing was prepared and executed by all the lienholders, the plaintiff included, except Glosser & Gallagher, who refused to assent thereto. The following is a copy of the agreement:

"We, the undersigned creditors of W. A. Van Dervort for work done and materials furnished in the erection of a certain structure for D. Samuels, situated on Greenwich street, near Buchanan street, hereby agree that if said D. Samuels will pay, on or before the first of July, 1891, the money still due on said building, to wit, $——, the same may be paid as follows, to wit: First, all the claims for labor, amounting to $310.50, shall be paid in full; second, the remainder, $——, shall be distributed among all the other lien claimants in the proportion which each of said claims bears to the whole amount of such other lien claims filed against said building, said proportion being —— per cent. of each of said claims. And, in consideration of said payment being made, we, and each of us, will, on receipt of our said proportionate shares, respectively assign our said liens to said D. Samuels, with the agreement that we, and each of us, will furnish the testimony necessary to prove and establish the validity of our respective lien in any litigation growing out of the refusal of one or more of the lien claimants to accept his said proportion, and that, if said respective liens are not so proved by us, we will, respectively, refund the moneys so paid for such invalid liens. And the said W. A. Van Dervort hereby agrees to the payment of said money as above provided for, and hereby waives his own liens for any and all moneys so paid. [Signed] W. A. Van Dervort. San Francisco, June ——, 1891."

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[1] For modification of opinion, see 35 Pac. 559.

Name of Claimant.	Amount of Lien.
C. E. Doty & Co.	$1,545 65
Keenan Withington	30 40
J. H. Wilson	1,200 00
L. E. Clawson & Co.	122 00
E. Platz	507 00
A. I. Sanborn	200 00
Latson Hardware Company	93 00
C. D. McGown & Co.	244 93
Fulda Bros.	79 79
Huntington, Hopkins & Co., per W. F. S.	518 19

As before stated, the parties did not know the amount due on account of extra work, and hence the blanks in the agreement. The clause in reference to proving amount due and validity of liens was inserted to meet the case in the event that some of the lienholders refused to accept the arrangement, and in order that such dissenters might not receive more than their pro rata share. Defendant Samuels was made acquainted with the agreement, and thereupon, through D. H. Bibb, paid off all the lien claimants their pro rata share of the $6,312 due the contractor, except the plaintiff, who refused to accept less than the full amount due him. Glosser & Gallagher, who refused to sign the agreement, finally accepted their pro rata share with the others. Before the 1st day of July, 1891, $720 was tendered to plaintiff, and refused by him, and, after this suit was brought, said sum was paid into court for him. This was slightly in excess of the pro rata share due him. The several liens so paid off pro rata were, with the consent of Samuels, assigned to one Greenwald, who brought suit upon them, which action was pending at the date of the trial herein. W. A. Van Dervort, the contractor, joined with Samuels as a defendant, made default, and Samuels alone is appellant here.

The position of respondent, in support of the judgment, is: (1) The agreement is not a composition agreement, and is not binding as such. (2) The agreement is fatally inchoate and incomplete by reason of the existence of the blanks therein relative to the pro rata the claimants were to receive. (3) The agreement, by its very terms, was to be obligatory only upon those who accepted the pro rata. (4) That, at the very most, the agreement was only an accord, which could be disregarded at any time before satisfaction, and therefore the respondent was at liberty to indorse his claim for the full amount.

In briefly noticing these propositions, it may be said of the first that a composition is an agreement made upon a sufficient consideration between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter, for the sake of immediate or sooner payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole. Considered in the light of this definition, the agreement herein set out is not, technically, a composition agreement, for the reason that it is not one for the payment by the debtor of any sum or thing, and for the further reason that it does not purport to be and was not intended as a release of the debtor. It does not follow, however, from these reasons, that the agreement was inoperative or void. The defendant Van Dervort, as a contractor, was indebted to his creditors on account of materials furnished and labor performed in a sum in excess of $10,000. To the extent of $6,312, they had or were entitled to liens upon the buildings constructed. To the extent of this last sum, the property of defendant Samuels was liable; but, as there was no personal liability against him, he was not at liberty to pay, without the consent of all the parties, the amounts claimed upon these liens. Had he done so, it would have been a mere voluntary payment without authority on his part, and would at least have devolved upon him the burden of proving, as against the contractor and lienholders, the validity of the demands and regularity of the liens. Covell v. Washburn, 91 Cal. 560, 27 Pac. 859. To collect these several amounts through the instrumentality of suits to foreclose the several liens would take much time and involve large expense, all of which would come out of the fund in the hands of Samuels. The counsel fees, judging from that allowed to plaintiff herein, would have approximated $1,000. The creditors and their debtor, combined, had the power to release Samuels from their claim upon his property, or to agree upon any mode or time of payment or amount to be paid they saw fit, subject to his approval, without suit. The law could only enforce the liens upon the property of Samuels by a foreclosure. All the parties in interest were at liberty to obtain the sum for which the property was liable by any other lawful method by which they could contract.

It is said that Samuels occupied the position of a garnishee towards the creditors, by reason of his indebtedness to the contractor. Grant the position, and what follows? Can it be doubted that the creditor and debtor may release the garnishee, if they see fit, or provide by agreement when, where, and to whom he shall pay the debt covered by the process of garnishment? We think not. It is true, as claimed by respondent, that Samuels did not seek any compromise or composition of the claims for which his property was liable. So far as appears, he was at all times willing to pay all that he owed to the contractor, in the mode provided by law. It was not for his benefit that the agreement was made, but for that of the creditors of the contractor. It was in part for the benefit of the plaintiff here, who signed the agreement with the contractor, and all of the creditors, except a single firm, which afterwards accepted its terms. All parties have abided by the contract except the plaintiff, who now seeks to be rewarded as a result of his violation of it. There was sufficient consideration for the agreement. In such cases the contract of each creditor is a sufficient consideration for the contract of all the others. When they mutually agreed to forego their right to pursue the usual method of enforcing their demands in consideration of being paid at a given time, the engagement of each was a sufficient consideration for the engagement of the others to do the same. In this respect, it is, in principle, not distinguishable from a composition agreement. Pierson v. McCahill, 21 Cal. 129. Again, the acceptance of the agreement by Samuels, and payment by him, was a sufficient consideration for the agreement.

It is claimed that the contract is incomplete by reason of the blanks left therein relative to the pro rata to be paid the lien claimants. The agreement was in substance, that "we, the undersigned, hereby agree that if Samuels will on or before July 1, 1891, pay the money still due, etc., as follows: First, all the claims for labor, amounting to $310.50 in full, the remainder among all the other lien claimants, in proportion which each bears to the whole amount of such other lien claims filed," etc.,—"we will assign our claims to him, and will, if any one or more claimants shall refuse to accept his proportion, prove our claims valid or return the money paid to us. Van Dervort agrees to the above, and to waive his right to liens for money so paid." This is signed by the creditors, with the amount of their liens affixed. The rule enunciated by Parsons in his work on Contracts, (volume 2, p. 693,) in reference to blanks in agreements, is as follows: "Thus, if a blank be left in an instrument, or a word or phrase of importance omitted by mistake, the omission may be supplied, if the instrument contains the means of supplying it with certainty." In the present case, the contract affords the means for supplying the blanks in the agreement. It was the money due from Samuels that was to be divided, and it was to the demands due the creditors of Van Dervort that it was to be applied ratably. Those demands were all of record, and the proofs introduced without objection showed that the parties had a complete list of them at the meeting when the agreement was decided upon. The amount due from Samuels was also well known at the meeting, except that Van Dervort thought there was something in addition for extra work. The contract afforded a criterion by which to ascertain the amount due, and its disposition. Had the agreement been simply to divide the sum due from Samuels to Van Dervort on account of, etc., among the lienholders on the property, without other or more accurate specification, it would have been ascertainable and valid. A. agrees to sell to B. all the corn on ship C., at a specified price per bushel. The quantity is not known, but is ascertainable. "As to the parties or the subject-matter of a contract, extrinsic evidence may and must be received and used to make them certain, if necessary for that purpose." 2 Pars. Cont. p. 680. The essential thing, under the contract, to be done, was to pay in full certain liens for labor, and then to distribute the residue of the money "among all the other lien claimants." It was to be thus distributed, irrespective of the pro rata, and irrespective of the validity of the liens. In other words, the contracting parties assumed that all the lien claimants had valid liens. Else, why was Samuels authorized to distribute the balance of the fund "among all the other lien claimants?"

Respondent contends, further, that the agreement was to be obligatory only upon those who accepted the pro rata, and that, as to any of those signing and refusing to accept, special provision was made. We do not so construe the contract. Those who signed the agreement were bound by it, but it appeared that one or more refused to execute it. Hence the necessity for providing a method by which they should be prevented from obtaining a larger share of the fund than those who became bound by the contract. To suppose that the parties who signed the contract did so with the view that they were not to be bound by it if Samuels consented to pay them the money under it is to assume that they lack intelligence, or that they were seeking to practice a fraud upon Samuels, neither of which we are willing to assume. The court below found that defendant Samuels had not paid any part of the sum in his hands, except the amount paid on the labor liens, the payment of which was admitted. This finding is in the face of the evidence, which is to the effect that Samuels accepted the agreement, and promised to pay it; that Bibb advanced the money on the agreement, and paid it out to the lienholders; and that Samuels repaid it to him. There is no conflict in the evidence on this point, and the finding is in direct conflict with the evidence. The evidence shows, beyond controversy, (1) that plaintiff signed the agreement; (2) that prior to July 1, 1891, defendant, pursuant to said agreement, paid the entire funds in his hands owing to the contractor, Van Dervort, except the sum of $720, which was the proportion of said fund to which plaintiff was entitled; (3) that said amount was tendered to plaintiff prior to July 1, 1891, and was deposited in the court below for plaintiff by the defendant, upon filing by him of his answer in this cause. All these things did not amount to an accord between the parties, but did constitute a valid and binding agreement, which authorized defendant to disburse the fund in hand, as has been done as to all the other claimants; and to permit the plaintiff to repudiate such executed agreement as to all the other parties, and recover from defendant the entire sum due him from Van Dervort, would be to permit him to take advantage of his own wrong, and equivalent to offering a premium for wrongdoing. The judgment and order appealed from should be reversed, and the court below directed to enter a judgment in favor of plaintiff for $720, the amount in court, but without costs, and with costs of the court below in favor of defendant, the appellant herein, and that appellant have and recover his costs on this appeal.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to enter a judgment in favor of plaintiff for $720, the amount in court, but without costs, and with costs of the court below in favor of defendant, the appellant herein, and that appellant have and recover his costs on this appeal.

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4 Cal. Unrep. 384

RITCHEY v. McMICHAEL. (No. 19,231.)

(Supreme Court of California. Dec. 26, 1893.)

DECEIT — WHEN ACTION LIES — PRINCIPAL AND AGENT—RIGHTS AND LIABILITIES INTER SESE.

1. Plaintiff authorized defendant to buy for him land from one B. for $2,750, agreeing to pay one-third cash, one-third in six months, and the balance in a year. Thereafter defendant represented that B. would not sell except for one-half cash and the balance in a year; that he had taken a deed to himself on those terms, and would convey to plaintiff on the terms agreed on between them. He then forwarded a contract of sale to plaintiff, and drew on him for $916.66. Plaintiff executed the contract, and paid the draft. Defendant's representation as to his purchase of the land from B. was false, B. having agreed to sell it to another for $1,375. *Held*, that plaintiff could recover the amount paid on the draft.

2. In such case the relation of principal and agent existed between plaintiff and defendant, and the latter was accountable for the money paid him by plaintiff to carry out the purposes of the agency.

Department 1. Appeal from superior court of Los Angeles county; William P. Wade, Judge.

Action by J. T. Ritchey against J. G. McMichael for moneys of plaintiff fraudulently converted by defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Anderson & Anderson, for appellant. Lacey & Trask and D. K. Trask, for respondent.

HARRISON, J. In April, 1888, one Buell was the owner of an interest in certain lands in Los Angeles county, and the defendant was the owner of a similar interest therein. The defendant was a resident of California, but was at that time in Louisville, Ky., where he had formerly resided, and where the plaintiff was then residing. He had known the plaintiff, and had been on friendly terms with him, for many years, and while there represented to him and one Curtice that Buell would sell his interest in the lands for $2,750, and urged them to purchase this interest, representing that it was of much greater value, and offered to make the purchase for them at the lowest price for which he could induce Buell to sell it. Neither the plaintiff nor Curtice had ever seen the lands, nor had they any knowledge of their value, or of the price at which Buell would sell his interest, but, relying upon the representations of the defendant, authorized him to make the purchase for them from Buell on terms of one-third cash, one-third in 6 months, and one-third in 12 months, thereafter. The defendant returned to California, and on the 9th of May wrote to the plaintiff to the effect that he had effected the purchase, but that Buell would not accept the terms proposed, but insisted on having half cash, and half in 12 months; and therefore he had had the contract from Buell made directly to himself upon these terms, but that the plaintiff and Curtice might have the benefit of the terms upon which they had agreed to make the purchase. Inclosed with the letter he sent a contract in duplicate to be executed by the plaintiff and Curtice, one of which they were to retain, and the other to return to him, by which he agreed to sell, and they to purchase from him, these lands for $2,750, payable one-third cash, one-third in 6 months, and one-third in 12 months, the deferred payments to be evidenced by their promissory notes; and at the same time made a draft upon them for $916.66. The draft was paid by them upon its presentation, but neither the contract nor the notes were executed or returned to him. When the second payment was about to mature, the plaintiff telegraphed the defendant to make his draft for both deferred payments with a deed attached, and they would be paid. To this request the defendant paid no attention, and does not appear to have made any subsequent attempt to collect the money. Subsequent investigation having satisfied the plaintiff that the defendant had defrauded them in the transaction, he brought this action to recover the amount of money paid on the draft, setting forth in his complaint the facts constituting the fraud, and that Curtice had assigned to him his interest in the money. The court finds that the representations of the defendant to the plaintiff in his letter of May 9th were false and untrue; that at the time he was in Kentucky, urging the purchase of Buell's interest for $2,750, Buell had authorized him to sell that interest for $1,650; that Buell did not refuse to sell the property upon the terms proposed by the plaintiff and Curtice, and that the defendant had never made such offer on their behalf to Buell; that defendant did not give Buell half of the purchase price in cash, and had not taken the property in his own name, or given Buell any cash; that, on the contrary, Buell did agree to sell his interest to a Mrs. Canine for $1,375, in terms of one-third cash, one-third in 6 months, and one-third in 12 months. The agreement for this sale was dated May 9, 1888, but the cash payment thereon—$458.33—was not made until July 24th. The defendant offered in evidence a deed from Mrs. Canine for this interest, purporting to have been made by her on May 9th, but which was acknowledged on the 15th of September, in the state of Kentucky. It does not appear that Mrs. Canine ever became the owner of the land, or that Buell ever made any conveyance of the land to any one. The court found that the defendant procured the $916.66 to be paid to him upon his draft by means of false and fraudulent representations, and that he had been guilty of fraud and deceit in the transaction, and rendered judgment in favor of the plaintiff.

The rule is so familiar as to be trite that the obligation of an agent to his principal demands of him the strictest integrity and the most faithful service. He is not permitted to acquire any adverse interest in the subject-matter of the agency, and is accountable to his principal for any gains that he may have made in violation of those obligations. So long as he retains his position of agent he is accountable to his principal for all property which he may have received from him with which to carry out the purpose of his agency, and for the faithful disposition of his property in accordance with the principal's directions. The defendant herein must be regarded as the agent of the plaintiff in all his transactions respecting the purchase of the lands in question. He had undertaken to effect the transfer of Buell's interest in the lands to the plaintiff and Curtice as their agent, and while that relation existed between them he was not at liberty to acquire any interest in the lands adverse to them. Even if it had been established at the trial that he had made a contract in his own name for the purchase from Buell of this interest, his relation to the plaintiff and Curtice would have made him a trustee of that interest for their benefit. In the first letter which he wrote to the plaintiff upon his return to California, in which he sent the notes and contracts for execution, he says: "Buell would not take one-third cash, one-third six months, one-third twelve months, but insisted upon one-half cash; so I had him to contract to me one-half cash, one-half twelve months, and make the terms to suit you all. The difference is small, and I gave it to him so as to fix you all up." And again: "I have taken the property in my own name, and consented to your terms, and I pay Buell one-half cash, one-half twelve months." And on the next day he telegraphed from California to the plaintiff: "Papers gone forward, and draft for one-third of the amount." The scheme which the defendant fraudulently devised for the transfer to Mrs. Canine of the right to purchase Buell's interest, and her assignment of this right to himself, did not divest him of his obligation to fidelity towards the plaintiff, or give to him any rights in the property which he could assert as against the plaintiff and Curtice. The money which the plaintiff and Curtice paid upon the defendant's draft was not for the purpose of discharging any obligation on their part to the defendant, or in pursuance of any transaction between them and the defendant as separate contracting parties, but it was merely placing that amount of money in his hands as their agent for the purpose of carrying out the object of the agency; and as soon as they learned that their agent had not applied this money as they had directed, but had proved faithless to his trust, they had the right to demand its return. Whether the money was paid upon the draft of the defendant, or had been personally placed in his hands, or forwarded to him, is immaterial. In either case it was at all times the money of the plaintiff and Curtice, given to the defendant for a special purpose.

The proposition of the appellant that the plaintiff cannot recover the amount of the draft without tendering to the defendant an assignment or reconveyance of any interest he may have in the lands, cannot be maintained. The relation of vendor and vendee never existed between them, nor was there ever any contract between them which required a rescission. The defendant could not, as we have seen, so long as he held the relation of agent to the plaintiff for the purchase of these lands from Buell, acquire any interest therein which he could hold as against his principals, or of which he could become the vendor. Equally untenable is the proposition that, inasmuch as the defendant was himself the owner of an interest in the lands equal to that of Buell, the contract between himself and the plaintiff is valid, and that the plaintiff cannot recover the money sued for until the defendant has made default upon this contract. The plaintiff never had any negotiations with the defendant for the purchase from him of his interest in the lands, and the defendant could not become the vendor of this interest without the assent of the plaintiff to purchase it. Even if he had intended to assume the relation of a vendor of his own interest, the agreement sent by him to the plaintiff can only be regarded as a proposition or offer from him, and would not be binding upon the plaintiff until his acceptance; and it is not claimed that the plaintiff ever executed the agreement, or manifested to the defendant any acceptance of the proposition. The money which he paid upon the defendant's draft was not upon any agreement to purchase the defendant's interest, but was for the purpose of making a payment for the Buell interest. If the defendant made a fraudulent use of this money, the plaintiff could at any time at his discretion repudiate his action and sue for the money. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(100 Cal. 525)

LOS ANGELES COUNTY v. LANKERSHIM.

(No. 19,235.)[1]

(Supreme Court of California. Dec. 26, 1893.)

COUNTY TREASURER—PAYMENT OF FRAUDULENT WARRANT.

1. A county treasurer is required (County Government Act, § 70) to disburse only on auditor's warrants issued on orders of the board of supervisors or superior court, "or as otherwise provided by law" to pay (section 73) warrants presented, but not until he has received from the clerk of the supervisors the certified list of orders made, and (section 80) to settle his accounts each month, and deposit all warrants redeemed, taking the auditor's receipt therefor. Pol. Code, § 1543, bases school-fund warrants on requisitions of the superintendent on orders of the school trustees or board of education, and does not provide for furnishing the treasurer with any list or notice of them. In an action on a treasurer's bond for the amount paid on a school warrant, brought three years after the payment, defendant produced the auditor's receipt for said warrant. The court found that the treasurer paid the sum to some person unknown on what purported to be an auditor's warrant, payable to D., of whose existence no evidence could be given, nor could the warrant be found; that no requisition therefor was made by the superintendent on the auditor, nor order made by any board of trustees or of education, and said purported warrant was fraudulent. *Held* insufficient to sustain judgment on the bond, since, in view of the presumption in favor of official acts, the treasurer should have been clearly charged with notice of the fraud.

2. A finding that the payments were made by the treasurer wrongfully, and without right or authority, and in violation of his duty, is a mere conclusion of law, or, if of fact, then too general.

3. A surety on an official bond is not discharged by the obligee's failure to present its claim to the deceased officer's executor in due time.

4. Additional findings of fact cannot be made after entry of final judgment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the county of Los Angeles against James B. Lankershim on the official bond of J. W. Broaded, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

Graves, O'Melveny & Shankland and S. M. White, for appellant. H. C. Dillon, Dist. Atty., and Houghton, Silent & Campbell, for respondent.

VANCLIEF, C. The defendant was one of the sureties on the official bond of J. W. Broaded, treasurer of plaintiff, for the term of two years commencing on the first Monday of January, 1887; and this action is upon that bond, to recover $7,910.80 for alleged delinquencies of the treasurer during that term. Broaded died November 29, 1889, and this action was commenced May 5, 1890. The cause was tried by the court, and judgment rendered for plaintiff for the sum of $7,371.60. The defendant has appealed from the judgment, and also from an order denying his motion for a new trial. The judgment includes the sum of $3,840 alleged to have been paid out of the school fund by the treasurer in June, 1888, to some person unknown to plaintiff, upon an auditor's warrant not based upon any order of the board of supervisors, nor upon any order of the superior court, nor upon any authority otherwise provided by law, with interest thereon from June 30, 1888, until the date of the judgment. The residue of the judgment is conceded to be right, so that the only points made by appellant relate to the question, whether or not the treasurer justifiably paid out of the school fund said sum of $3,840.

As to this payment from the school fund, the court originally found as follows: "(5) That in the month of June, 1888, said treasurer also paid out of the general school fund of said county the sum of $3,840 to some person unknown; that said payment was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan, of whose existence no evidence was given, and which warrant cannot be found; that no requisition of said last-named money was ever made by the county superintendent of public schools upon the county auditor of said county; nor was any order therefor made by any board of trustees nor by any board of education in or of said county, and said purported warrant was fraudulent, and wholly without right, and was not based upon any claim against the school fund of said county." The original findings, including the above, were filed July 28, 1892, and the judgment, signed by the judge, was filed and docketed on the same day, and entered on the next day—July 29th. On August 3, 1892, the judge filed the following additional finding: "The court makes the following additional finding herein, the facts having been established on the trial of this action, to wit: The paper referred to in finding 5, as said finding 5 appears in the findings already filed in this cause, and which it is therein stated purported to be a county auditor's warrant, was regular on its face, was executed by the auditor or deputy auditor of said county, and the amount named therein, and for which said warrant purported to be drawn, was $3,840. W. H. Clark, Judge of said Court. [Indorsed] Filed Aug. 3, 1892." Counsel for appellant contend that upon finding 5, and the above additional finding, the judgment should have been for defendant, as to the sum of $3,840 paid from the school fund. But respondent contends—First, that the additional finding is immaterial; and, second, that if it is material it cannot be deemed a finding in the case, because made after the entry of the judgment, and without notice to respondent.

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[1] Rehearing denied. See 35 Pac. 556.

Assuming, without deciding, that the additional finding is equivalent to a finding that the warrant was genuine and contained in proper form, substantially, all things which the law requires in a warrant on the school fund, I think the additional finding is material, unless the treasurer had actual or constructive notice that the warrant was not based upon a lawful requisition of the county superintendent of schools. The law has provided the treasurer with a check upon the auditor in all cases where warrants are drawn for claims allowed by the board of supervisors. Section 20 of the county government act requires the clerk of that board, immediately after the adjournment of each meeting, to prepare and certify duplicate lists "of all claims allowed and orders made for the payment of money," etc., to be countersigned by the chairman of the board, one of which lists must be delivered to and left with the treasurer, who is forbidden to pay any warrant for a a claim allowed by the board unless the claim or order upon which the warrant is based appears on such list. Warrants upon the school fund, however, are not based upon orders of the board of supervisors, but upon requisitions of the superintendent of schools, which requisitions are based upon orders of the school trustees or board of education. Pol. Code, § 1543. But the treasurer is not furnished with any list of the requisitions of the school superintendent, nor of the orders of the school trustees or board of education. Nor is there any provision of law requiring notice to the treasurer of the orders or requisitions upon which warrants upon the school fund are based. Section 70 of the county government act provides that the county treasurer must "disburse the county moneys only on county warrants issued by the county auditor, based on orders of the board of supervisors, or upon order of the superior court, or as otherwise provided by law." Section 73 of the same act provides: "When a warrant is presented for payment, if there is money in the treasury for that purpose, he must pay the same, and write on the face thereof 'Paid,' the date of payment, and sign his name thereto, provided, however, that the treasurer shall not receive, or pay, or indorse, any warrant until he shall have received from the clerk of the board of supervisors the certified list mentioned in subdivision four of section twenty of this act, and not then unless the claim or order upon which said warrant is based appears upon such list." It is obvious that the proviso in this section was intended to apply only to warrants based on orders of the board of supervisors, since the claim or requisition upon which a warrant on the school fund is based could not appear upon any list of claims allowed by the board of supervisors. Therefore, when this section is to be applied to warrants on the school fund, the proviso should be omitted. Thus read, the section absolutely commands the treasurer to pay a genuine auditor's warrant on the school fund, if there "is money in the treasury for that purpose." And this is perfectly consistent with subdivision 6 of section 70, above quoted, which restricts the disbursement of county moneys to the payment of warrants "based on orders of the board of supervisors, or upon order of a superior court, or *as otherwise provided by law.*" Section 73, omitting the proviso, is a provision of law for the payment of warrants on the school fund, otherwise than on the condition that they are based on orders of the board of supervisors or superior courts; and fully answers the intention and purpose of the last clause of subdivision 6 of section 70, above italicized. It must have been intended by the legislature that a genuine auditor's warrant upon the school fund, in regular and legal form, should justify the treasurer in paying it, unless the treasurer has notice that it was not based upon a lawful demand, or has notice of facts sufficient to put an ordinarily prudent treasurer upon inquiry, which, if diligently prosecuted, would lead to a discovery of the illegality of the claim upon which the warrant was founded; otherwise, the legislature would have provided for him a check upon the auditor, and all others for whose delinquencies he is to be held responsible, of the same kind as that provided in cases of warrants based on claims allowed by the board of supervisors, in which cases the treasurer may properly and without hardship be held severally liable with the auditor, if the warrant is not founded upon an apparently lawful order of the board. But suppose the order of the board of supervisors is only apparently lawful, but really fraudulent and illegal. Should either the auditor or treasurer be held liable, in case the warrant is drawn and paid? If not, why not? I think neither should be held liable, for the reason that neither had notice of the fraud or illegality, both being misled by the apparently regular and lawful order of the board.

Again, suppose the warrant on the school fund in this case had been based on an apparently valid requisition of the superintendent of schools, but that such requisition was not founded upon any order of the board of school trustees or board of education. Would either the auditor or treasurer be liable for the $3,840 paid on the warrant? If either would be liable, why not extend the liability a step further back, and hold them accountable for any delinquency or fraud of school trustees or board of education, of which they had no notice? When a genuine warrant upon the school fund, in legal form, is presented for payment, to what extent must the treasurer review the action of the auditor, superintendent of schools, and board of school trustees, before he may safely pay it? If such genuine auditor's warrant does not justify the payment, I see no reason why the addition of a genuine requisition of the superintendent of schools, based upon no order of school trustees or board of education, should justify it, since the treasurer can no more be presumed to have notice of the want of a proper requisition of the superintendent upon the auditor than of the want of a proper order of the school trustees or board of education upon the superintendent. If the treasurer is to be made responsible for the delinquencies of the auditor, the superintendent of schools, and the school trustees, he should be supplied with lists of all requisitions of the superintendent upon the auditor, and of all orders of school trustees and boards of education upon the superintendent; and even then fraudulent claims might be allowed by school trustees or boards of education, upon which genuine requisitions, in due form, might be made by the superintendent upon the auditor.

While it has been often decided that treasurers and their sureties are responsible on their official bond for losses of public money by means of forgery, theft, and robbery, (Murfree, Off. Bonds, § 197,) no case has been cited by counsel, and I have found none, in which they have been held accountable for a loss resulting from payment of a genuine auditor's or comptroller's warrant in due form, without notice, actual or constructive, of any fraud or infirmity in the claim upon which such warrant was based; and it would seem that to hold a treasurer accountable for the frauds, mistakes, or other delinquencies of the auditor, of which he has no notice, would be to hold that the so-called auditor's warrants for the payment of money from the treasury are delusive misnomers, since they warrant nothing. I am of opinion, however, that the additional finding, though material, cannot be deemed a valid finding in the case. After the entry of final judgment the court had no power to change the findings of fact in any material respect. The superior court has power to set aside judgments and findings upon various grounds, as provided in the Code of Civil Procedure; but there is no provision of law authorizing any change in the findings of fact after the entry of final judgment thereon, while the judgment is allowed to stand. The entry of final judgment terminates the jurisdiction of the court over the cause and the parties, except as otherwise expressly provided by law. Hence, it is wholly immaterial whether the additional finding in this case was made upon notice to plaintiff or not. The court had no more power to make it upon notice than without notice. Whether, and to what extent, findings may be changed by consent and agreement of the parties, is not here involved; but, however this may be, a change of findings thus made would be the act of the parties, and not of the court. The following cases bear more or less directly upon the question as to the power of the court to change findings: Condee v. Barton, 62 Cal. 1; Bate v. Miller, 63 Cal. 233; Wunderlin v. Cadogan, 75 Cal. 618, 17 Pac. 713; Smith v Taylor, 82 Cal. 544, 23 Pac. 217; Brady v Burke, 90 Cal. 1, 27 Pac. 52. Yet I think the original findings, filed before the entry of judgment, insufficient to support the judgment for the sum paid out of the school fund on warrant No. 1,712, payable to Delevan. "There is always a presumption of law that officers perform their duty, and, whenever there is a charge made of official default, the burden of proof is upon the party making the allegation. If, in an action on an official bond, the breach laid is the failure of the officer to discharge the duties of his office, by refusing or neglecting to account for and pay over, as required by law, money which came into his hands, it is incumbent upon the plaintiff to prove what money did come to his hands, what amount he has not truly accounted for, and in what respects he has failed to do his duty." Murfree, Off. Bonds, § 593. And such presumption in favor of the officer inures to the benefit of his sureties. Id. § 596. In the face of this presumption of law, the original finding, No. 5, utterly fails to show that the treasurer failed to perform his duty in any respect, unless he was responsible for the delinquency or fraud of the auditor in drawing the warrant without a proper requisition therefor from the superintendent of schools, of which fraud or delinquency he had no notice. The finding that the "warrant was fraudulent, and wholly without right," is not a finding that the treasurer was guilty of any fraud or wrong; and, from the finding that "said payment was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan, of whose existence no evidence was given, and which warrant cannot be found," the presumption must be, in the absence of any finding to the contrary, that the warrant was genuine, and complied with the law in form and substance; in other words, that it was what it "purported" to be. Nothing against the treasurer can be inferred from the fact that the warrant could not be found at the time of the trial. The trial was three years after the warrant had been paid, and presumptively deposited with the auditor, as required by section 80 of the county government act. That section requires the treasurer, on the first Monday in each month, to settle his accounts relating to the collection and disbursement of public revenue, and at such settlements to deposit all warrants redeemed by him, and take the auditor's receipt therefor. Such a receipt from the auditor of all county warrants paid in the month of June, 1888, amounting to $188,162.74, including the sum of $3,840, for which the warrant in question was drawn, was offered in evidence by the defendant. But, even if this receipt had not been produced, the presumption would be that the warrant, (which "cannot be found,") if not in the possession of the auditor, who was the legal custodian thereof, must have been lost, destroyed, or otherwise disposed of by him.

The sixth finding, "that all of said payments were made by said treasurer wrongfully, and without right or authority, and in violation of his duty as such treasurer," consists of mere conclusions of law; and, even if it could be regarded as a statement of facts, it is too general and indefinite.

The finding "that the said treasurer did not, during his said term of office, keep any books as required by subdivision 3 of section 70 of the county government act," does not state any particular in which the treasurer's books were deficient, and consequently does not show that any deficiency or irregularity in his bookkeeping contributed anything to the cause or causes of the loss of the money paid on the warrant to Delevan.

The liability of the defendant on the bond of Broaded was not discharged by the failure of the plaintiff to present its claims arising on that bond to the executor of the estate of Broaded, for allowance, within the period of 10 months after publication of notice to creditors, and in so ruling the court did not err.

I think that so much of the judgment as appears to be based upon the payment by the treasurer, Broaded, of the auditor's warrant on the school fund for $3,840, payable to C. H. Delevan, should be reversed, and a new trial granted on the issue as to whether the defendant is accountable for the money paid on that warrant, but, as to the residue of the judgment, not based upon the payment of that warrant, the order and judgment should be affirmed; costs of the appeal to be taxed to the respondent.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the judgment as appears to be based upon the payment by the treasurer, Broaded, of the auditor's warrant on the school fund for $3,840, payable to C. H. Delevan, is reversed, and a new trial is granted on the issue as to whether the defendant is accountable for the money paid on that warrant. As to the residue of the judgment, not based upon the payment of that warrant, the order and judgment appealed from are affirmed; costs of the appeal to be taxed to the respondent.

(100 Cal. 543)

STEWART et al. v. SUPERIOR COURT.

(No. 15,482.)[1]

(Supreme Court of California. Dec. 27, 1893.)

INJUNCTION—APPEAL—STAY OF PROCEEDINGS—CONTEMPT.

In an action for injunction, commanding defendant not to interfere with plaintiff in connecting with defendant's water conduit, which right plaintiff claimed under a contract, there was judgment for plaintiff, but defendant appealed, and gave bond. Plaintiff had had no connection with the conduit, except pending a temporary injunction, which had been dissolved. *Held*, that the appeal stayed the operation of the judgment, so that defendant was not in contempt for preventing the connection.

Department 1.

Application of Julia V. Stewart and W. B. Prentice for writ of review to annul an order of the superior court of San Diego county. Order annulled.

Gibson & Titus and V. E. Shaw, for petitioner. E. W. Britt, for respondent.

PATERSON, J. This is an application for a writ of review to annul an order of the court below, adjudging petitioners guilty of contempt for the disobedience of its judgment. It appears that the petitioners, Julia V. Stewart and W. B. Prentice, entered into a contract with one Hill, whereby they agreed to deliver to the latter, or his executors, representatives, and assigns, at a certain point on the line of their pipe, water not to exceed 10 miners' inches, in perpetual flow, under a 4-inch pressure, for a term of 20 years. Thereafter, Hill sold and assigned all his rights under the contract to one J. W. Sefton, who constructed a pipe line extending from the point mentioned in the contract to his ranch, and thereupon demanded of Stewart and Prentice that he be allowed to make a direct connection between his pipe and the pipe line of Stewart and Prentice, and to divert from the flume two inches of water. This demand was re-

[1] For modification of opinion, see 35 Pac. 563.

fused by Stewart and Prentice, who claimed that he had no right to make such connection, whereupon Sefton instituted an action against them, in which, upon proper allegations made, he prayed that an injunction might issue, commanding the defendants not to interfere with the plaintiff in effecting a connection of his pipe with the conduit of the defendants, and for the sum of $1,000 damages. Thereupon, the court issued a temporary injunction in accordance with the prayer of the complaint, which was afterwards, on motion of the defendants, dissolved, and the plaintiff was ordered to detach his pipe from the pipe line of the defendants, the connection having been made during the pendency of the temporary injunction. A trial was had upon the merits, and judgment was entered in favor of the plaintiff, awarding to him one dollar damages, and the right to connect his line of pipe as prayed for. It was further decreed that the defendants desist and refrain from interfering with the plaintiff in making the connection of his pipe with the pipe line of defendants, and thereafter, and for the period of 25 years, in any manner interfering with or preventing the flow of water from defendants' pipe, to the extent of two miner's inches. Immediately after the entry of the judgment, the defendants perfected an appeal to this court by giving and filing a notice of appeal, and executing and filing an undertaking in the sum of $300. Thereafter, the plaintiff, notwithstanding the fact that notice of appeal had been filed and served, and an undertaking given, entered upon the premises of the defendants, cut into their water pipe, and connected his own pipe therewith. The petitioners herein, acting under the advice of counsel that the perfecting of the appeal stayed all proceedings, cut the connection, and restored the pipe and line to the condition in which it had existed prior to the time the connection was made. Again the plaintiff in the action cut the pipe of the defendants, and connected his pipe therewith, and proceeded to take water therefrom, whereupon the petitioners herein again broke the connection, and restored the water way to its previous condition. Thereupon, they were cited to show cause before the superior court why they should not be punished for the acts set forth; and after a hearing the order adjudging them guilty of contempt, above referred to, was made. A stay of proceedings was granted for a period of 30 days to enable the petitioners to make this application.

We think that the appeal in Sefton v. Prentice et al. operated as a supersedeas against the judgment, in so far as it authorized the plaintiff therein to conect his pipe with the pipe of the defendants. The decree was, in effect, a mandatory injunction, although prohibitory in form. Neither Hill nor Sefton had ever connected his pipe with the pipe line of the defendants prior to the commencement of the action; and the main question in the case was whether, under the contract and the acts alleged to have been done by the plaintiff, he was entitled to make such connection. It is true that such connection had been made under the preliminary injunction, but when that injunction was dissolved the defendants' property was restored to the condition in which it had theretofore existed. The purpose of an injunction is to hold the subject of the litigation in statu quo until a final determination. It is doubtless true, as a general rule, that an injunction is not dissolved or suspended by an appeal; but there are exceptions to the general rule, and these exceptions are where the judgment commands or permits some act to be done. In such cases a stay of proceedings can be had. Hicks v. Michael, 15 Cal. 107. An appeal would in many cases be useless, if the execution of a decree which authorizes or permits the plaintiff to use the property of the defendant cannot be stayed during the pendency of the appeal. "During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered." Dewey v. Superior Court, 81 Cal. 68, 22 Pac. 333. In Bullion, etc., Min. Co. v. Eureka Hill Min. Co., (Utah,) 13 Pac. 174, the court said: "The taking of the appeal and the giving of the supersedeas bond did not make void, or nullify or suspend, the judgment, nor the injunction contained therein, but all affirmative action looking to the execution of the terms of the decree was suspended. Slaughterhouse Case, 10 Wall. 273; Swift v. Shepard, 64 Cal. 423, 1 Pac. 493. But the lower court could nevertheless take such action as was necessary to hold the property intact, and enforce a continuance of the statu quo. However, the district court, during the pendency of the appeal, could do no act which did not look to the holding of the subject of litigation just as it existed when the decree was rendered. Hovey v. McDonald, 109 U. S. 161, 3 Sup. Ct. 136. In the exercise of its authority to preserve the property, the district court was empowered to punish as for contempt the violation of any provision of the injunction, where the parties were not allowing the property to remain as it was at the date of the decree. * * * Taking all the evidence together, we do not see that the appellants, at the time they are charged with having violated the injunction, occupied any other or different place on the lode in question than they did when the judgments containing the injunction were rendered, or that they were in manner hindering or obstructing the respondent company from working its lode. This being so, an injunction could not be used to eject them, and it was no violation of the injunction for the appellants to remain as they were when the injunction was granted." The office of a writ of injunction, as its name imports, is peculiarly a preventive, and not a remedial, one. It is to restrain the wrongdoer, not to punish him after the wrong has been done, or to compel him to undo it. An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered. To hold that an appeal from a judgment granting such an injunction does not stay the operation of the judgment would often render a reversal of the judgment entirely ineffectual, —"a barren victory." Dewey v. Superior Court, supra; Mining Co. v. Fremont, 7 Cal. 132. We think that the court below exceeded its jurisdiction, in adjudging the parties guilty of contempt.

The order of the court below is annulled.

We concur: DE HAVEN, J.; HARRISON, J.

100 Cal. 576

SUTTON v. SYMONS et al. (No. 18,163.)

(Supreme Court of California. Dec. 28, 1893.)

Appealable Orders — Motion for New Trial—Sufficiency of Notice.

1. An appeal will not lie from an order refusing to vacate an order striking a statement on appeal from the files.

2. A notice of an intention to move for a new trial, that is not filed with the clerk until after the expiration of the time allowed, though served on the opposite party within such time, is insufficient, under Code Civil Proc. § 659.

Department 1. Appeal from superior court, Tuolumne county; Joseph H. Budd, Judge.

Action by Fred Sutton against William Symons and others. Judgment for plaintiff. From an order denying a motion for a new trial, and from an order refusing to vacate an order striking a statement on appeal from the files, defendants appeal. Affirmed as to order denying a new trial, and dismissed as to order refusing to vacate order.

Moses G. Cobb and J. B. Curtain, for appellants. F. W. Street, for respondent.

HARRISON, J. Judgment was rendered and entered in this action, in favor of the plaintiff, October 7, 1890, and the time for serving and filing a notice of intention to move for a new trial was extended by stipulation and by an order of the court until January 5, 1891. January 3, 1891, the defendants served upon the plaintiff a notice of their intention to move for a new trial, stating therein that it would be made upon a statement of the case, but the notice was not filed with the clerk until January 10, 1891. At the same time with serving this notice, the defendants served upon the plaintiff their proposed statement of the case, to which the plaintiff afterwards proposed amendments. We have assumed, in accordance with the admission by counsel for both parties, that this statement was afterwards settled by the judge and filed with the clerk, but the record fails to show these facts. The plaintiff afterwards moved the court to strike this settled statement from the files, and on the 13th of September, 1891, this motion was granted. The motion for a new trial came on to be heard September 13, 1892, at which time the defendants asked the court to vacate its previous order striking the statement from the files, which was denied; and on the next day the court made an order denying their motion for a new trial, from which the defendants have appealed. They have also appealed from the order refusing to vacate the order striking the statement from the files. An appeal was also taken at the same time from the order striking out the statement, but this appeal was dismissed March 8, 1893, upon the ground that it had not been taken in time. 97 Cal. 475, 32 Pac. 588. The order refusing to vacate the order of September 13, 1891, is not an appealable order, and for that reason the appeal therefrom must be dismissed. The order striking the statement from the files was itself appealable, (Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 633;) and the rule is well settled that an appeal cannot be taken from an order refusing to vacate an order which is itself appealable, (Harper v. Hildreth, [Cal.] 33 Pac. 1103.) When the motion for a new trial came on to be heard, there was no statement before the court upon which it could entertain the motion, and for that reason its order must be affirmed. The court was also required to deny the motion upon the ground that the notice of intention therefor had not been filed with the clerk in time. Section 659, Code Civil Proc., requires the party who intends to move for a new trial to serve the notice of his intention upon the adverse party, and also to file it with the clerk within 10 days after notice of the decision, or such additional time as may be allowed by the court. Although the notice in the present case was served upon the plaintiff within due time, it was not filed until after the time allowed by the court had expired. The order is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

100 Cal. 547

McCANN v. PENNIE. (No. 15,241.)

(Supreme Court of California. Dec. 28, 1893.)

Transitory Actions—Breach of Contract—Action against Administrator—Sufficiency of Complaint—Presentation of Claim—Written Contract.

1. A cause of action for breach of an executory contract during the life and after the death of the promisor is transitory, and the action may be maintained against the administrator of the promisor without reference to where

the contract was made, or to the fact that it was to be performed in a foreign country.

2. A complaint in an action against an administrator on a claim against decedent's estate is not bad on general demurrer, where it alleges that the claim was properly presented and rejected, because it fails to allege that it was presented within the time limited in the notice to creditors.

3. A complaint in an action on contract need not allege that it was in writing, since such fact will be presumed if necessary to the validity of the contract.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by William F. McCann against James C. Pennie, as administrator of Thomas H. Blythe, deceased, for breach of contract. From a judgment sustaining defendant's demurrer to the complaint, plaintiff appeals. Reversed.

Mich. Mullany, Aylett R. Cotton, and Wm. Grant, for appellant. Naphtaly, Friedenrich & Ackerman and John A. Wright, for respondent.

HAYNES, C. Judgment was entered against the plaintiff upon demurrer to his complaint, and this appeal is from that judgment.

In May, 1882, Blythe claimed to be the owner and was in possession of a tract of land in Mexico containing about 1,800,000 acres, and at that date entered into a contract with the plaintiff by which the plaintiff and his family should go from San Francisco to Mexico, and live upon the land, and conduct and manage the business of breeding, raising, and selling hogs, cattle, horses, and mules thereon from that time until December 31, 1887; and as compensation for plaintiff's services he was to receive $50 per month, 50 acres of said land to be conveyed to him at the expiration of the contract, a certain number of cows, with their increase, and a percentage of the profits resulting from the business; Blythe to furnish a designated number of hogs, cows, brood mares, etc., and to make the improvements necessary for conducting the business. Plaintiff entered upon the performance of the contract, and continued upon the land in charge of the business until August, 1887. Blythe resided in the city of San Francisco, and died in said city April 4, 1883, leaving a large estate in said city and county. On June 12, 1883, Philip A. Roach was appointed administrator of his estate by the superior court of said city and county, and qualified the same day.

After stating the terms of the contract very fully, and assigning several breaches of the same, and alleging the damages sustained therefrom, and other matters not necessary to be stated here, the complaint further alleged that the next day after the appointment and qualification of Roach as administrator, he informed him of his said contract, and the particulars of it, and requested immediate and full performance of it on the part of the administrator; that the administrator recognized the validity of the contract, and from that time acted under and partially performed the same; that the court and judge in which the administration proceedings were conducted also recognized the validity and obligation of the contract as against the estate, and at various times from that date until August, 1887, ordered and appropriated sums of money out of said estate, aggregating over $20,000, for the purpose of carrying out said contract on the part of the estate, which sums were expended by the administrator for that purpose that said cause of action did not fully accrue until January 1, 1888; and that on the 19th of February, 1888, he presented to the administrator his claim, amounting to $1,226,743, supported by his affidavit, and that his said claim was rejected on the 19th of March, 1888. The original complaint was filed March 20, 1888. Roach died after suit was commenced, and James C. Pennie became administrator of said estate, and was substituted in place of Roach. The demurrer was general and special.

1. It is contended in support of the demurrer that, in so far as the complaint sets up a cause of action accruing after the death of Blythe, the contract out of which it arose was to be executed in Mexico; that the administrator had no control over the lands and interests of his intestate in Mexico, and could not protect plaintiff from the wrongful acts of the Mexican citizen who dispossessed him; and that he had no authority to send funds or property into Mexico for the purpose of fulfilling the contract.

The special grounds of demurrer assigned do not reach these objections to the complaint, and as the objection only goes to a part of the cause of action, viz. that occurring after the death of the intestate, the demurrer cannot be sustained upon that ground. But the fact that the services to be performed under the contract were to be or were performed in a foreign country does not affect his right to maintain an action in the courts of this state against an administrator appointed here. It is not contended that the contract did not survive, nor are any authorities cited to sustain respondent's contention. In Janin v. Browne, 59 Cal., at page 44, it is said: "Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so, and enforce the contract, (Pars. Cont. 131;) e converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets, (Siboni v. Kirkman, 1 Mees. & W 418.)"

In 1 Chitty on Contracts, (11th Amer. Ed.) 138, it is said: "It is a presumption of law that the parties to a contract bind not only themselves, but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they are not named therein."

The cause of action is transitory in its nature, and might have been maintained against Blythe, had he lived, in any jurisdiction in which he might have been served with process; and hence his administrator is properly sued here without reference to where the contract was made, or was to be performed.

2. Respondent further contends that the complaint fails to state a cause of action, because it does not allege that plaintiff presented his claim to the administrator within the time limited in the notice to creditors; that it appears from the complaint that Roach qualified as administrator June 12, 1883, and that his claim was presented to the administrator February 29, 1888, and was rejected March 19, 1888.

The complaint does not show nor allege that notice to creditors was given. If the complaint had alleged that notice to creditors had been given, the complaint would be bad if it alleged a presentation at a date after the time limited in the notice had expired. But a claim may be presented before the notice is published, and such presentation is good. Ricketson v. Richardson, 19 Cal. 330; Society v. Hayes, 56 Cal. 306; Field v. Field, 77 N. Y. 294. In Janin v. Browne, 59 Cal., it was said at page 43: "It is not the publication of notice which is the prerequisite to the maintenance of an action on a claim, but the proper presentation of a claim and its rejection." I am not aware of any case holding that a complaint is bad, on general demurrer, where it is alleged that the claim was presented in due form, but contained no allegation touching publication of notice to creditors.

In Wise v. Hogan, 77 Cal. 184, 19 Pac. 278, the complaint alleged a presentation of the claim "within ten months next following and succeeding the first publication of notice to creditors." It was claimed in that case that the complaint stated no cause of action, inasmuch as the notice may have required the presentation of claims within four months; but the court held that such objection could not be raised by general demurrer, and said: "Although defectively stated, there is an allegation of the presentment of the claim;" and cited several cases in support of that proposition. The language of section 1500, Code Civil Proc., that "no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented," etc., is analogous to the statute of frauds, which declares that no action shall be maintained on, etc., unless, etc.; and the bar of the statute must be pleaded in defense, unless the complaint shows upon its face that the contract is void under the statute; and a similar rule prevails in regard to the statute of limitations.

The special demurrers (b) and (c) go to the same point, and are sufficiently covered by what has been said. Special demurrer (a) is that it does not appear that the contract between the plaintiff and Blythe was in writing. Even though the contract were void if not in writing, it is not necessary to allege that it was in writing. If necessary to its validity, it will be presumed that it was in writing. Broder v. Conklin, 77 Cal. 330, 19 Pac. 513, and cases there cited.

The judgment should be reversed, with directions to overrule the demurrer, with leave to the defendant to answer.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed, with directions to the court below to overrule the demurrer to the complaint, with leave to the defendant to answer.

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4 Cal. Unrep. 390

NEVIN v. THOMPSON et al. (No. 19,318.)

(Supreme Court of California. Dec. 28, 1893.)

PLEADING—COMPLAINT—SUFFICIENCY AS AGAINST GENERAL DEMURRER—PARTIES.

1. A complaint averred that defendant T. gave to plaintiff a note for $700; that, six months afterwards, defendants D. as principal, and S. and C. as sureties, gave T. a $3,000 bond, which was set out, conditioned that whereas T. and T. J. C. (who was not made a party) "are now indebted to parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said T. from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of $700 each, and the interest thereon: * * * Now, if the said T. J. C., or any of the parties save and except the said T.," shall pay such sums, the bond shall be void, etc; that T. was then indebted to plaintiff on two notes, one of which is the one sued on; and that the only indebtedness from T. to plaintiff was that evidenced by such notes. *Held*, that such complaint was not subject to a general demurrer, because the bond was to relieve T. from liability on a joint indebtedness of T. and T. J. C., while the debt sued on was T.'s only.

2. Nor was such complaint demurrable because T. J. C. was not a party, as he was not a necessary party.

3. Such complaint was not defective for uncertainty as to whether the suit was on the note or on the bond.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Nathan Nevin against Frank C. Thompson, T. J. Daley, A. R. Schulenberg, and H. T. Christian on a promissory note executed by Thompson, and on a bond whereby the other defendants assumed and agreed to pay such note; and also to reform such bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. L. Copeland and Gibson & Titus, for appellants. J. Z. Tucker, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The complaint shows that defendant Thompson, in June, 1890, executed and delivered to plaintiff a promissory note for the sum of $700, which note plaintiff still owns and holds, and which has not been paid; that, on the 11th day of December following, the defendants Daley, Schulenberg, and Christian executed and delivered to defendant Thompson an instrument in writing, which is set out in the complaint. This instrument, it was averred, as written, did not truly express the intention of the parties to it, and the plaintiff asked to have it reformed. This was done, and no point is made here as to that procedure. As it is alleged the parties meant to have it read, and as it is made to read by the judgment and decree of the court, it is a penal bond executed by Daley as principal, and Schulenberg and Christian as sureties, who are held and firmly bound to Thompson in the sum of $3,000, jointly and severally; and is conditioned "that whereas the said Frank C. Thompson and one Thomas J. Cambron are now indebted to the parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said Frank C. Thompson from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of $700 each, and the interest thereon: * * * Now, then, if the said Cambron, or any of the parties save and except the said Thompson, shall well and truly pay the said amounts, then this obligation is to be null and void, and otherwise to remain in full force and effect." It is alleged that Thompson was then indebted to plaintiff upon two notes, one of which is the note set out in the complaint, and that the only indebtedness from Thompson to plaintiff was that evidenced by the two notes. It is then averred that these notes are wrongly described in the bond, and the court is asked to reform the instrument so as to correctly describe them.

The complaint was demurred to generally for insufficiency of the statement of facts; for uncertainty as to whether the suit is on the note or bond; for nonjoinder of Cambron as a party defendant; and for misjoinder, in that Christian is not a proper party defendant. The point is made that the bond is to relieve Thompson from liability upon a joint indebtedness of Thompson and one Cambron, while the indebtedness upon which suit is brought is an indebtedness of Thompson alone. Therefore, as Daley, Schulenberg, and Christian have only undertaken to pay a joint indebtedness of Thompson and Cambron, it does not appear that they have undertaken to pay the debt averred. This point is certainly very plausible, but I think must be overruled. The complaint is undoubtedly very defective, but the objection is raised only on general demurrer. That does not reach a case where the facts are insufficiently stated, if it can be seen that the facts inartificially stated would, if properly stated, have been sufficient. The complaint does substantially aver that the indebtedness sued upon is the same as that described in the bond, and, the bond being a part of the complaint, a correct description is there found, and, as against a general demurrer, this allegation, which amounts to a statement that the debt described and sued upon is the debt assumed by the appellant, is enough. Nor is the other description of the indebtedness, as an indebtedness of Thompson upon a promissory note, which appears to have been signed by Thompson alone, absolutely inconsistent with the statement in the bond that the indebtedness is that of Thompson and Cambron. Both may be true. The indebtedness may have been a joint one, although secured by the note of Thompson alone. As to this general demurrer, if this could be so, we must assume it. The findings do, in fact, show that the note was signed by Thompson and indorsed by Cambron, and it is said that they were given for a horse purchased from plaintiff by Thompson and Cambron. This is, of course, only stated in lieu of a supposable case showing that the statements may both be true.

Although Cambron was also liable for the debt, it was not necessary to make him a defendant in this case, and the defendants are not injured by the fact that his liability is not more particularly averred.

There is no uncertainty as to whether the appellants are sued on the bond. They cannot doubt that it is sought to hold them liable upon it, and it is equally plain that they are not sued upon the note. As to them, at least, the averments as to the note are mere matters of inducement showing the consideration of their promise. No other points are raised here, and, if other objections might be suggested, they are not decided. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

NEVIN v. THOMPSON et al. (No. 19,188.)

(Supreme Court of California. Dec. 28, 1893.)

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Nathan Nevin against Frank C. Thompson, Thomas J. Daley, A. R. Schulenberg, and H. T. Christian on a promissory note executed by Thompson, and on a bond whereby the other defendants assumed and agreed to pay such note; and also to reform such bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. L. Copeland and Gibson & Titus, for appellants. J. Z. Tucker, for respondent.

PER CURIAM. The judgment in this case is affirmed on the authority of Nevin v. Thompson, (No. 19,318; this day decided in this department,) 35 Pac. 160.

100 Cal. 571

PEOPLE ex rel. CONNOLLY v. CITY OF CORONADO. (No. 19,239.)

(Supreme Court of California. Dec. 28, 1893.)

POWERS OF LEGISLATURE—AMENDING CHARTER OF CITY.

Const. art. 11, § 8, which provides that the charter of a city "may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof," refers only to amendments made by and at the instance of the officers and electors of the city.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Proceedings by the people, on the relation of James Connolly, against the city of Coronado, to have defendant city excluded from all corporate rights, privileges, and franchises, and to dissolve said corporation. Judgment for defendant. Plaintiff appeals. Affirmed.

Atty. Gen. Hart and C. H. Rippey, for appellant. J. S. Callen and Gibson & Titus, for respondent.

BELCHER, C. A general demurrer to the complaint in this action was sustained by the court below, and, the plaintiff declining to amend, judgment was entered in favor of the defendant, from which the plaintiff appeals. The facts stated in the complaint are, in substance, as follows: Under the provisions of section 8 of article 11 of the constitution of this state, a charter for the city of San Diego was framed by 15 freeholders, ratified by a vote of the electors, and on March 16, 1889, approved by the legislature. St. 1889, p. 643. On March 19, 1889, an act was passed by the legislature, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom." Id. p. 356. On March 17, 1890, proceedings were commenced, under the provisions of this act, to change the boundaries of the city of San Diego as described in its said charter, and to exclude therefrom certain territory known as "Coronado Beach," the boundaries of which were specifically described. These proceedings were conducted and carried on in strict conformity to the provisions of the said act, and resulted, in October following, in the exclusion of the said territory, if the provisions of the act were applicable to the city of San Diego, and the proceedings could be taken at that time. Afterwards, in November and December, 1890, the excluded territory was regularly organized as a municipal corporation of the sixth class, called the "City of Coronado," pursuant to the provisions of an act of the legislature approved March 13, 1883, and entitled "An act to provide for the organization, incorporation and government of municipal incorporations." St. 1883, p. 93. It is alleged that said pretended corporation, the city of Coronado, has "usurped and exercised, without any warrant, charter, or grant, the franchises of a municipal corporation of California, to wit, a city of the sixth class, and continues so to do, and has exercised, and still continues to exercise, franchises of a city of the sixth class, without any right so to do;" and the prayer is for judgment "that the defendant, the city of Coronado, be excluded from all corporate rights, privileges, and franchises," and that said corporation be dissolved.

It is admitted by counsel for appellant that the facts stated in the complaint show "the due incorporation and organization of the defendant city in all respects, if the stated proceedings had for the purpose of excluding territory from the city of San Diego were effectual for that purpose;" and it is said: "Our point of contention is that these segregation proceedings were wholly ineffectual to segregate the territory therein described from the city of San Diego; that the said territory remained, and still is, a part of the city of San Diego; and that therefore the incorporation and organization of the defendant city within the territorial limits of San Diego was and is void." The constitution, in section 8 of article 11, provides that any city containing a certain named population may frame a charter, commonly called a "freeholders' charter," for its own government, "consistent with and subject to the constitution and laws of this state," and that the charter so framed, when ratified by the qualified electors of the city and approved by the legislature, shall become the charter of such city and the organic law thereof; and also that "the charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter." The constitution also, in section 6 of article 11, provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." It is argued for appellant that the description of the boundaries of the city of San Diego, as found in its charter, constituted a part of the charter, and that the change of its boundaries by excluding therefrom Coronado beach was in effect an amendment of the charter, which, under the constitutional provision above quoted, could not be made for at least two years after the charter became the organic law of the city. The argument is unsound. It rests on the assumption that the constitutional provision referred to inhibits the amendment or change of a freeholders' charter, in any way, at intervals of less than two years, when, as clearly appears, the provision relates only to amendments made by and at the instance of the officers and electors of the city. The constitution plainly declares that all charters of cities, framed or adopted by its authority, shall be subject to and controlled by general laws, and there is no limit of time as to when such laws may be passed and take effect. The act of March 19, 1889, providing for changing the boundaries of cities, and under which the proceedings complained of were had, was a general law, and was constitutional. People v. Common Council of San Diego, 85 Cal. 369, 24 Pac. 727. This being so, the proceedings were authorized and must be sustained.

There are several decisions of this court which are in harmony with, and tend to support, the views above expressed, but we do not deem it necessary to cite them. The case of People v. City of Oakland, 92 Cal. 611, 28 Pac. 807, cited by appellant, is not in point. In that case a freeholders' charter for the city of Oakland was approved by the legislature on February 14, 1889. After the charter was framed, and before it was approved, certain territory was annexed to the city under the provisions of the act of March 13, 1883, (St. 1883, p. 93,) but this annexed territory was not included within the boundaries of the city, as described in the new charter. It was held that the old charter, which was amended by the proceedings to annex additional territory, was wholly superseded by the new charter, and the effect of such new charter was to detach the territory so annexed. We advise that the judgment be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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100 Cal. 537

PEOPLE ex rel. FLEMING v. SHORB et al. (No. 19,377.)

(Supreme Court of California. Dec. 26, 1893.)

COUNTY TREASURER — VACATION OF OFFICE — ABSENCE FROM STATE — QUO WARRANTO — SUFFICIENCY OF COMPLAINT.

1. Under Pol. Code, § 996, providing that an office shall become vacant before the expiration of the term on the incumbent's absence from the state, without permission of the legislature, beyond the period allowed by law; and section 4120, forbidding a county officer to absent himself from the state for more than 60 days, or for any period, without the consent of the board of supervisors,—such absence, ipso facto, creates a vacancy in his office, and in the office of each of his deputies, and the appointing board may appoint another to fill the office.

2. The fact that such treasurer was necessarily absent from the state on account of his health is immaterial.

3. In quo warranto against such treasurer and his deputies, on the relation of one claiming title to the office by appointment, a general demurrer to the complaint was properly overruled, though it failed to show title in relator, since a judgment ousting defendants would not rest on the want of relator's right to the office, (Code Civil Proc. § 803 et seq.,) and since such demurrer, for that reason, did not raise the question of relator's right.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Quo warranto by the people, at the relation of T. J. Fleming, against J. De Barth Shorb and others. There was judgment for relator, and all the respondents, except said Shorb, appeal. Affirmed.

Smith & Winder, for appellants. McLachlan & York and Atty. Gen. Hart, for respondent.

VANCLIEF, C. The defendant Shorb was elected treasurer of the county of Los Angeles in November, 1892, and, having duly qualified, commenced to discharge the duties of that office January 2, 1893. The other defendants are his appointed and duly-qualified deputies, who were acting as such before and at the time of the commencement of this action. The action is of the nature of a quo warranto information, and is prosecuted by the attorney general, on the relation of T. J. Fleming, who claims the office of treasurer by virtue of an appointment thereto by the board of supervisors of Los Angeles county. The plaintiff alleges, in substance, that on July 14, 1893, Shorb left this state, and has ever since remained, and now (September 25th) is absent from this state, without the consent of the legislature, and without the consent of the board of supervisors of said county, for a longer period than 60 days, from July 14, 1893; that, by reason of such absence from the state, the office of treasurer of said county became vacant on September 13, 1893; that on September 15, 1893, the board of supervisors of said county appointed the relator, T. J. Fleming, to fill the vacancy; that, after having duly qualified, Fleming, on September 25, 1893, demanded of the defendants, who were then conducting the business of the office as deputies of Shorb, the records of the office, together with all moneys of the county deposited in the office and then in their custody; but that said deputies refused to comply with such demand. The prayer of the complaint is for judgment that none of the defendants are entitled to the office of deputy treasurer, nor to the custody of the records or moneys appertaining to that office, and that the relator, Fleming, is entitled to the office of treasurer, and that he be put in possession thereof, and of all records and moneys belonging thereto. The defendant Shorb was not served with process, and did not appear, and as to him the action was dismissed. The other defendants filed a general demurrer to the complaint, and answered at the same time, and plaintiff filed a general demurrer to the answer. The demurrer to the complaint was overruled, and the demurrer to the answer was sustained. The answer not being amended, judgment was rendered in favor of plaintiff, against the defendants other than Shorb, according to the prayer of the complaint. The defendants, except Shorb, have appealed from the judgment upon the judgment roll, without any bill of exceptions. The answer admits all the facts alleged in the complaint, but, as affirmative new matter of defense, alleges, in substance, that Shorb has been unwillingly, but necessarily, absent from the state on account of his serious and dangerous illness—severe nervous prostration—for proper treatment of which he was advised by his physicians it was necessary that he should go to the city of Philadelphia; that, pursuant to such advice, he left this state, and has not sufficiently recovered his health to enable him to return without danger of fatal consequences; but that defendants have such information of his convalescence as warrants their expectation and belief that he will soon return to this state.

1. It is contended for appellants that the absence of Shorb from the state for any period would not, ipso facto, effect a vacancy of his office; that the vacating of an office by absence of the incumbent from the state is a statutory penalty, of the nature of a forfeiture, which can be enforced only through legal proceedings in which the incumbent must have his day in court. I think, however, this position cannot be sustained, as it seems to depend upon a misconstruction of sections 996 and 4120 of the Political Code, which are as follows: "Sec. 996. An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. (2) His insanity found upon a commission of lunacy issued to determine the fact. (3) His resignation. (4) His removal from office. (5) His ceasing to be an inhabitant of the state, or, if the office be local, of the district, county, city or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged. (6). His absence from the state without permission of the legislature beyond the period allowed by law. (7) His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislature. (8) His conviction of a felony, or of any offense involving a violation of his official duties. (9) His refusal or neglect to file his official oath or bond within the time prescribed. (10) The decision of a competent tribunal declaring void his election or appointment." "Sec. 4120. A county officer shall in no case absent himself from the state for a period of more than sixty days, and for no period without the consent of the board of supervisors of his county." The 10 events mentioned in section 996 are merely conditions, upon the occurrence of any one of which the legislature has declared the office shall become vacant, not as a penalty or forfeiture, but simply as the legal effect of the happening of any one of the events mentioned. It is true that the occurrence of some of these events are conclusively established against the incumbent of the office by the finding or judgment of a competent tribunal, namely, his insanity, his removal from office, his conviction of a felony, and the invalidity of his election. But in all these cases he has his day in court; and section 997, Pol. Code, requires that "the body, judge, or officer before whom the proceedings were had must give notice thereof to the officer empowered to fill the vacancy." But no official notice to the appointing power of the happening of any of the other events mentioned in section 996 is required; and therefore, upon any kind of satisfactory evidence of the occurrence of any one of them, the appointing officer or board may make an appointment, though the incumbent of the office is not thereby concluded as to the fact of the occurrence of such event. He may still question and contest the allegation of that fact, either before or after the installation of the appointee,—before such installation, if he refuse to vacate the office, in an action by the people to oust him; or, after such installation, in an action by the people on his relation to oust the appointee. Thus, he may always have his day in court before it can be conclusively adjudged against him that the office was vacant at the time the appointment was made, The absence of Shorb from the state, as alleged and admitted, ipso facto, effected a vacancy of the office of treasurer, and consequently a vacancy of the office of each of his deputies, the appellants, who have had their day in court, and have admitted all the facts essential to plaintiff's cause of action against them. Of course, Shorb is not concluded by their admissions, since they do not represent him in this action, and he is not a party to it. I think the foregoing construction (section 996, Pol. Code) warranted by the decision of department two of this court in case of People v. Brite, 55 Cal. 79.

2. The complaint shows that the official bond of the relator was approved by only four of the six judges of Los Angeles county, the other two judges having been absent from the county at the time; and for this reason it is claimed that the general demurrer to the complaint should have been sus-

tained. By section 69 of the county government act, the bond is required to be approved "by the judge or judges, if there be more than one, of the superior court." The judgment ousting the defendants does not rest upon the want of the relator's right to the office, (Code Civil Proc. § 803 et seq.,) and therefore they were not interested in the question as to whether his bond had been properly approved, and their general demurrer did not raise that question. The complaint being good as against them, their demurrer was properly overruled. Flynn v. Abbott, 16 Cal. 359. It is therefore unnecessary to decide whether or not the approval of relator's bond was sufficient.

3. What is said under the first head sufficiently answers appellants' contention that the absence of Shorb from the state was necessary to his health, and that its continuance beyond the period limited by law was inevitable by reason of his sickness. The legislature has made no exception to, or qualification of, the rule that the continuous absence of a county officer from the state, for a period exceeding 60 days, without consent of the legislature or board of supervisors, shall absolutely effect a vacancy of his office, which may be filled by appointment; and courts have no power to interpolate any exception or qualification. The object and effect of the rule are to protect the interest of the public, and it is not perceived that it works the least injustice to an incumbent of an office. In effect it is only a contingent limitation of the term of an office, subject to which the office is voluntarily taken and generally eagerly sought. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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100 Cal. 5

STEVENS v. SAN FRANCISCO & N. P. R. CO. (No. 15,371.)

(Supreme Court of California. Dec. 28, 1893.)

MASTER AND SERVANT — ACTION FOR PERSONAL INJURIES — FELLOW SERVANTS — EVIDENCE — INSTRUCTIONS.

1. Though a steamboat engineer has power to employ and discharge an oiler working under him, they are fellow servants, under Civil Code, § 1970, providing that those are fellow servants who are employed by the same master in the same general business.

2. In an action for the death of plaintiff's intestate through the negligence of defendant's steamboat engineer, an instruction asked by plaintiff, that if an engineer should be perfectly competent to run an engine by reason of his knowledge and skill, yet he would not be a competent engineer within the meaning of the law if he should be unsteady and unreliable on account of habits of intoxication, is misleading, since it ignores the question whether defendant knew of such habits.

3. Plaintiff's intestate, an oiler on defendant's steamboat, was in such proximity to the machinery when the engine was started that he was crushed. Plaintiff sought to show that he was entitled to notice from the engineer before starting the engine. Defendant gave evidence that the rule of defendant's engineer was to have intestate inform him when he was going into a dangerous place, and, if he was not in his engine room, to withdraw the starting bar, and place it on the floor, as notice to the engineer not to start; that plaintiff followed this rule until the day of the accident, when he failed to give any notice, and, as a consequence, was killed by the machinery. *Held*, that it was proper to charge that, if it was intestate's duty to give such notice, and he failed to do so, plaintiff could not recover, even though the engineer was intoxicated and careless.

4. Plaintiff having introduced witnesses, who testified as to their own knowledge of the engineer's sobriety, the court properly refused to permit him to prove his general reputation for sobriety among his fellow employes, as such evidence would be mere hearsay.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Stevens against the San Francisco & North Pacific Railroad Company. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. Charles F. Hanlon, for respondent.

SEARLS, C. Defendant had judgment in this cause. Plaintiff moved for a new trial, and this appeal is prosecuted from an order denying such motion.

The action is by plaintiff, as administratrix of her deceased husband, Joseph Stevens, to recover damages for his death while in the employ of the corporation defendant, alleged to have been caused by its negligence. The defendant, at the time of the injury complained of, was conducting a steam ferry between the city of San Francisco and Point Tiburon, in Marin county, using for that purpose a steamer called the James M. Donahue. On the 16th of August, 1887, the deceased was a fireman and oiler on said steamer under W. H. Wiggins, who was engineer of the vessel. The complaint avers that the business of oiling some part of the machinery when the engine was in motion was dangerous and full of peril to the life of the oiler; that it was the custom among oilers to attend to the oiling of the more dangerous portions while the steamer was lying idle at its landing, and the engine motionless; that it was the duty of the engineer to give the oiler notice before starting the engine; that on the 16th day of August, 1887, while the steamer was at Tiburon, and deceased was engaged in oiling the machinery, the engineer, without notice, started his engine, whereby deceased, without fault or negligence, was jammed by the crank of the engine against the frame supporting such engine, and crushed so that he died. The complaint further avers that Wiggins was, and for many years had been, the engineer of the steamer; that he was reckless, careless, and negligent in the discharge of his duty as an engineer, was given to habits of intoxication while on duty, and had been twice discharged by the defendant for drunkenness and negligence; all of which was known to defendant, but unknown to deceased, who had been employed on the steamer but 10 days. Defendant denies all of the foregoing allegations of the complaint imputing negligence to it or its engineer, or that he was careless, negligent, or intoxicated, or addicted to intoxication, and avers that he was a sober, skillful engineer, and denies that he was ever discharged; avers that the deceased had been in the employ of defendant for about 15 years, a portion of the time on the steamer James M. Donahue, and the remainder upon other steamers, and was well acquainted with the character and habits of Engineer Wiggins. Denies that it was necessary to oil the machinery when at rest, and avers negligence and carelessness on the part of deceased whereby he was injured. There was a substantial conflict upon all these issues, and the verdict in favor of defendant is conclusive, unless errors of law intervened by which the rights of the plaintiff were violated.

The James M. Donahue was, and for ten days to two weeks had been, running as a regular passenger ferryboat in place of the Tiburon, which was hauled off for repairs. She ran in connection with trains on the North Pacific Railroad. A train was due on that road at Point Tiburon from the north at 1:55 P. M., and the habit of the boat was to leave for San Francisco as soon thereafter as the passengers, baggage, and express matter could be transferred, which would usually be about 2 P. M. The steamer usually at this midday trip remained at Tiburon, say, one hour, during which time deceased, as oiler, was accustomed to oil the machinery. It is conceded on all hands that, when the engine ceases to run, water accumulates in the cylinder and fills the vacuum, and, before starting, it becomes necessary to start the machinery slowly, and give it a few revolutions to expel this water and restore the vacuum. The weight of testimony is to the effect that this movement of the engine usually takes place about five minutes before the time for starting the steamer, by which time the oiling is supposed to be completed; and that many engineers give notice before turning the machinery for such purpose by calling out "All clear" as a signal to the oiler. There was testimony, however, to the effect that this moving of the machinery to clear the engine may occur at irregular intervals, and that engineers have different methods by which oilers are notified. The engineer of the Donahue testified that his method was to have the oiler, when about to go into a dangerous place, notify him if in the engine room, and, if not, to take out the starting bar, and place it on the floor of the engine room, which was a signal to him not to start; that when deceased came under him as an oiler he notified him of this, his rule, and deceased replied he was acquainted with such rule, and that he (deceased) observed it, and often removed the starting bar, gave him notice, etc. There is also a conflict in the testimony as to the time at which the engine was started on the occasion upon which deceased was caught by the crank shaft and killed. Some three witnesses on behalf of plaintiff testified that it was at 20 minutes before 2 P. M. Defendant proved without contradiction that the train arrived at 1:55 P. M. on that day, and several witnesses, including the captain and other officers of defendant, testified that the engine was started after or about the moment the train arrived. The precise position occupied by deceased when killed by the accident is not clear. He had been seen on the upper deck not long before, but, as he was killed by the crank, and was found in the crank pit, had oiled on one side of the crank and not on the other, it may fairly be inferred he had come down from the upper deck, and was engaged in oiling about the pillow blocks and crank, when caught by the starting machinery and crushed.

The testimony in reference to the habits of W. H. Wiggins, the engineer, as to sobriety, was, as on other issues, contradictory. That he partook of intoxicants to a moderate extent was admitted by him at the trial. That he was ever intoxicated when on duty was disputed. There was testimony that he had drank from one to three times on the day Stevens was killed, which was contradicted beyond the statement that he had taken a single drink; and no one testified as to his apparent intoxication on that day, while as many as seven witnesses testified as to his apparent sobriety. At the trial counsel for the plaintiff asked the court to instruct the jury as follows: "If you believe from the evidence that the engineer, Wiggins, on board the steamer James M. Donahue, at the time of the accident, August 16, 1887, had charge of a department,—that is, the engineering department on board that boat,—with full control over the fireman and oiler, and with power to employ or discharge them, and that he occupied his position for and on behalf of defendant, then, and in that event, you are instructed that the said engineer, Wiggins, was what is termed in law a vice principal or agent for the defendant, and was not a co-employe of the oiler, Stevens; and, if the accident resulted from the negligence of the said engineer within the rules and principles otherwise laid down by the court, the defendant was responsible, whether it had or had not exercised due diligence and care in the selection of said engineer." The court refused the instruction, and subsequently, and on its own motion, gave the following instruction: "Now gentlemen of the jury, I instruct you that, as a matter of law, Wiggins, the engineer, and Stevens, the deceased, were fellow servants, and that section 1970 of the Civil Code of this state is the law which must control your verdict in this matter, subject to the facts as you may find them to be. That section reads as follows, (as far as it applies to this case I will read it to you:) 'That an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the negligence of another person employed by the same employer, in the same general line of business, unless he has neglected to use ordinary care in the selection of the culpable employee.' Now, the complaint avers, and the evidence shows, that Wiggins and Stevens were both employed in the same general business by the defendant. That on the day of the accident Mr. Wiggins, the engineer, started the engine of the steamboat, and Mr. Stevens, who was then and there acting as oiler, was caught in the machinery and killed. Now, under the pleadings and the evidence shown in this action, I instruct you that, in order to arrive at your verdict in this case, you must determine the following question: Did the death of Stevens occur through the defendant neglecting to use 'ordinary care,' as defined to you heretofore, in the selection and retention of Mr. Wiggins? The plaintiff claims it did, and the defendant claims it did not. It is for you to determine that question. Now, keeping this rule of law and this question which I have just read to you in your minds, and remembering that the evidence is that Mr. Wiggins moved the engine at the time of the accident, it then remains for you to answer this question: Did the death of Stevens occur through the carelessness or neglect of Mr. Wiggins, caused by the use of intoxicating liquors, used then or theretofore by Mr. Wiggins, and of which the defendant knew, or ought, by reason of the fact shown, to have known? The plaintiff claims it did; the defendant claims it did not. This is wholly for you to determine, and it is a great and important question in this case, for it is, in fact, a part of the question of 'ordinary care,' and to which I have just called your attention. Now, subject to the next instruction as to contributory negligence, —which I will give you,—if you should find that the defendant did not use this 'ordinary care' in the selection and retention of its engineer, Wiggins, then your verdict will be for the plaintiff. But if, on the other hand, you should find that the railroad company defendant did use this 'ordinary care' in the selection or retention of its engineer, Wiggins, then your verdict should be in favor of the defendant. If you should find that the defendant did not use 'ordinary care' in the selection or retention of its engineer, Wiggins, and that the accident occurred by reason thereof, then you will be obliged to answer this question: Did the killing of Stevens occur without contributory negligence on the part of Stevens? Contributory negligence is that degree of negligence on the part of the decedent, in this case, which would have contributed proximately or directly to the injury complained of, and it is here to the loss of life of decedent. The plaintiff says it did, and the defendant says it did not, and it is for you to determine. If the plaintiff is correct on this point, she would be entitled to a verdict in her favor; if, on the other hand, the defendant is correct on this point, then the railroad company, defendant, would be entitled to a verdict in its favor." The court also, at the request of defendant, gave the following: "If the defendant corporation here has used ordinary care in the selection and retention of Wiggins as engineer, then, if Stevens was free from all fault, and Wiggins was to blame altogether for the accident, it is a matter between co-employes, and the corporation, I instruct, has discharged its duty, and your verdict must be against the plaintiff and in favor of the defendant corporation."

The contention of appellant is that, as to the fireman and oiler on the steamer Donahue, the defendant had abdicated its authority to Wiggins, and that the latter had full power to employ and discharge them; and, as he had complete management and control of them, that, as to them, Wiggins was their master. That, under such circumstances, the engineer was a representative of his principal,—a vice principal, and not a fellow servant of the deceased,—and, as a sequence, defendant is liable to the same extent that it would be for its own carelessness or neglect, had it directly managed the engineer's department. Many cases are cited in support of this theory, and among them Brown v. Sennett, 68 Cal. 225, 9 Pac. 74. There is much contradiction between the decisions of the several states upon the question involved in the proposition presented by appellant's instruction. In this state, however, it is believed the recent decisions have settled the question adversely to the contention of the appellant. The deceased oiler and Engineer Wiggins were fellow servants, employed in the same general business; and the fact, if it was a fact, that the engineer employed and discharged the firemen and oilers who worked under him at will, did not alter their relations as fellow servants. Collier v. Steinhart, 51 Cal. 116; McLean v. Mining Co., Id. 255; Daves v. Railroad Co., 98 Cal. 19, 32 Pac. 708. Being fellow servants, it was incumbent upon plaintiff to show that the death of Joseph Stevens was proximately caused by the negligence of the engineer, and that the latter was incompetent, and that there was negligence upon the part of the defendant in employing him in the first instance, or in retaining him in its service after notice of his incompetency. Holland v. Railway Co., (Cal.) 34 Pac. 666. Section 1970 of the Civil Code has placed in the category of "fellow servants" all those who are employed by the same employer in the same general business. The section has been construed so often by this court, and with such uniformity and unanimity of opinion, that further remarks on the subject are not deemed necessary. Congrave v. Railroad Co., 88 Cal. 360, 26 Pac. 175; Yeomans v. Navigation Co., 44 Cal. 71; Hogan v. Railroad Co., 49 Cal. 128; McDonald v. Hazeltine, 53 Cal. 35; Brown v. Railroad Co., 72 Cal. 523, 14 Pac. 138; Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. 437; Stephens v. Doe, 73 Cal. 26, 14 Pac. 378. The case of Brown v. Sennett, relied upon by appellant, was commented upon in Congrave v. Railroad Co., supra, and evidently is not regarded as authority in cases like the present. The conclusion is reached that the instruction asked by appellant and refused did not properly embody the law applicable to the case, and that the instructions given by the court on its own motion contained correct expositions of the law.

Plaintiff asked an instruction as follows: "If an engineer should be perfectly skillful and competent to run an engine by reason of his intelligence, knowledge, skill, and experience, and yet should be unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he would not be a competent engineer, within the meaning of the law." The court refused the instruction as asked, and modified it by adding the following: "If the employer knew of the fact, or had means of obtaining such knowledge;" with which addition it was given, and to which addition by the court plaintiff excepted. The instruction as asked may be conceded to be correct as an abstract proposition of law. As asked, however, it was well calculated to mislead the jury, for the reason that there was some evidence to the effect that the engineer, Wiggins, was addicted to drunkenness; and whether or not knowledge of such drunkenness (if the jury found it to exist) had been brought home to the defendant was an issue in the case; an issue which the instruction, as asked, entirely ignored. Again, the court had, in the 13th, 16th, 27th, 28th, 30th, 32d, 33d, 34th, 36th, and 39th instructions given at the request of the plaintiff, and in the instructions given on its own motion, correctly declared the law upon the question involved in the modified instruction; and, had it refused this instruction altogether, it would not have been error.

Exception is also taken to the following instruction given on behalf of defendant: "The plaintiff, in her complaint, alleges a duty in regard to the engineer on the question of signals, but she nowhere refers in her complaint to any corresponding duty on the part of the oiler to give a signal to the engineer. Now the defendant has adduced testimony to show that it was the duty as well as the practice of Stevens, during the period immediately before the accident, to give notice to the engineer by taking out the starting bar, or by notice whenever he desired the machinery to remain still while the ship was lying still at the ferry slip. Therefore, if you find that the accident was caused by Stevens failing to give any signal, and that it was the practice and rule on that boat at that time for him to give it, and he was thereby killed, then, even if Wiggins was intoxicated, or was careless, or was to blame, it would make no difference, as I instruct you that in that case the contributory negligence on the part of Stevens would defeat plaintiff's action, and would make it your duty to bring in a verdict against the plaintiff and in favor of the defendant corporation." In this instruction, and another, involving negligence on the part of Stevens if he needlessly placed himself in the way of the machinery, etc., appellant contends that the instructions are erroneous, in that they hold that mere negligence on the part of defendant would defeat a recovery, whereas the negligence which defeats a recovery must be a negligence which directly conduces to the injury; and, while the injured party may have been negligent, yet, if the injury was caused by the failure of defendant, after such notice as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding such injury, the party injured is entitled to recover, etc. The immediate cause of Stevens' death was not in dispute. It was conceded on all hands that he was in such proximity to the machinery of the steamer that when it was started it caught and crushed him. The real question involved related to his being rightfully in such position that starting the machinery would produce this result. Plaintiff sought to show that the deceased was entitled to notice from the engineer before starting the engine. Defendant, on the other hand, introduced evidence tending to show that different engineers had different rules; that the rule of the engineer, Wiggins, was to have the oiler inform him when going into a dangerous place, and, if not in his engine room, to withdraw the starting bar, and place it on the floor of the engine room, which was notice to him not to start; that he instructed Stevens as to this rule when the latter first came with him; that the latter replied that he was familiar with the rule, and acted upon it until the day in question, when he gave no notice, and, as a consequence, was killed by the starting of the machinery. If this was true, there can be no serious question but that Stevens was in fault.

The court is not required to instruct upon phases of the law not involved in the case, and what the duty of defendant's engineer would have been had he in fact known the position of Stevens when he started his engine did not concern the court or jury, for the reason that there is nothing in the testimony to show that the engineer or any one else on the boat saw or knew what the position of Stevens was until the engine started, when he cried out, and the engineer at once stopped the engine, the crank not having moved over two or three feet, when he was found crushed. It follows that the hypothesis contended for was foreign to the case. If the jury believed the theory of plaintiff, that it was the duty of the engineer to give notice before starting the engine, then, as to that branch of the case plaintiff was in the right, irrespective of knowledge of the whereabouts of Stevens by the engineer.

Another exception of appellant is founded upon the refusal of the court to permit plaintiff to prove the general reputation of Wiggins for sobriety among those employed in the ferry service. Intemperance, sobriety, and drunkenness are facts to be proven like other facts. The proffered evidence was hearsay, concerning which Greenleaf, at section 99, vol. 1, of his work on Evidence, says: "Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge." Plaintiff had already introduced witnesses upon the subject, who had testified as to these specific facts; and upon the face of the offer the testimony was not admissible. There are some exceptions to the general rule enunciated by Greenleaf, but the offer of plaintiff failed to bring the proffered testimony within any of the exceptions; in other words, the offer was general. In his brief, counsel for appellant argues that this evidence was proper, as tending to bring knowledge of the habits of the engineer home to defendant. If offered for that specific purpose, it should have been so specified, which was not done. Where evidence is admissible, not generally, but for some specific purpose, the offer should designate the purpose.

We have patiently examined the record bearing upon the numerous exceptions reserved at the trial. To comment upon all of them in detail would swell the decision beyond reasonable limits, and, as they are either without merit, or not of sufficient importance to call for a reversal, no useful purpose will be subserved by their elaboration. The cause was properly tried, and the verdict of the jury was in consonance with the weight of testimony. The order denying plaintiff's motion for a new trial should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying plaintiff's motion for a new trial is affirmed.

(4 Cal. Unrep. 393)

PACIFIC MUT. LIFE INS. CO. v. BECK et al. (No. 15,332.)

(Supreme Court of California. Dec. 28, 1893.)

MORTGAGES — FORECLOSURE — PURCHASING MORTGAGEE—RIGHT TO RENTS AND PROFITS.

1. Where a receiver was appointed in a suit to foreclose a mortgage, and the mortgagee purchased the mortgaged premises at the foreclosure sale for the full amount of his debt and costs, the rents and profits of the mortgaged premises in the hands of the receiver at the time of the sale belonged to the mortgagor, and not to the mortgagee.

2. The mortgagee did not become owner by purchasing at the foreclosure sale, so as to entitle him to rents payable 10 days after the sale, since his title was not changed thereby, except that the amount of his debt was fixed, and his right to a deed or to a sum paid to redeem within six months became absolute.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by the Pacific Mutual Life Insurance Company against John Beck and Priscilla Beck and another to foreclose a mortgage. From an order directing a receiver of the mortgaged property to pay rents and profits in his hands to the mortgagor, the mortgagee appeals. Affirmed.

Kellogg & King and Fox, Kellogg & King, for appellant. J. W. Harding, for respondents.

TEMPLE, C. This appeal is from an order made after judgment. The action was to foreclose a mortgage executed by the defendants Beck to plaintiff, in which it was stipulated that, when proceedings to foreclose were instituted, a receiver might be appointed.

November 17, 1890, a suit to foreclose having been commenced, an application was made for the appointment of a receiver. By consent a receiver was appointed, who in the order was directed and authorized "to take charge of the property, and prevent waste thereon, and to collect and receive the rents and profits thereof, and especially to farm or lease or cultivate said land, and to care for, protect, and at the proper time harvest and thresh or otherwise prepare for market and sell the product of said premises, holding the same and all moneys collected or received by him hereunder subject to the further order of this court in that behalf, reporting to the court, from time to time, his doings hereunder," etc. The receiver was appointed, and duly qualified, and took possession of the mortgaged premises, which consisted of a farm.

In pursuance of the authority, the receiver leased the property for the cropping season of 1891, "but in no event to exceed nine months from January 1, 1891, at the rent of one-fifth of all crops raised thereon during said demised term, payable as follows: Hay, well baled; wheat, barley, and similar products, sacked in good sacks,—and all the foregoing products delivered in a seasonable time for harvesting and gathering same at warehouse in Livermore, free of all expense to receiver." The proceedings not having been ended in 1891, the lease was renewed for the cropping season of 1892 on the same terms. Besides the terms above recited, the lease contained a stipulation that the tenant would cultivate the land "in a farmer-like manner, using the same for the purpose of raising hay, wheat, barley, and similar crops."

The questions involved in this appeal have reference to the crops of 1892. They were all harvested, and the portion paid as rent was delivered in the warehouse, as stipulated, before September 7, 1892. At that time the receiver obtained warehouse receipts for it. On the 21st day of September, 1892, the premises were sold under a decree of foreclosure entered in the suit. At that sale the mortgagee purchased, paying the full amount of its debt and costs. September 30, 1892, the receiver filed a report, showing that he had in his hands hay, wheat, and barley, the crop of 1892. Thereupon a contest arose between appellant and the defendants Beck, each claiming the property. It was given to the defendants, and plaintiff appeals from that order.

As the mortgage debt and all costs had been fully paid, it is difficult to comprehend upon what rational ground the mortgagee can claim the crops which were in the hands of the receiver. Counsel argues that the rents were collected by the receiver for the purpose of having them applied to the mortgage debt. Let that be admitted; still they did not belong to the mortgagee. They were held as security only. The mortgagee was not entitled to his debt and the rents and profits, but to his debt only. The debt having been fully paid from the property of the debtor, the securities which remain belong to the debtor.

Counsel seem to argue, in the opening brief, that the lease did not expire until October 1st, and they put in proof that it was generally thought that the cropping season ended at that time. They then contend that the rents were not due until the end of the term, and that plaintiff, when he purchased the mortgaged premises at the foreclosure sale, which was nine days before October, became the owner of the premises, and, as such, entitled to all rents which fell due after his purchase. I think it clear that counsel are mistaken in all these propositions. The term expired at least as soon as the crops were harvested and removed from the premises. The term was for the cropping season, and it was stipulated, in effect, that the premises were to be used for the purpose of raising these crops only. If, however, it be conceded that the term continued until October, the crops were to be delivered to the receiver as soon as convenient after harvesting, "in a seasonable time after the proper and suitable time for harvesting and gathering same." If they had not been so delivered, it would have been the duty of the receiver to compel such delivery. And, lastly, if it be admitted that the rent was payable after the sale under the foreclosure, still the plaintiff would have no right to them. He did not become owner by purchasing at the sale. His title was not at all changed by that fact, except that the amount of his debt was fixed, and his right to a deed, or a sum paid to redeem within six months, absolute. His rights as purchaser are carefully defined in the Code of Procedure.

It is suggested, rather than clearly stated, that his title dates back to the date of the mortgage. It cannot be that it is really claimed that any such relation affects plaintiff's rights in this case. The relation is allowed only to cut off intervening rights, but the purchaser has the rights of an owner only when he becomes entitled to his deed. Jones, Mortg. § 1661. I advise that the order be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(100 Cal. 590)

BANK OF UKIAH v. PETALUMA SAV. BANK et al. (No. 15,022.)

(Supreme Court of California. Dec. 28, 1893.)

UNRECORDED MORTGAGES—JUDGMENTS—PRIORITIES.

An unrecorded mortgage, being valid between the parties and those having notice, (Civil Code, § 1217,) and being declared void, by section 1214, only as against subsequent purchasers or mortgagees for value and in good faith, takes precedence over an attachment or judgment lien obtained after execution of the mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action of the Bank of Ukiah, a corporation, against the Petaluma Savings Bank, a corporation, Pierce Asbill, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Haskell & Meyer, for appellants. J. A. Cooper, for respondent.

TEMPLE, C. Appeal from the judgment. A simple question of law is presented by this appeal. The learned judge of the trial court, in an opinion which respondent has printed in his brief, presents that question thus: "Will the lien of an unrecorded mortgage, given to secure a loan, take precedence over an attachment or judgment lien obtained after the execution of the mortgage?" There is no law in this state which requires conveyances to be recorded. Section 1217 of the Civil Code provides that 'an unrecorded instrument is valid as between the parties thereto and those who have notice thereof.' This section implies that a mortgage, though unrecorded, is a lien upon the real estate mentioned therein, and our supreme court has said that the mortgage lien attaches when the instrument is executed, though recorded afterwards. Root v. Bryant, 57 Cal. 48; Walker v. Buffandeau, 63 Cal. 312." The mortgage covered property situate in Sonoma county, and also property in Trinity county. It was recorded in Sonoma, but not in Trinity. Shortly after it was executed, appellant brought suit against the mortgagors, and caused an attachment to be levied on the land in Trinity county. Subsequently, a judgment having been obtained, a transcript of the original docket was filed with the recorder of Trinity county, as provided in section 674, Code Civil Proc. The judgment was rendered July 3, 1890, and this suit was commenced to foreclose plaintiff's mortgage May 14, 1891, which was after the levy of the attachment and the filing of the judgment docket. The trial court held that the lien of the judgment was subject to the lien of the mortgage, and defendants appeal.

The lien being created by the mere execution and delivery of the mortgage, the next question is whether the lien is lost, as to a judgment or attaching creditor, because the mortgage is not recorded. It is enough to say that the statute does not so provide. The mortgage unrecorded is only declared void as against subsequent purchasers or mortgagees for value and in good faith. Civil Code, § 1214. An attaching creditor takes only whatever interest the debtor has. "An attachment and the levy of an execution or a judgment lien are not much different, and an attachment creditor cannot be considered as a bona fide purchaser. The creditor is entitled to the same rights as the debtor had, and to no more." Ping. Chat. Mortg. § 665. See, also, Foorman v. Wallace, 75 Cal. 553, 17 Pac. 680. I find some cases from other states which at first view seem to sustain the position of appellants. So far as I have examined such cases, they all depend upon some statutory provision which is wanting here. In some states an unrecorded instrument is made void as to creditors under certain circumstances. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

100 Cal. 419

PEOPLE ex rel. SCEARCE et al. v. GLENN COUNTY. (No. 18,193.)

(Supreme Court of California. Dec. 15, 1893.)

Legislation—Dispensing with Reading of Bill—Urgency — Counties — Creation — Special Legislation.

1. Under Const. art. 4, § 15, providing that a bill shall be read on three several days in each house before its passage, unless, in a case of exigency, two-thirds of the house, where the bill is pending, shall vote to dispense therewith, the reading of a bill may be dispensed

with by a resolution expressly naming the bill, though including other bills.

2. The motive of a legislator in voting for a resolution declaring a bill a case of urgency, and dispensing with readings thereof, cannot be inquired into.

3. An act creating and providing for the original organization of a county is not special or local legislation.

4. It is no objection to a bill creating and providing for the original organization of a county that it does not divide the county into supervisor districts, but allows supervisors to be in the first instance elected at large, who, under the general law, have power to divide the county into districts.

Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by the people, on the relation of Scearce and others, against the county of Glenn, to have it declared not legally organized. Judgment for defendant. Plaintiffs appeal. Affirmed.

Atty. Gen. Hart, Stanly & Hayes, and H. M. Albery, for appellants. Aylett R. Cotton and J. C. Campbell, for respondent.

McFARLAND, J. On March 11, 1891, an act of the legislature was approved entitled "An act to create the county of Glenn, to establish the boundaries thereof, and to provide for its organization," (St. 1891, p. 98;) and defendant claims that, in pursuance of the provisions of that act, the county of Glenn became duly organized. For some time past defendant has been exercising the ordinary functions of a county government, and has been recognized as such by the political and executive departments of the state government. This present proceeding was brought in the superior court, in the name of the people, to have it judicially decreed that said county of Glenn "is not legally organized, and is not a separate county government;" that it has usurped the franchise of a public corporation; and that it be precluded from exercising the same, etc. To the complaint defendant interposed a demurrer, upon general as well as upon many special grounds. The demurrer was sustained, and, plaintiffs declining to further amend, judgment was rendered for defendant. Plaintiffs appeal.

The only point presented by appellants at the oral argument, and the main one made in their brief, is that said act providing for the creation of Glenn county was not, before its passage by the state senate, "read on three several days" in that branch of the legislature, in accordance with the provision of section 15 of article 4 of the state constitution; that such provision was not dispensed with by a two-thirds vote of the senate, as may be done under that section; and that, therefore, said act is unconstitutional and void. The complaint avers that said act, which had been regularly passed in the assembly, and was designated as "Assembly Bill No. 185," was not read on three several days before its passage in that body. But the complaint also shows that, before its passage in the senate, a resolution was there adopted by a two-thirds vote, by which it was resolved that said act, (Assembly Bill No. 185,) and also a number of other bills, "present 'cases of urgency,' as that term is used in section fifteen of article four of the constitution, and the provision of that section requiring that the bills shall be read on three several days in each house is hereby dispensed with, and it is ordered," etc. The only objection to the dispensing resolution is that it included other bills as well as the one now in question. But the constitution does not undertake to provide the form, or to set limitations to the manner, in which the dispensing power shall be exercised. The words are simply: "Unless, in a case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of yeas or nays, dispense with this provision." It merely provides that a bill shall be read on three different days in each house, unless such house, by a two-thirds vote, shall, in some appropriate form, dispense with that necessity. This was done in the case at bar with respect to the bill in question, the bill being expressly named in the resolution. The main virtue of the provision is evidently the requirement of a two-thirds vote. The constitution does not, either expressly or by necessary implication, prohibit the senate from exercising its dispensing power with respect to two or more bills by one declaration of its purpose; and the unquestioned rule with respect to American states is that the legislature may exercise all legislative power not prohibited to it by the constitution. The judiciary, when called upon to determine what the law is that applies to an action regularly pending in a court, is sometimes forced to say that a particular act of the legislature invoked by one of the parties to the action is not law, because in conflict with the higher law,—the constitution; but it will exercise that delicate power only in cases where the legislature, in passing the act in question, did clearly violate some prohibitory clause of the constitution. To otherwise exercise it would be to confound the distinction between the co-ordinate departments of the government. And, in the case at bar, to hold here that the Glenn county act is unconstitutional, for the reason assigned, would simply be to substitute our judgment of the propriety of certain legislative action for that of the legislators themselves, whose judgment in the premises was, under the constitution, supreme and final.

It is averred in the complaint that several of the senators who voted to declare the Glenn county bill a case of urgency afterwards voted against the bill on its final passage. This averment is clearly of no value. It was made to indicate that such senators may have voted in the first instance through improper motives. In the first place, if motives could be at all inquired into here, we would not hunt after bad motives for an act when worthy motives were apparent. For instance, a legislator, although opposed to a certain bill, might well vote to dispense with the readings on different days, because he thought that the public interest required speedy action on the subject; or it might well be that between the first and second vote he had changed his views as to the policy of the bill. Other creditable motives could easily be suggested. But the motives which induced legislative action are not a subject to judicial inquiry; and a legislative act cannot be be declared unconstitutional because, in the opinion of a court, it was or might have been the result of improper considerations. A court is neither the director of the discretion of a legislator, nor the keeper of his conscience. The case of Bloom v. Xenia, 32 Ohio St. 461, cited and relied on by appellants, is not authority for them, but is authority against them. The case involved the validity of an ordinance of a municipal corporation, and the facts were that the rules were suspended generally, without special mention of the ordinance in question, and then, after a certain other ordinance had been passed, the ordinance in question was passed, without any further suspension of the rules. But the court elaborately shows the distinction between a municipal corporation, with granted and limited powers, and the legislature of a state, with powers unlimited, except by prohibitions of the constitution. The court says: "The efforts of courts are to sustain acts of the legislature. They will not be declared unconstitutional unless clearly so. * * * By the terms of the organic law the legislative power of the state is declared to be vested in the general assembly. The grant of power is general, not special. It embraces all such legislative power as the people of the state could, under the federal constitution, confer,—the whole legislative power of the state. The limitations upon the exercise of this power thus broadly confined are special, and are to be found in other parts of the instrument. When, therefore, the power of the legislature to enact a general law is disputed, the proper question is whether such exercise of legislative power is clearly prohibited by the constitution."

There are other points made by appellants in their brief, which we do not deem necessary to be largely discussed. They are in great part answered by the decision of this court in People v. McFadden, 81 Cal. 489, 22 Pac. 851, which involved the validity of the act creating the county of Orange. It must be remembered that, as held in the case just cited, an act creating and providing for the original organization of a new county is not within the prohibitions of the constitution against special and local legislation; and this consideration parries most of the additional thrusts made in the brief at the validity of the Glenn county act. Many of the provisions of an act creating a new county are intended to be only preliminary and temporary, and are necessary to put the new political subdivision on its feet; so that, at the expiration of time limited for the existence of the temporary expedients, the county may, in due course, take its place under the general law for the government of organized counties. And, as there is no limitation upon the means which may be employed for this preliminary organization of a county, it is not fatal to the Glenn county bill that it does not itself provide for the division of the proposed county into supervisor districts, but allows five supervisors to be, in the first instance, elected at large, who have power under the general law to divide the county into districts.

Neither do we see anything in the objection to the manner in which the election, at which the voters of proposed new county expressed their will, was held. It was held in accordance with the provisions of the act itself; and by subdivision 11, § 25, art. 4, of the constitution, there may be a special law for holding and conducting an election "on the organization of new counties." There are in the complaint some attempted allegations of fraud at the election; but if the determination of the commissioners, appointed by the act to superintend the election and declare the result, is not conclusive of that point, in the absence of any law for contesting such an election, still the said allegations are only of conclusions of law, and state no facts sufficient to constitute such fraud. There were special demurrers on that point, and they were properly sustained. There are no other points necessary to be specially mentioned. The judgment appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

4 Cal. Unrep. 371

HAMILTON v. BATES et al. (No. 19,211.)

(Supreme Court of California. Dec. 21, 1893.)

CORPORATIONS—CONTRACTS.

Where a president of a corporation agrees that the corporation shall assume the debts of a person it cannot be held liable by a creditor of such person, no corporation action with relation to the contract being shown, but it being claimed simply that money paid on the contract came into possession of the corporation.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. L. Pierce, Judge.

Action by Charles S. Hamilton against F. E. Bates and others and the Coronado Beach Company. Judgment for defendants. Plaintiff appeals. Affirmed.

J. J. Henderson and Luce & McDonald, for appellant. Works & Works, for respondents.

TEMPLE, C. This appeal is from a judgment of nonsuit, rendered in favor of the defendant the Coronado Beach Company, and was taken within 60 days after the rendition of the judgment. The action was brought to recover $2,152 for goods sold and delivered to Ben S. and Josie A. Miller. The respondent was sued upon the supposition that for a valuable consideration, paid to it by one F. E. Bates, it had promised to pay all the indebtedness of the Millers. Plaintiff claims that the contract is one made expressly for his benefit, upon which he may therefore sue, as provided in section 1559, Civil Code. Ben S. Miller and Josie A. Miller, his wife, had purchased a large amount of land from the Coronado Beach Company, for which they held contracts; the purchase money not having been paid. They had built upon the land purchased an hotel called the "Hotel Josephine." About January 27, 1888, being unable to pay their indebtedness, they entered into a verbal arrangement with Bates, who had become liable for a large amount of their indebtedness, by which Bates was to take their property and sell it, and from the proceeds pay their debts. It is a matter of dispute as to whether Bates then undertook and promised to pay all the indebtedness of the Millers. The purchase money due the respondent, for which they held the land as security, was $40,785.41. Bates had previously become responsible for about $1,900 of the Millers' debts, and they owed about $8,000 more, which are called "floating debts." The debts sued upon are a part of this floating indebtedness, for which Bates was certainly not liable prior to the arrangement with the Millers, above alluded to; and I think there is no evidence in the case upon which the court could have found that Bates then assumed such debts. Subsequently to the verbal arrangement it was agreed that respondent should convey the title to the land to Bates, who should secure the purchase money by a mortgage to the respondent. Accordingly the deed and mortgage were executed, and at the same time an instrument in writing by all the parties, reciting the change in the relation of the corporation to the property, and wherein Bates agreed to save the respondent harmless from loss through certain claims against the property, and particularly against the attachment of the Chadbourne Furniture Company and the floating indebtedness of the Millers. Afterwards, March 10, 1888, the Millers executed a release in favor of Bates, whereby they released Bates from all claims on account of the conveyance to him of said property, provided Bates should pay all their indebtedness in the county of San Diego, not exceeding in the aggregate $70,000. This was not signed by Bates, and was probably intended to release him from that part of the first verbal arrangement in which it was agreed that, in case of a surplus after payment of the debts, such surplus should be equally divided between Bates and the Millers. Before this last instrument was executed, however, to wit, February 23, 1888, Bates had become convinced that he would be unable to manage the debts of the Millers, or prevent the property from being sold under the attachments. He therefore informed Babcock, who was president and manager of respondent, of his inability. Babcock then asked what he could do to induce the corporation to assume the indebtedness of the Millers. It was then finally arranged between Bates and Babcock, acting as president and manager of respondent, that Bates would pay to respondent $15,000, and hold the property for the Beach Company, or convey it to any one at request of that company; that, in case the debts were paid, the corporation should have and retain one-half of any surplus that might remain, and Bates should have the other half; in consideration of which Babcock agreed for the corporation that it would pay all the indebtedness of the Millers. Bates paid to Story, who was acting with Babcock, for the corporation, of which he was vice president, the $15,000. This was charged to the corporation, and most of it, it is shown, was afterwards paid out in the name of the corporation upon the debts of the Millers in discharge of attachments upon the property.

Respondent's counsel contend that the evidence only shows that Babcock and Story undertook and agreed to pay certain debts which were then threatening to throw the Millers into insolvency, and did not assume to pay all the debts; but, as the judgment is by nonsuit, we must assume as against it that every fact was proven in favor of plaintiff which there was any substantial evidence tending to prove. It will be presumed that the trial court considered all such facts as established, and held as matter of law that, conceding that they were proven, they did not entitle the plaintiff to judgment. Bates testified very clearly that Babcock agreed for respondent that it should assume all the debts of the Millers in San Diego county. The motion for a nonsuit was based upon seven alleged defects in the evidence. The one sustained by the court was that it was not shown that the corporation ever assumed the indebtedness. As I think this point must be sustained, it is not necessary to consider the others. The only showing in regard to the corporation in the record consists in the allegation that it is a corporation; the proof that it had sold land to the Millers; that it conveyed the title to Bates, and received a mortgage for the purchase money; that Babcock assumed to act for it as president and manager; that Story signed a receipt as its vice president; that a payment was made in its name, and a note so indorsed; that Story was heard to say that he had paid the $15,000 to it, and the testimony of Bates that some of the Miller land had been sold, and the proceeds divided between himself and the corporation. There was no proof as to the character or purpose of the corporation, or the nature of the business in which it was engaged. There was no proof as to who were its directors or stockholders, or that Babcock or Story owned any stock except by such presumption as would arise from the fact that they assumed to act as president and vice president. No corporate action of any kind is shown. There was, so far as the proof shows, no meeting of the board of directors or of the stockholders. There was no proof tending to show the nature or extent of the authority of the president or vice president, or that they had been accustomed to transact business of any kind for the corporation. It is not a case where an agent had ostensible authority, as there is no evidence whatever as to what Babcock's authority was, and no facts tending to show that any one had a right to assume anything whatever as to the extent and scope of his authority. There is no proof that any one was or could have been deceived upon the subject. It is not shown that the directors took any action whatever upon the matter. Perhaps, had they done so, it might be assumed that a resolution authorizing it had been passed. It is not shown in proof that there were any directors. It was not shown that the articles of incorporation—in other words, its charter—would justify such a transaction. One dealing with a corporation is bound to take notice of the limitations of its charter. Mor. Priv. Corp. § 591.

It is not claimed that there is any proof of an actual ratification of the agreement made by Babcock and Story, but it is contended that the corporation has received the benefit of the contract, and cannot now repudiate its obligations. The benefits alleged to have been received are the $15,000 paid by Bates in cash; the agreement that the land should be sold, and the corporation should have one-half of the surplus; and the statement of Bates that some land had been sold, and the proceeds divided between himself and the Beach Company. So far as the first is concerned, it seems to have been a mere matter of bookkeeping by Babcock and Story. They charged the money to the corporation, and when it was paid out in discharge of the Miller debts the checks were drawn in the name of the corporation. It is not shown that any stockholder or director ever knew of the transaction, or that the treasurer of the corporation—if there be one —ever had the money. It is presumable that more than that sum was paid to discharge pressing Miller debts, for Bates testified that he made the arrangement with Babcock because he only had $15,000, which was not enough for that purpose. The evidence only shows that Babcock and Story paid the Chadbourne claim, which was a little more than $13,000. It was shown that the property was not sold for enough to pay the Miller debts. It was in fact sold to pay the purchase money. As to the statement of Bates that he had sold some land and divided the proceeds, it does not appear when he sold the land. It may have been before the arrangement with Babcock, and the money part of the $15,000. But Bates does not specify how the money was paid, or to what agent of respondent he gave it. We are justified in supposing it was simply given to Babcock or Story. But there is nothing in all this which tends to prove a ratification of the contract made by Babcock and Story. At the most, it would only tend to show that the corporation had received a benefit which it could not retain when it repudiated the contract made on its behalf. In Foulke v. Railroad Co., 51 Cal. 365, it was held that in such case the express contract is not ratified, but the corporation is liable upon an implied contract to pay for the benefit received, and the recovery must be limited to the extent of the benefit. Section 1559, Civil Code, only authorizes a person not a party to a contract to sue when it is expressly made for his benefit. He cannot sue upon an implied contract, and, if he could, in no sense would this be one made for his benefit. And then there is a total absence of proof showing that the respondent has retained any benefit from the arrangement. As the property did not sell for more than its own debt, for which it had a preferred lien, the presumption is it has nothing.

It is not necessary here to hold that a corporation may not so deal with an unauthorized contract as to be held to have become bound by its terms. We are dealing with a case in which no corporate action with reference to the contract is shown, but where it is claimed simply that money paid upon the contract has come into its possession. There is no evidence tending to show that any creditor has been induced to change his position to his injury by reason of supposed assumption of the Miller debts. Indeed, they would hardly have been justified in doing so, in view of the fact that in the Code the right of the parties to the contract to rescind it at any time, at least before it has been acted upon, is expressly recognized. I think the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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5 Cal. Unrep. 765

DAVIS v. LAMB et al. (No. 15,293.)

(Supreme Court of California. Dec. 21, 1893.)

JUDGMENT—CORRECTION—NEW TRIAL—SUFFICIENCY OF MOTION—ACTION ON NOTE—DEFENSE OF ALTERATIONS—OPENING CASE.

1. A judgment in an action against an administrator that is entered against him personally will be corrected on appeal therefrom, as

the error is one that is apparent on the judgment roll.

2. A judgment in an action against an administrator that is made immediately enforceable will be corrected on appeal therefrom so as to make it payable "in due course of administration," as required by Code Civil Proc. § 1504, as the error is one that is apparent on the judgment roll.

3. A judgment in an action on a note for a sum larger than the principal and interest due on the note will be corrected on appeal therefrom, as the error is one that is apparent on the judgment roll.

4. The denial of a motion for a new trial on the ground of insufficiency of evidence will not be reviewed where the bill of exceptions on which the motion was made contains no exception on that ground, and no specification of any particular in which it is claimed the evidence was insufficient.

5. In an action, tried before the court, on a note guarantied by defendant's intestate, error cannot be predicated on the consideration of the note as evidence, on the ground that it had been altered after intestate's death, where no objection was offered to its admission on such ground, and the court found the note in the form in which it was made.

6. In an action, tried before the court, against an administrator on a note guarantied by his intestate, the court's refusal to open the case after taking it under advisement, to permit the administrator to show that he demanded the production of the original note when the claim was presented to him, is a proper exercise of discretion when it does not appear that the claim was rejected because of the nonproduction of the original.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Joseph Davis against George W. Lamb, administrator of the estate of William H. Lamb, deceased, and another, on a promissory note. Judgment for plaintiff. Defendant Lamb appeals. Modified.

Welles Whitmore, for appellant. Marcus Rosenthal, for respondent.

VANCLIEF, C. Action on a promissory note made by the defendant Larabee to A. Davis & Son, and indorsed by the decedent as guarantor. The plaintiff is a member of the firm of A. Davis & Son, and sues as assignee of the note. The defendant Larabee was not served with summons. The court found in favor of plaintiff on all the issues of fact, and, among other things, found the note to have been made and indorsed in the following form: "$400.00. San Francisco, Oct. 19, 1889. Two months after date —— promise to pay to the order of A. Davis & Son four hundred dollars, for value received, with interest at —— per cent. per —— from —— until paid, both principal and interest payable only in United States gold coin; and in case suit is instituted to collect this note, or any portion thereof, —— promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit. C. E. Larabee." As conclusions of law the court found as follows: "(1) That by the terms of said promissory note the defendant Larabee promised to pay to the order of said A. Davis & Son, two months after its date, the sum of four hundred dollars, with interest thereon from its date at the rate of seven per cent. per annum, and, in case suit should be instituted to collect said note or any part thereof, such additional sum as the court should judge reasonable as attorney's fees in such suit. (2) That the said note was a nonnegotiable instrument, and the said William H. Lamb, by such indorsement, became a guarantor of such note, and guarantied the payment by said Larabee of the amount of said note. (3) That by reason thereof the plaintiff is entitled to judgment against the defendant George W. Lamb, as administrator of the estate of William H. Lamb, deceased, for the sum of four hundred dollars, with interest thereon at the rate of seven per cent. per annum from the 19th day of October, 1889, and costs of suit, such judgment to be payable in the course of administration of the estate of the said William H. Lamb, deceased; and it is ordered that judgment be entered accordingly. Done in open court this 14th day of May, 1892. F. W. Henshaw, Judge." Thereafter, on June 13, 1892, the clerk entered judgment on the findings as follows: "Wherefore, by reason of the law and by the finding aforesaid, it is by the court here ordered, adjudged, and decreed that plaintiff do have and recover of and from the defendant George W. Lamb the sum of five hundred and twenty-six and 40-100 dollars, and costs taxed at $72.00. Judgment entered June 13, 1892. James E. Crane, County Clerk. By Robert Edgar, Deputy Clerk." The defendant Lamb appeals from the judgment, and from an order denying his motion for a new trial.

Unquestionably, the judgment is erroneous in the following respects: First, it is against George W. Lamb personally, whereas it should have been against him as administrator of the estate of William H. Lamb, deceased, in which character he is sued; second, it is enforceable immediately, instead of being payable "in due course of administration," as required by section 1504 of the Code of Civil Procedure; third, it is for a sum ($526.40) exceeding the amount of the principal and interest of the note at the time it was rendered by about $53. All these errors are plainly apparent on the judgment roll, and may be corrected on the appeal from the judgment. On the appeal from the order denying the motion for a new trial, however, no error is made to appear. The motion was made on a bill of exceptions, proposed and settled after judgment, which contains no exception on the ground of insufficiency of the evidence, and no specification of any particular in which it is claimed the evidence is insufficient. Nor does the bill of exceptions show on what ground the new trial was asked. A paper purporting to be a notice of motion for a new trial is printed in the transcript, but it is not in, nor referred to by, the bill of exceptions, nor does it purport to have been served; and, since it is no part of the judgment roll, it forms no part of the authenticated record. It must be presumed, therefore, that the evidence justified the findings of fact. Jones v. Shay, 50 Cal. 509; Watson v. Railroad Co., Id. 523; Bonner v. Quackenbush, 51 Cal. 180; Perham v. Kuper, 61 Cal. 331; Coglan v. Beard, 67 Cal. 304, 7 Pac. 738. The bill of exceptions sufficiently specifies several alleged errors in law.

1. It is claimed that the note sued on should have been rejected and held void, for the reason that it had been altered after the death of William H. Lamb. In the note, as set out in the complaint, all the blanks appearing in it, as found by the court, are filled in so that instead of reading, "with interest at —— per cent. per —— from —— until paid," as found by the court, it reads as follows: "With interest at four per cent. per month from date until paid." In this form, with the blanks so filled, the note was offered in evidence by plaintiff, and admitted by the court without objection, on the ground that it had been altered by filling these blanks, though it was objected to on other grounds not tenable. After it had been admitted in evidence, it appeared by other evidence on the part of the plaintiff, including the testimony of the plaintiff himself, that these blanks had been filled after the death of William H. Lamb; and one of the plaintiff's witnesses testified that all the alterations were in the handwriting of the plaintiff. Thereupon plaintiff testified that he did not make nor authorize the alterations, and made an explanation of how they might have been made without his fault or knowledge, which explanation, it must be admitted, seems lame and unsatisfactory. Yet the defendant did not move to strike out the note, nor make any objection to it, on the ground that it had been altered by filling the blanks. As we have seen, the court found the note in the form in which it was made, disregarding the alterations; and, in the absence of any specification of insufficiency of evidence, it must be presumed that the evidence justified this finding; and, since there was no objection to the note as evidence on the ground that it had been altered by the filling of the blanks, the court did not err in considering it as evidence.

2. The case was submitted to the court on briefs to be filed by both parties within 20 days. After the briefs had been filed, and while the court held the case under advisement, the defendant's attorney moved to open the case for the admission of additional evidence on the issue as to whether the defendant had demanded the production of the original note at the time a copy of it was presented to him, as administrator, for allowance; and it is contended that the court erred in denying this motion, but I think otherwise. The proposed additional evidence was merely cumulative. Besides, it does not appear that the claim was rejected by the administrator on the ground that the original note was not presented. Under the circumstances, I think the refusal of the court to open the case was clearly within the bounds of its discretionary power, and not an abuse of such power.

The other points made by appellant are not sufficiently plausible to require special consideration. I think the cause should be remanded, with instructions to the court below to modify the judgment as indicated in this opinion; and, although this relief might have been obtained by motion in the trial court, I think, upon consideration of all the circumstances, the costs of the appeal should be taxed to respondent.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with instructions to the court below to modify its judgment as above indicated, and, as so modified, the judgment and order are affirmed. The costs of the appeal are to be taxed to respondent.

100 Cal. 592

HOUSE et al. v. MEYER. (No. 19,283.)

(Supreme Court of California. Dec. 29, 1893.)

NEGLIGENCE — ACTION FOR PERSONAL INJURIES — COMPLAINT—SUFFICIENCY— CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries caused by defendant's alleged negligence, it is sufficient that the complaint allege generally negligence on defendant's part.

2. Nor was it necessary that plaintiffs should allege that they were free from contributory negligence.

Department 2. Appeal from superior court, Los Angeles county.

Action by House and others against Meyer. A demurrer to the complaint was overruled, and from a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Reymert & Orfila, for appellant. C. C. Stephens, for respondents.

DE HAVEN, J. The demurrer to the complaint was properly overruled. In an action like this, to recover damages resulting from the alleged negligence of a defendant, a general allegation of negligence upon the part of the defendant is sufficient. "The negligence is the ultimate fact, to be pleaded, and is not a legal conclusion." Bliss, Code Pl. § 211. Nor was it incumbent on the plaintiffs to allege that they were not guilty of contributory negligence. Robinson v. Railroad Co., 48 Cal. 409. The appeal in this case is without merit. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 388

In re DE LEON'S ESTATE. (No. 15,367.)

(Supreme Court of California. Dec. 27, 1893.)

APPEAL—DISMISSAL.

Where the transcript on appeal does not show that the findings of fact and conclusions of law set out in it were signed by the trial judge and filed with the clerk, and that judgment was entered upon such findings and conclusions, as required by Code Civil Proc. §§ 632, 633, the appeal will be dismissed.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings by Virginia Durstein to have allotted to her a share in the estate of Jose Francisco De Leon, deceased. Decree for plaintiff. The assignee of one of the distributees of said estate appeals. Dismissed.

T. M. Osmont, for appellant. Lloyd & Wood and L. D. McKisick, for respondent.

FITZGERALD, J. The appeal in this case purports to be from a judgment upon the judgment roll with a bill of exceptions. There are so-called "findings and conclusions of law" set out in the transcript, but they do not appear to have been signed by the judge or filed with the clerk; nor was there any judgment entered thereon, as required by sections 632, 633, of the Code of Civil Procedure. With the exception of a statement in the bill of exceptions that a "decree was rendered in favor of the petitioner as in said decree set forth," there is nothing in the record showing that any judgment was ever rendered by the court. This point was not made by counsel, either in their arguments or briefs, for the reason, perhaps, that they supposed that the judgment had been regularly entered upon the decision, and that, as the appeal had been taken upon the judgment roll, it was necessarily contained therein. If, however, it should be made to appear within the time allowed to file a petition for rehearing that the judgment was in fact entered upon the decision, but was inadvertently omitted from the transcript, then the judgment herein will be set aside, and counsel permitted, upon a suggestion of diminution of the record, to supply the omission. Appeal dismissed.

We concur: DE HAVEN, J.; McFARLAND, J.

(Jan. 26, 1894.)

BY THE COURT. Ordered that the judgment heretofore rendered in this cause on December 27, 1893, be and the same is hereby vacated and set aside, and, upon stipulation of the parties filed herein, further ordered that the case stand submitted upon the amended record, and upon the briefs now on file.

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4 Cal. Unrep. 415

KAHN v. BRILLIANT et al. (No. 15,170.)

(Supreme Court of California. Dec. 30, 1893.)

TRIAL—INSTRUCTIONS.

It is not error to refuse an instruction which has been already substantially given.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Henry Kahn against Abraham I. Brilliant and William H. Byington. From a judgment in favor of defendant Byington, plaintiff appeals. Affirmed.

Naphtaly, Friedenrich & Ackerman, for appellant. C. L. Weller and McCreery & Byington, for respondent.

BELCHER, C. The plaintiff brought this action to recover the value of certain goods, wares, and merchandise alleged to have been sold and delivered to the defendants, who were copartners doing business under the firm name of A. I. Brilliant & Co. The defendant Byington only appeared, and by his answer he denied that he was a partner with the other defendants. The case was tried by a jury, and the verdict and judgment were in his favor. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

The only point made for a reversal is that the court erred in refusing to give to the jury a certain instruction asked by the plaintiff. In charging the jury, the court, among other things, said: "Now, there are two essential points in dispute here, and it is around these two points that your deliberations must crystallize. Those points are substantially these: Was or was not Mr. Byington a partner in this firm of A. I. Brilliant & Company on or after December 17, 1889? Or, if he was not a partner, did he (Mr. Byington) permit himself to be held out or represented as a partner in such firm at any time to third persons, who gave credit to such firm on the strength or faith of such representations?" The court then, after stating the law very fully as to general and special partnerships, and as to the liability of every general partner, read to the jury sections 2444 and 2445 of the Civil Code, which are as follows: "Sec. 2444. Any one permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who on the faith thereof give credit to the partnership. Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section." Following this, the court said: "If you should find, from the evidence, that Mr. Byington was in fact a partner (as I have explained that term to you) in the firm of A. I. Brilliant & Company on and after December 17, 1889, then I charge you your verdict must be in favor of the plaintiff for such amount as may have been proven here, which you will get later on. Again, if you find from the evidence that Mr. Byington was not in fact a partner in such firm on or after December 17, 1889, but should find that Mr. Byington permitted himself to be held out or represented as a partner in such firm at any time to third persons, and such third persons gave credit, on the faith of such representations, to such firm, then Mr. Byington would be liable to such persons, and your verdict should then be in favor of the plaintiff; but only, of course, for such amounts of credits as may have been given to those third persons who gave credit on such representations, if any you find to have been so given." The instruction asked by plaintiff, and refused, was in these words: "When an individual permits others to hold him out as a partner, or by his acts and declarations creates in the mind of another a reasonable belief that he is a member of a partnership, he is liable to the person so believing, on a bona fide contract made by the latter with a member of such firm in the regular course of business, although in fact no such partnership existed." It is admitted that the instruction was refused upon the ground that it had already been given in substance and effect, and we think the refusal was justified. The charge as given stated the law upon the subject referred to in the refused instruction fully and fairly; and, as has been many times held by this court, a trial court is not bound to repeat itself at the request of counsel. After it has already given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may well be refused. The authorities to this effect are numerous, and need not be cited. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 402

ESREY v. SOUTHERN PAC. CO. (No. 15,-440.)

(Supreme Court of California. Dec. 29, 1893.)

APPEAL—TIME OF TAKING—DISMISSAL.

An appeal from an order denying a new trial, not taken within 60 days after the order is entered on the minutes of the court, (Code Civil Proc. § 939,) will be dismissed.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Nannie Esrey against the Southern Pacific Company, in which defendant appealed from the judgment in favor of plaintiff, and from an order denying its motion for a new trial. Plaintiff moves to dismiss both appeals. Motion to dismiss appeal from such order granted. Motion to dismiss appeal from the judgment denied.

Foshay Walker, for appellant. Justin Jacobs, for respondent.

PER CURIAM. Motion to dismiss the appeals. Judgment was rendered in this case in favor of the plaintiff February 8, 1892, and an order denying the defendant's motion for new trial was made and entered May 24, 1893. The defendant appealed from the judgment February 1, 1893, and from the order denying a new trial August 14, 1893. The plaintiff now moves to dismiss the appeal from the order denying a new trial, upon the ground that it was not taken within 60 days after the entry of the order.

The right of a litigant to have the action of the lower court reviewed by this court upon an appeal therefrom depends upon a compliance by him with the statutory requirements for taking an appeal. Section 939, Code Civil Proc., limits the time for taking an appeal from an order granting or refusing a new trial to 60 days after the order is made and entered in the minutes of the court, and, unless taken within that time, this court has no jurisdiction to hear the appeal. The appeal from the order denying a new trial, not having been taken within 60 days after the entry of the order, must therefore be dismissed.

The plaintiff has also moved to dismiss the appeal from the judgment upon the ground that the transcript was not filed within the time limited by rule 2 of this court, or within the time limited by any order of the court or stipulation of the parties. The time for filing the transcript was extended by stipulation until 40 days after the decision of the lower court upon the motion for a new trial, in order that, if the motion should be denied, a single transcript might serve for both appeals. If the motion should be granted, the defendant would have no occasion to appeal. We are of the opinion, however, that the facts and circumstances presented in the affidavit on behalf of the appellant in opposition to this motion are such as to excuse its failure to file the transcript prior to receiving the plaintiff's notice of motion to dismiss the appeal. See Carter v. Paige, 77 Cal. 64, 19 Pac. 2.

The motion to dismiss the appeal from the order denying a new trial is granted, and the motion to dismiss the appeal from the judgment is denied.

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100 Cal. 648

OULLAHAN et al. v. BALDWIN et al. (No. 14,622.)

(Supreme Court of California. Dec. 30, 1893.)

REAL-ESTATE AGENTS—CONTRACT—WAIVER—COMMISSIONS—WHEN EARNED—EVIDENCE—ESTOPPEL.

1. To a request by landowners to be released from a contract made with brokers to find a purchaser of their land, the brokers replied that unless they could convince the principals by Thursday morning, at 8 o'clock, that they could make a sale, they would "then" waive all claims under it. *Held*, that it did not constitute a waiver of the original contract on the failure to perform the condition named in such reply, but was a conditional promise to waive in futuro, and did not affect the original contract.

2. Where the acts and statements of such brokers and the intended purchaser at the time specified were sufficient to convince a fair man of ordinary understanding that such brokers would make the sale, it must be held that such owners were convinced.

3. Where such reply by the brokers was purely voluntary, and written in a spirit of accommodation only, it had no binding effect.

4. In an action to recover commissions for

finding a purchaser, it appeared that the contract provided that the terms of payment should "be $10,000 within the five days, $5,000 additional on confirmation of title;" that at 8 o'clock in the morning of the last day for making a sale, as provided by the contract, plaintiffs and one B. met defendants, and B. offered himself as a purchaser, and tendered a check for $10,000 as the first payment; that the check was declined by defendants, as not equivalent to money, whereupon they were informed that the money would be produced on the opening of the bank; that defendants said they would allow until 9:30 o'clock to produce the money; that plaintiffs and B. drew the money at 10 o'clock, and endeavored to tender it to defendants, but were eluded all day by the latter; and that at 10 o'clock defendants sold the land to other persons. B. had made no written contract for the purchase of the land. *Held*, that defendants were liable. Harrison and Paterson, JJ., dissenting.

5. It appeared that when defendants declined B.'s check, and said they would wait until 9:30 o'clock for the money, they also said, if plaintiffs and B. did not return at that time, they would "go down below, and take up the other offer," and that plaintiffs replied, "Very well." *Held*, that such reply by plaintiffs, and their failure to return by the time stated, did not constitute either a waiver or an estoppel.

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by Robert B. Oullahan and others against Frank T. Baldwin and others to recover brokerage commissions under a written contract executed by defendants to Gaman & Lyon, and by the latter assigned to plaintiffs. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Reversed.

Louttit, Woods & Levinsky, Carter & Smith, and Mich. Mullany, for appellants. J. C. Campbell, for respondents.

GAROUTTE, J. This is an action by real-estate brokers to recover commissions for negotiating a sale of a tract of land situated near the city of Stockton. The owners thereof gave Gaman & Lyon, real-estate brokers of San Francisco, the following writing: "Stockton, September 17, 1887. We, F. T. Baldwin, B. F. Langford, and John D. McDougald, do hereby constitute and appoint Gaman & Lyon, of 339 Kearny street, of San Francisco, our sole agents for a period of five days from date hereof, to negotiate a sale of our Stockton lands, consisting of thirteen hundred and fourteen (1,314.35) and thirty-five hundredths acres, and known as 'Stockton Gardens.' Our price for said land is one hundred and sixteen thousand six hundred and sixty-six (116,666.65) and sixty-five hundredths dollars, net to us, * * * and any amount over and above said sum, for which our said agents may sell said land, we agree to give them for commissions for their services. Terms of payment shall be $10,000 within the five days, $5,000 additional on confirmation of title. * * * Complete abstract of title to be furnished, and ten days allowed for examination." The brokers had in view one C. D. Barrows as prospective purchaser, and were expecting him to appear upon the scene at any moment for the purpose of viewing the land. After the owners had placed the property in the hands of Gaman & Lyon under the aforesaid agreement, they ascertained that certain parties residing in San Jose were desirous of purchasing, whereupon they stated to the brokers their fears that the prospective buyer Barrows would fail to purchase, and that prior to the expiration of the life of the contract the San Jose parties would undergo a change of mind, and thus no sale be consummated to any one; and they thereupon requested said brokers to release them from the contract. In answer to such request, Gaman & Lyon sent them the following letter: "Stockton, Cal., September 20, 1887. Messrs. Baldwin, Langford, and McDougald—Sirs: You have requested us to release you from the contract which we hold on your tract of land near Stockton, known as the 'Stockton Gardens.' Replying, we beg to say that under the circumstances, and in view of the amount of labor we have performed, we cannot, in justice to ourselves, release you from said contract, but we will concede that, unless we can convince you by Thursday morning, at eight o'clock, that we will make a sale, we will then waive all claims under said contract. Respectfully yours, Gaman & Lyon." Baldwin gave his power of attorney to Langford and McDougald to act for him in the premises, and was not in the city on Thursday, the 22d. Langford was not in Stockton upon that day, and hence McDougald alone, aside from their attorney, represented the owners in the transaction. Thursday morning, September 22d, at 7 o'clock, Lyon informed McDougald that Barrows was present, and ready to take the land upon the terms stated in the contract, whereupon McDougald requested them to meet him at Judge Budd's law office at 8 o'clock, for the purpose of completing the trade. The parties met at that time, and Barrows offered himself as a purchaser, and tendered his personal check for $10,000 as the first payment under the contract. This check was declined, as not the equivalent for the money, whereupon McDougald was informed that the money would be produced for him upon the opening of the bank, and McDougald then stated that he would allow them until 9:30 o'clock of that morning to produce the money, and, if not present with it at that time, he would close the trade with other parties. Thereupon Lyon and Barrows withdrew, and McDougald sold the land to the San Jose parties at 10 o'clock at a largely increased price. Lyon drew the money from the bank at 10 o'clock, and passed the remainder of the day in an effort to tender it to McDougald as the first payment upon the purchase price; but McDougald was elusive, and Lyon's efforts in that direction were not crowned with success.

Viewing the case from any standpoint, the letter written by the brokers to the defendants, and which was entirely voluntary upon their part, and written purely through a spirit of accommodation, in no way changes the status of this litigation. In speaking as to the effect of this letter, respondents' counsel says: "While we do not contend that they [owners] would or should demand of appellants anything unreasonable or impossible, they had the right to demand and receive evidence sufficient to satisfy them, as reasonable men, that the premises would be sold according to the terms of the power or authority given appellants." After a review of the evidence upon this point, we can say it fills the measure furnished by respondents' counsel. If the letter bound the brokers to convince the owners by 8 o'clock upon Thursday morning, the 22d, that a sale would be made upon that day, or that all their rights under the contract would lapse by reason of a failure so to do, then the brokers fulfilled the self-imposed conditions, for at the agreed time ample evidence was produced to convince McDougald of the certainty of the sale. At least, the evidence was sufficient to convince a fair man of ordinary understanding,—a man who was honestly willing to be convinced, and consequently it must be held that McDougald was convinced. But, aside from the foregoing considerations, we think the letter a false quantity in the case. It neither strengthens nor weakens the cause of either party. The contract of defendants was simply an employment of Gaman & Lyon as brokers to negotiate a sale of the realty. They were made sole agents for that purpose for the period of five days from September 17th, which would include the entire day of September 22d. It is insisted that the letter modified the terms of the contract; but the letter itself, in express words, says: "We cannot, in justice to ourselves, release you." As already suggested, the letter was entirely voluntary, no consideration passed to the brokers for its issuance, and there were no mutual covenants. It did not possess a single element necessary to create a binding, valid contract upon the part of the brokers. Again, conceding the letter to have a binding force upon the writers of it, it, in substance, says: "We cannot now release you from the contract, but, if we do not convince you by Thursday morning, at 8 o'clock, that we will make a sale, we will then waive all claims under the contract." This amounts simply to a conditional promise to waive something at a specified time in futuro. It is not a waiver, but an agreement to waive at a particular future time. There can be no waiver until the time arrives, and the condition fails; and when the time does arrive, if the party declines to waive, the only result is a violated promise and a breach of the agreement. The waiver does not take place, ipso facto, upon the failure of the condition and the arrival of the appointed time. Positive action upon the part of the party holding out the promise is demanded. This letter, conceding the failure of the condition, does not constitute a waiver of rights under the contract, any more than a promise by an attorney to his brother attorney, that upon the morrow he will extend his time 10 days to file a brief, constitutes in itself such extension.

No question of estoppel arising from the letter is suggested by counsel; neither does it appear to be present in the case. But it is insisted by some of respondents' counsel that a waiver took place, or an estoppel against plaintiffs was created, at the 8 o'clock meeting in the lawyer's office; and the basis of this contention is found in the following testimony of defendants' attorney: "He went away when Mr. McDougald told him he would wait until half past 9 o'clock for the money, and, if he came back with the money in that time, they would complete this trade; if not, he would go down below, and take up the other offer; and Mr. Lyon left, saying, 'Very well.' That is the last I saw of him." Conceding the broker to have used the words charged to him, still it is a very small thing out of which to build either a waiver or an estoppel. The pecuniary interests here involved are too weighty to depend upon such a slender thread. The phrase "Very well" may mean assent, and, again, it may mean the strongest dissent. Tone, inflection, gesture, and manner are the only indicators by which the phrase may be properly interpreted. The history of the various doings of these parties upon this day destroys the claim of either waiver or estoppel upon the part of plaintiffs.

The brokers were simply authorized to negotiate a sale. Their contract was completed, and their commissions earned, when they produced a purchaser, within the five days, ready, willing, and able to purchase upon the terms stated in the contract of employment. They had all of the 22d day of September in which to produce such purchaser, and upon that day they did produce a purchaser in the person of C. D. Barrows. That he was ready, able, and willing to purchase is entirely apparent from the record. It can scarcely be said to be denied by opposing counsel. The fact that his check was not a legal tender amounts to nothing. He was not required to produce, at that 8 o'clock meeting, either check or money. He was not required to attend any meeting whatever at that time. He was entitled to the last hour of the fifth day in which to pay the $10,000. The contract so expressly provided. At this meeting he offered himself as the purchaser upon the terms presented by the contract, and stated he would pay the $10,000 in cash as soon as the bank opened,—an event which was near at hand. He attempted to pay the $10,000 through his broker, during the entire day of the 22d, but was prevented by his failure to secure a personal audience with McDougald. He was not only willing, but using his best efforts, to pay this money, free of all limitations and conditions not found in the contract; and his efforts to make the first payment upon the purchase price is the highest evidence that Barrows was a purchaser ready, able, and willing to take the property. Aside from these considerations, the property was sold to third parties at 10 A. M. upon the 22d; and, if a tender of the first payment ever was required in order to establish Barrows' ability and good faith in the transaction, the conduct of the owners in making this sale waived it.

Conceding that no liability for commissions was created against respondents by the occurrences taking place at the meeting in the lawyer's office, appellants still make a showing by subsequent events that entitles them to recover. From 10 o'clock until Dr. Barrows left the city of Stockton, some time during the afternoon of that day, he was there, ready and willing to buy the land upon the terms fixed by the owners. He had the $10,000 in hand, and was anxious to make the first payment. This period of time was during the life of the contract, and, when those conditions existed, defendants' liability attached. The fact that one of the owners was in Sacramento, another in Arizona, and the third was suddenly called from the city to look after important matters upon his farm during the expiring hours of the contract, is entirely immaterial. It is apparent that the broker was acting in good faith, and his rights cannot be sacrificed or injuriously affected by the absence of all the owners from the city of Stockton at this important period of time. For the foregoing reasons it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

HARRISON, J., (dissenting.) A broker's contract for the sale of real estate is to be construed under the same principles as is any other contract. It is a contract of employment wherein the right to compensation is established when the broker has performed the contract according to the terms of his employment, and, until he has rendered the services for which he was employed, he has no right to compensation. "The general rule of law as to commissions undoubtedly is that the whole service or duty must be performed before the right to any commissions attaches, either ordinary or extraordinary; for an agent must complete the thing required of him before he is entitled to charge for it." Story, Ag. § 329. The rendering of such services being in the nature of a condition precedent to his right of recovery, the burden of proving the performance of the condition is upon him, and its performance must be satisfactorily established in the mode, and to the extent, stipulated by the contract of employment. Whart. Cont. § 601; Hinds v. Henry, 36 N. J. Law, 328. For the purpose of showing, therefore, whether he has performed his contract, it is first necessary to ascertain the terms of the contract. The ordinary contract between a broker and the owner is that he will find a purchaser upon certain specified terms who will be acceptable to the owner. Sometimes other terms are included in the contract, such as that a sale shall be effected, (Walker v. Tirrell, 101 Mass. 257,) or that his commission shall be payable out of the purchase money, (McPhail v. Buell, 87 Cal. 115, 25 Pac. 266,) or that he shall have a fixed compensation for his services, irrespective of the result; but, in the absence of some terms qualifying his employment, his contract is performed only when he finds a purchaser who is able, ready, and willing to make the purchase according to the terms upon which he was employed to make the sale. To find a purchaser, however, means more than to procure some one who will offer to negotiate for the purchase. It implies the production of one who is not only ready and willing to comply with the terms of the purchase, but who has also the present ability to consummate it, and to comply with all of its terms, and who is also willing and ready to do all the acts that may be required to make an actual purchase of the land. To produce one who makes an offer to purchase, and who is without means, or who is not in condition to comply with the terms of the sale, and against whom a claim for damages resulting from a failure to perform the contract of purchase could not be enforced, does not constitute the finding of a purchaser, within the terms of the agreement, (Iselin v. Griffith, 62 Iowa, 671, 18 N. W. 302;) and the mere statement by one who is produced that he is ready and willing to make the purchase, even if he has the ability to do so, does not render him a purchaser, if at the same time he refuses to do the acts which are requisite to consummate the purchase. Upon the production of such purchaser, if the transaction is not to be consummated by an immediate delivery of the deed and payment of the purchase money, the owner has the right to demand that a valid, enforceable contract for the purchase of the land shall be executed by him; and the services of the broker have not been fully performed until such agreement is executed. The owner may, however, waive the execution of such contract; as, if, after the broker has introduced the purchaser to him, he himself assumes to prepare a contract which afterwards proves defective, or to deal with the purchaser upon other terms, or accepts a parol obligation from him. The broker is, however, entitled to his commissions whenever the purchaser who is produced by him is accepted by the owner, even though the owner fail to make a binding contract, or to enforce the execution thereof, or though, either by reason of defect of title, or a refusal of the vendor or vendee to perform such contract, the sale be not afterwards consummated. So, too, the owner may by his own conduct prevent the execution of the contract, or its fulfillment on the part of the purchaser, by insisting on other terms, or by a refusal to sell, or from a defect in his title. In such case the broker is entitled to his commissions upon the principle that he has fully complied with all the terms of his employment, except those which have been waived, or from which he has been released by the acts of the owner.

It is not essential, however, that the owner and the purchaser should be brought face to face. The broker sufficiently performs his agreement if he tenders to the owner a valid, written contract, containing the terms of sale agreed upon, executed by a party able to comply therewith, or to answer in damages if he should fail to perform. Hayden v. Grillo, 35 Mo. App. 647. The contract must, however, be one which the owner can enforce against the vendee, and must be delivered to the owner. The owner is not bound to accept the statement of the broker that he has a contract, or that a deposit has been made with him on account of the purchase. He is entitled to the contract itself, and also to the deposit made thereunder, and to know whether the purchaser is able to carry it out. The person proposed by the broker may be insolvent, and thus, during the pendency of the transaction, the owner might lose the opportunity of making a valid sale. Much less is the owner required to accept a verbal contract made on his behalf by the broker, even though a deposit has been made with the broker upon such verbal contract. A verbal contract made by the purchaser with the broker is insufficient. A sale of real estate can be made only by an instrument in writing, and is "negotiated" only when such instrument has been executed. A binding contract for a sale constitutes a sale, within the meaning of such agreement, (Rice v. Mayo, 107 Mass. 550;) and an employment to negotiate a sale has been held to be satisfied by finding a purchaser, (Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111.) It is not, however, a part of the broker's employment to prepare a contract of purchase to be executed by the purchaser. Cook v. Kroemeke, 4 Daly, 268. He has done all that he was employed to do when he has produced a purchaser who is acceptable to the owner. The preparation of such agreement, and any further negotiations regarding the terms of purchase, are to be made between the owner and the purchaser. In the absence of special authority therefor, the broker has no authority to enter into any contract on behalf of the owner, (Duffy v. Hobson, 40 Cal. 240,) or to make any contract on behalf of the purchaser; a broker being "one who makes a bargain for another, and receives a commission for so doing," (Pott v. Turner, 6 Bing. 706.) "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made; and, until that is done, his rights to commissions do not accrue;" (Sibbald v. Iron Co., 83 N. Y. 378;) but the agreement for the purchase must be one that is valid, and can be enforced.

The foregoing principles have been established in various decisions, and may be regarded as settled rules for construing the contract between brokers and their principals. Masten v. Griffing, 33 Cal. 111; Phelan v. Gardner, 43 Cal. 306; Gonzales v. Broad, 57 Cal. 224; Hyams v. Miller, 71 Ga. 608; Veazie v. Parker, 72 Me. 443; Buckingham v. Harris, 10 Colo. 460, 15 Pac. 817; Moses v. Bierling, 31 N. Y. 462; Mooney v. Elder, 56 N. Y. 240; Barnard v. Monnot, *42 N. Y. 203; Love v. Owens, 31 Mo. App. 510; Hayden v. Grillo, 35 Mo. App. 654; McGavock v. Woodlief, 20 How. 221; Coleman v. Meade, 13 Bush, (Ky.) 363; Watson v. Brooks, 11 Or. 271, 3 Pac. 679; Hinds v. Henry, 36 N. J. Law, 328; Love v. Miller, 53 Ind. 294; Glentworth v. Luther, 21 Barb. 145; Leete v. Norton, 43 Conn. 219. There are expressions in the opinions in some cases to the effect that a written contract of purchase is not necessary in order to entitle the broker to his commissions but an examination of those cases will show that in each one of them the written contract was waived by the owner, or that the owner himself refused, or was unable, to consummate the sale. We know of no authority in which it has been held, or even stated, that if the owner insists upon the execution of a valid contract of purchase, and the purchaser produced by the broker fails or declines to enter into such contract, or to comply with the other terms of purchase. the broker is nevertheless entitled to his commissions. The owner does not lose his right to make a sale of the property by reason of his having employed a broker, (Dolan v. Scanlan, 57 Cal. 264; Hungerford v. Hicks, 39 Conn. 259; McClave v. Paine, 49 N. Y. 561; Wylie v. Bank, 61 N. Y. 415,) or to employ other brokers for the same purpose; and the mere fact that he has made a sale within the time allowed the broker by his employment does not entitle the broker to his commission unless the broker has, within the terms of his employment, found a purchaser, (Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195; Stewart v. Murray, 92 Ind. 543;) and, however much he may have labored for the purpose of securing the purchaser, he is not entitled to commissions unless he produces one. "A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money, with ever so much of devotion to the interests of his employer, and yet, if he fails; if, without effecting an agreement or accomplishing a bargain, he abandons the effort; or his authority is fairly and in good faith terminated,—he gains no right to commissions. He loses the labor and effort which was staked upon success, and in such event it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal." Sibbald v. Iron Co., 83 N. Y. 383.

Under the foregoing principles it must be held that the plaintiffs did not negotiate a sale or find a purchaser for the land, and consequently did not become entitled to compensation for their services. No agreement in writing for the purchase of the land was ever made by Barrows, and, when he was introduced to the owners as the purchaser, he not only did not comply with their demand that such contract be executed, but he also failed to comply with their terms of sale. It was specified in the instrument of September 17th that $10,000 of the purchase price should be paid "within the five days." This can only be construed as meaning that this amount of money should be deposited with the owners within that time as a payment on account of the purchase price, without any condition, and as an earnest of good faith on behalf of the purchaser that he would complete the purchase, subject, of course, to the implied agreement on behalf of the owners that it would be repaid if, through any fault on their part, the sale should not be completed. The succeeding clause in the agreement, that $5,000 additional should be paid "on confirmation of the title," shows that this $10,000 was to be paid irrespective of and before any examination of title. At the first interview between the plaintiff Lyon and the owners on the morning of the 22d, he had neither a contract on behalf of Barrows, nor did he produce Barrows as the purchaser, nor did he offer to pay or deposit with the owners the $10,000, but insisted that as broker he had the right to retain this amount of money until after the examination of the title and completion of the sale. The function of a broker, however, as we have seen, is merely to make bargains, and not to execute contracts, and he was neither authorized to retain the money which his customer had given him with which to make a deposit or part payment on account of the purchase, nor to receive or hold the money for the account of the owners. Budd, on behalf of the owners, refused to accept the check as a compliance with the terms of the sale, on the ground that it was not money, and so stated to the plaintiff Lyon, and also stated to him that, if Barrows would come with the money or what they knew to be money, he would then close the matter up, and put the agreement in writing, so that it would be binding on all parties. Lyon then went away, and after a few minutes returned with Barrows, who stated that he was willing to purchase the land according to the terms of agreement, if the title was good, and again tendered the check as a performance of the condition to pay the $10,000. The owners, however, again declined to accept the check, upon the express ground that it was not a legal tender, or the equivalent of money, and Budd said to him that he was ready to draw up the contract and accept the money, but would not accept the check. This interview took place before the hour for the opening of the bank in Stockton. The check was drawn upon a bank in San Francisco, and was made payable to the order of the plaintiffs, Gaman & Lyon; and McDougald, on behalf of the owners, thereupon stated to Lyon and Barrows that he would wait at Budd's office until half past 9 o'clock, and that, if they then had the money there, the trade would be made, otherwise he would close with the other parties. To this Lyon assented, and thereupon Barrows and Lyon left the office without saying whether or not they would return; but neither of them did in fact return, and a little after noon of that day Barrows left Stockton, and about the same time Lyon obtained the money on the check, and took from the bank a certificate of deposit payable to his own order. McDougald and Budd waited at the office of the latter until about 10 o'clock, and afterwards, on the same day, closed the contract for the sale with the other parties. When it was thus shown to the court below that no contract for the purchase of the land was ever made by or on behalf of Barrows, and that when he was introduced to the owners he did not comply with the terms of the sale, and that when he was informed by them that they would require a contract of purchase to be made by him, and that the $10,000 should be paid to them in money at the same time, instead of complying therewith, or saying that he was willing to do so, he went away, and soon after left town, and did not thereafter, in any form, offer to make such payment, or to enter into such contract, the court was justified in finding and adjudging that the plaintiffs had not performed their contract of employment, and that they were not entitled to a recovery from the defendants.

PATERSON, J.: I concur in the views of Mr. Justice HARRISON.

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WHEELOCK v. GODFREY et al. (No. 15,236.)

(Supreme Court of California. Dec. 28, 1893.)

JUDGMENT—PAYMENT—INTERPLEADER.

1. Where judgment is rendered against a savings bank for a deposit with accrued div-

idends, the creditor having leave to apply for any relief needed to fix the amount and enforce payment, and later a decree is entered fixing the amount due to date at a certain sum, for which judgment is rendered against the bank, the first judgment is interlocutory, and payment of the second discharges both.

2. Where a defendant has disclaimed interest except as stakeholder, and prayed interpleader, and judgment is given against it in accordance with its own prayer, with costs against the defeated claimant, it may safely pay the judgment, in spite of irregularities in the interpleader suit which are uncomplained of by said claimant.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. From a judgment for defendant Godfrey against the bank, the bank appeals. Affirmed.

H. C. Campbell and Clunie & Clunie, for appellant. Wm. Barber, for respondents.

SEARLS, C. Almon Wheelock, executor of the last will of Albert G. Wheelock, brought an action to set aside and declare null and void an assignment made by Albert G. Wheelock, deceased, to defendant Arabella Godfrey, upon the ground of the mental incapacity of said Wheelock to execute the same, and fraud on the part of said Godfrey in procuring the execution of such assignment, and also to recover from both the defendants the sum of money assigned. Albert G. Wheelock, plaintiff's testator, according to the complaint, had on deposit with the San Francisco Savings Union, an incorporated bank of savings, one of the defendants and the appellant herein, the sum of $7,045.89, for which he had a bank book. On the 1st day of October, 1888, said Wheelock assigned his said demand and bank book to the other defendant, Arabella D. Godfrey, the respondent herein, who thereupon procured the amount aforesaid to be transferred by the bank to her credit, and in evidence thereof the issue of a bank book showing such credit to her. The bank defendant answered the complaint, and also filed a cross complaint, in both of which it admitted the deposit by Wheelock of the $7,045.89, the issue of a bank or deposit book to him, wherein he was credited therefor, and avers the due assignment thereof to defendant Godfrey, and the issuance to her of a bank or deposit book, and a credit to her of the amount thereof on its books, etc. And in its further answer or cross complaint it avers that the plaintiff and defendant Godfrey each claim said sum of money; that one of them is entitled thereto, with the dividends thereon, and that it has no means of knowing or ascertaining which of them is entitled thereto, except by the determination of the court in the premises; that it is willing to pay the same when the ownership is determined, and has no interest in the question except to hold the money according to the terms of the deposit, and to pay it to the party entitled thereto. Defendant prays that plaintiff and defendant Godfrey be required to interplead, and that the court, by its judgment, determine which of them is the owner and entitled to said money deposit and dividends thereon. No answer was filed to this so-called "cross complaint" by either plaintiff or defendant Godfrey. The cause was tried by the court, written findings filed, and judgment entered as follows: (1) In favor of both of the defendants, as against the plaintiff; (2) that, as between the defendants, the sum of $7,045.89, which by the answer of the bank defendant is admitted to be held by it on deposit in the name and to the credit of defendant Godfrey, belongs to her, together with any and all dividends that have accrued thereon; and it was further decreed that she recover the same, and that she be at liberty to apply to the court for any further relief that may be necessary to ascertain the amount due her by the terms of this decree, and to enforce payment thereof. This decree was entered September 18, 1891. On the 30th day of October, 1891, a further decree was entered, as between the defendants, which recited that, in pursuance of the permission granted in the former judgment entered, testimony had been introduced, from which it apears that the amount due to date (October 30, 1891) on the deposit referred to in said judgment is $8,302.16. Judgment is rendered in favor of defendant Godfrey, and against the bank defendant, for said amount.

The bank defendant has taken an appeal from each of said judgments, and in each case the cause comes up on the judgment roll; this appeal being from the last or final judgment. As they are submitted together, it may be said here the first judgment or decree was, as between the defendants, an interlocutory judgment, which simply established the right to the deposit, but left the amount of the recovery thereon to be adjudicated and crystallized in the final judgment rendered October 30, 1891. Freem. Judgm. §§ 29–33. We do not doubt that a satisfaction of the last judgment will extinguish the first, and all the rights of defendant Godfrey acquired thereunder. It must be admitted that there are serious defects in the record, some of which are inexplicable, growing out of the filing of an amended complaint pending the trial. These do not, however, affect this appellant, which occupies the position of a stakeholder as between the other parties. No judgment was rendered against it either on the original or amended complaint, but, on the contrary, it had judgment for costs against the plaintiff. The judgment rendered against it was in consonance with the prayer of its answer and cross complaint. It stands indifferent, as between the other parties to the action; and the controversy having been settled as between them, and the deposit awarded to defendant Godfrey, it was in order for it to pay the demand, as it expressed a willingness to do. There were, however, good reasons apparent why appellant here should exercise due caution in the premises by not paying the demand until a final adjudication between plaintiff and its codefendant; and it may fairly be presumed this consideration was an important inducement to this appeal. The judgment appealed from should be affirmed; each party to pay his own costs on appeal.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed; each party to pay his own costs on appeal.

WHEELOCK v. GODFREY et al. (No. 15,235.)

(Supreme Court of California. Dec. 28, 1893.)

Department 1. Appeal from superior court of San Francisco county; W. H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. From an interlocutory judgment for defendant Godfrey against the bank, the bank appeals. Appeal dismissed.

Clunie & Clunie and H. C. Campbell, for appellant. Wm. Barber, for respondents.

PER CURIAM. The appeal of the San Franciso Savings Union in the above-entitled cause is hereby dismissed, upon the authority of the opinion in No. 15,236, between the same parties, this day filed. 35 Pac. 315.

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100 Cal. 578

WHEELOCK v. GODFREY et al. (No. 15,398.)

(Supreme Court of California. Dec. 28, 1893.)

MENTAL STATUS—OPINION EVIDENCE — INTIMATE ACQUAINTANCE —JURY TRIAL — COMPETENCY OF WITNESS—EXPERT—OBJECTION WAIVED—LEADING QUESTION.

1. There is no abuse of discretion in holding a witness competent as an "intimate acquaintance," within Code Civil Proc. § 1870, subd. 10, allowing expression of opinion of an intimate acquaintance respecting the mental sanity of a person; it appearing that witness had known him for 18 years, had until the last 6 years lived next door to him, and seen him every day, and had since then visited the family, where he lived, twice a week or more, and had often had conversations with him.

2. Plaintiff is not entitled to a jury in an action to recover money, it being asked that the assignment thereof be set aside for fraud and undue influence, the case being one of equitable cognizance.

3. Where a party offers a witness, who is not objected to, he cannot, after discovering that his testimony militates against him, have it stricken out on the ground of incompetency of the witness.

4. Where a witness has testified that he, as a physician, attended deceased from January to the time of his death, in October, describing his ailments, physical condition, and conversations with him, etc., a question as to the state of his mind on October 1st, based on his appearance, actions, condition, and conversation, will not be held leading or suggestive.

5. Where witness has testified as an expert for plaintiff, it cannot be objected, when he is called for defendant, that he is not an expert.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. There was judgment for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Clunie & Clunie and H. C. Campbell, for appellant. Wm. Barber, for respondents.

SEARLS, C. This action was brought to recover, by Almon Wheelock, as the executor of the last will of Albert G. Wheelock, the sum of $7,045.89, moneys received on deposit by the defendant the San Francisco Savings Union from Albert G. Wheelock in his lifetime. Defendants had judgment. Plaintiff thereupon moved for a new trial, which motion was denied, and from the order of denial this appeal is taken. Albert G. Wheelock was a bachelor of the age of, say, 65 years; had been a bank clerk in San Francisco, and possessed a fortune worth, say, $50,000. Arabella D. Godfrey was a widow, and Wheelock had lodged at her house for some 15 years, was a friend of her deceased husband in his lifetime, and had, according to some of the testimony, at intervals from the time of the death of the husband of said Arabella D. Godfrey, evinced a determination to make some provision for the support and maintenance of the latter. On or about September 25, 1888, said Albert G. Wheelock made a last will, whereby he bequeathed and devised all his estate, real, personal, and mixed, to his nephews, a niece, and sister residing at Chicago, Ill., and Toledo, Ohio. On or about October 1, 1888, Wheelock had on deposit with defendant the San Francisco Savings Union, an incorporated bank of savings, which we will hereafter denominate the "Bank," the sum of $7,045.89, in evidence of which he held a bank book. At the date last mentioned, he duly assigned his said bank book to the defendant Arabella D. Godfrey, who took it to the bank with the assignment, had the amount thereof transferred to her credit, and received a bank book therefor in her own name. On the 20th day of October, 1888, Albert G. Wheelock died at the house of said Arabella D. Godfrey, in the city and county of San Francisco.

The last will aforesaid was admitted to probate, and Almon Wheelock, named therein as an executor, was duly appointed and qualified as such executor. The gravamen of the complaint is that at the date of the said assignment, if the same was ever in fact executed, Albert G. Wheelock had been stricken with paralysis, was weak in body and mind, and mentally unsound, and incompetent to attend to any business whatever; that he lodged and boarded at the house of defendant Godfrey, was subject to and under her influence, direction, and control; and that the latter fraudulently, and by duress and menace, and by undue influence, induced and procured said Wheelock, in his enfeebled condition, to execute the assignment to her, etc. Plaintiff demanded judgment (1) that the assignment be declared null and void, and set aside; (2) that the assignment was not made by Albert G. Wheelock; (3) that said moneys be declared the property of the estate of Albert G. Wheelock, and that plaintiff have judgment against the defendants therefor,—and for general relief. The complaint was not verified. The defendants answered separately, each denying the material allegations of the complaint, except as expressly admitted. The bank admitted that it held the money on deposit, set up the transfer of the deposit to defendant Godfrey, etc., and, by way of answer and cross complaint, set out that both plaintiff and defendant Godfrey claimed the money, that it was willing to pay it over to the one entitled thereto, etc., that it has no interest in the dispute, and asks that the parties be required to interplead, and that the court determine which of them is entitled to the fund, etc. Defendant Godfrey also filed a cross complaint, which was, on motion, stricken out.

At the trial the principal question in controversy related to the mental status of Wheelock at the date of the assignment. A number of witnesses on the part of defendants were called upon to express an opinion as to the mental sanity of said Wheelock. To the expression of an opinion on this subject, counsel for appellant objected, and the action of the court in overruling the objection is assigned as error. The first of these alleged errors is in relation to the testimony of Mary S. Mugan, and is based upon an alleged failure to establish a predicate for the expression of an opinion by showing that the witness was such an "intimate acquaintance" of said Wheelock as is required by subdivision 10 of section 1870 of the Code of Civil Procedure. That section, after providing for other cases in which witnesses may give an opinion, adds, in subdivision 10, as follows: "And the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." The witness stated, in substance, that she was 23 years of age, and had known Wheelock since she was 5 years old, lived in his vicinity, first across the street, and then next door, and saw him every day until within the last 6 years, "when we moved away. We were good friends with Mrs. Godfrey, (where Wheelock lived,) and I have been since in the habit of going there maybe twice a week, and sometimes oftener, and saw Mr. Wheelock many times and conversed with him; very often had little conversations with him; conversed with him in 1888; was in his room in 1888, and had a talk with him as to the changes in the furniture of his room. When Mrs. Godfrey was out at times, he would come to the door for me. There were many times that we had conversations, so that I haven't them placed." The witness was then permitted to express an opinion that "he was of sound mind," and gave as reasons therefor that there was no evidence of any illness; that there was no evidence of any unsoundness; that Mrs. Godfrey used to go out, and leave him in charge of her house, and would not have done so with a man of unsound mind,—and added: "The expression of his countenance was always just as I had seen it from a child. It was perfectly sound and bright. There was no change in Mr. Wheelock's expression from the time I knew him first until his death."

From necessity, much must be left to the discretion of the trial court in determining whether or not a given witness is an "intimate acquaintance," within the purview of the statute. As an abstract proposition, the question would seem to be one easily solved. In practice, however, a serious difficulty is met in the incapacity to detail specifically all the minor incidents from which the ultimate fact of an intimate acquaintance is deduced. Many persons cannot describe particulars in detail. A witness, as the result of observation, will determine with great accuracy that a given person is intoxicated; but confine him to a detail of the minute appearances that have led him unerringly up to the fact, and he will often fail most signally. The details of conduct, attitude, tones, gestures, words, expression of eye and face, and abnormal movements have either escaped him, or he is unable to draw what may be termed a "living picture" of what he has seen, and what is in reality photographed upon his mind. It is much the same in regard to the lesser details which go to make up the status of an intimate acquaintance; and the court, having the witness before it, is better able to determine the relation of the parties from the evidence given than can be done from a cold record of the words spoken. It is for this and similar reasons that this court has said that the question was addressed to the discretion of the court below, and that, there being no abuse of the discretion, the appellate court would not interfere. Estate of Carpenter, 79 Cal. 382, 21 Pac. 835; Id., 94 Cal. 407, 29 Pac. 1101; People v. Levy, 71 Cal. 623, 12 Pac. 791; People v. Fine, 77 Cal.147 , 19 Pac. 269; People v. Pico, 62 Cal. 53. The difficulty in this class of cases which has been met and will continually meet the courts in determining what is an intimate acquaintance, within the meaning of the statute, is aptly epitomized by Temple, C., in Estate of Carpenter, supra, where, in speaking of the statute, he says: "Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is, and must remain, more or less indefinite;" and he adds: "A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, [thereinbefore set out,] this court cannot review the ruling." Within the purview of the above reasoning and the cases cited, there was no abuse of discretion by the court below in holding the witness competent, as an intimate acquaintance, to express an opinion as to the mental sanity of Albert G. Wheelock.

The other alleged errors, founded upon rulings in the cases of other witnesses upon the same point, involve the same question, and do not vary in their facts sufficiently to alter the conclusion reached in the case considered, and need not therefore be elaborated.

The next error assigned is founded upon the denial by the court of an application by plaintiff for a jury trial. It appears from the record that the cause was set down for trial by the court, January 26, 1891, and notice thereof served upon the attorneys of plaintiff. Prior to the commencement of the trial, and prior to January 26, 1891, but at what precise date does not appear, the plaintiff in open court demanded a jury trial, which was refused by the court. The facts stated in the complaint, and the prayer for relief, indicate the case to be one of equitable cognizance, and therefore one in which plaintiff was not entitled to a jury. Fish v. Benson, 71 Cal., at pages 434, 435, 12 Pac. 454; Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234. The statement of appellant's counsel that the amended complaint contains matter which might have been omitted, and that he demanded unnecessary relief, is, in effect, but a statement that a different cause of action, sufficient for a recovery at law, with a demand for only such relief as a court of law could grant, might have been prosecuted. The answer must be that the phraseology of the complaint was adapted to the relief sought, viz. setting aside, and declaring null and void, the assignment by plaintiff's testator to defendant Godfrey; that the money be declared the property of plaintiff; and that he have a judgment therefor against the defendants. The court committed no error in the premises. It is true, the amended complaint stated "that the said pretended assignment and transfer was never signed, made, executed, or delivered by," etc., and then proceeds to set out at length the incompetency and weakness of the testator, the fraudulent practices of defendant Godfrey to induce him to sign the transfer, and avers that, "if he ever signed said pretended assignment or transfer, [he] was induced to sign the same by and through fraud and undue influence," etc. This allegation is iterated and reiterated in various forms. That the complaint was ambiguous is apparent, but it is not apparent that the plaintiff should be permitted to take advantage of that fact by now saying he did not mean what he said in his pleading, and by repudiating the whole theory upon which he tried the cause. He proved by his own witnesses the execution of the assignment, and then sought to show the invalidity of the act by proving the incompetency of his testator.

The next error assigned relates to the action of the court in denying a motion on behalf of plaintiff to strike out the testimony of John Montgomery, M. D., the attending physician of deceased, and in overruling the objections of plaintiff to questions put to said Montgomery by defendant as to the mental condition of said deceased. John Montgomery was called as a witness on behalf of plaintiff, and stated that he was a physician; had been in practice as such for 17 years; testified as to attending Wheelock as a physician from January, 1888, to October of the same year, when he died; gave his opinion as to his ailments; and described his death as being due to progressive paralysis, etc. On cross-examination he testified as to the mental status of his patient; said he was thoroughly rational in conversation, and deemed him a competent gentleman; that his physical condition did not affect his brain, etc. Upon the close of the testimony on behalf of the plaintiff, his counsel moved the court to strike out substantially all the testimony of Dr. John Montgomery upon the ground that he was a licensed physician, in attendance as such upon Wheelock, who was his patient, and that the information possessed by him was acquired while attending his patient, and was necessary to enable him to prescribe for Wheelock, and hence was incompetent, under subdivision 4 of section 1881 of the Code of Civil Procedure of this state. The motion was denied by the court, and the ruling excepted to by plaintiff. At a later stage of the case, Dr. Montgomery was called as a witness on behalf of the defendants, and gave important testimony, including his opinion that Wheelock was mentally sane, etc., to which objections and rulings were had, and exceptions noted. Conceding, without deciding, that Dr. Montgomery was an incompetent witness for the reasons indicated by the plaintiff, appellant is not in a situation to urge such incompetency. His testimony was received without objection from the defendants. The question, then, presents this proposition: Can a party to an action introduce testimony which, in the face of an objection, would be incompetent, and, upon discovering that it militates against him, strike it out without the consent of the opposite party? The question must be answered in the negative. By offering the witness, and eliciting testimony from him, he in effect declared the witness was competent and the testimony proper. In the absence of objections by defendants, it was the equivalent of consent, and was as binding upon them as a written stipulation agreeing to the competency of the witness to testify to the given facts would have been. The motion came too late. People v. Long, 43 Cal. 446; People v. Samario, 84 Cal. 484, 485, 24 Pac. 283. Rogers on Expert Testimony, at page 111, says: "When it is proposed to introduce in evidence the testimony of witnesses who are disqualified by these statutes, the party who desires to claim the benefit of the statutes must seasonably exercise the privilege by objecting to the evidence at the time it is offered. It is too late after the examination has been insisted on, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out;" citing Hoyt v. Hoyt, 112 N. Y. 514, 20 N. E. 402, the doctrine of which fully sustains the text. The objections to questions put to Dr. Montgomery when a witness for defendants were not as to his competency by reason of having been the physician of Wheelock, and are regarded as of little importance. The first was to a question as to the state of Wheelock's mind on October 1, 1888, based upon his appearance, actions, condition, and conversation. It was objected that the "question was leading and suggestive, and not the proper question, and, further, that he has testified that he did not form an opinion." The witness answered: "Well, the man, to my mind, was perfectly sane." The witness then said he formed an opinion, and answered as before. Again, to a question as to his opinion whether he was of sound or unsound mind, the witness answered: "I believe he was of sound mind." Counsel objected that the witness was "not an expert, and not proven to be." Another question was as to the state of mind of Wheelock, in the opinion of the witness, from January, 1888, down to and including the time when he was stricken with this paralysis, which had been shown to have occurred some three days before his death. This was objected to as "irrelevant, immaterial, and incompetent, and as covering periods of time and occasions when the witness did not see him, and could not express an opinion." The witness answered that he never had the slightest doubt as to his sanity; "it would have been an impossibility for me to do such a thing as that." A motion to strike out the answer as not responsive was denied. The first question was not leading or suggestive, in view of the preceding testimony, in which the witness had stated at length that he had attended the deceased from January 8th to the time of his death, in October; had described his ailments, physical condition; had conversed with him, etc. The witness had been shown to be, as before stated, a physician of 17 years' experience, and had testified as an expert for the plaintiff, and was entitled to be questioned as such. As his physician during 1888, and being in the habit of visiting him as such, and at times as often as two or three times a day, he was competent to speak of his condition during the entire period from January to October, except as thus stated. The questions, answers, and rulings of the court thereon were correct, and their propriety is sufficiently apparent to obviate the necessity of discussion.

We have examined most of the other errors assigned in the record, and find them either without merit or not of sufficient importance to warrant a reversal; and as appellant has contented himself with saying he does not waive them, and asking us to examine them, as set forth in the specification of errors, without any direction as to where they are to be found in a record of 373 printed pages, we are justified in the conclusion that they are not important. Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; West v. Crawford, 80 Cal. 33, 21 Pac. 1123. The order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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4 Cal. Unrep. 399

WHEELOCK v. GODFREY et al. (No. 15,234.)

(Supreme Court of California. Dec. 28, 1893.)

FINDINGS—DEFINITENESS—ULTIMATE FACTS—JUDGMENT.

1. A finding that all the averments of a complaint, down to and including a certain averment, are true, is sufficiently explicit.

2. Where an attempt is made to avoid a gift on the ground of mental incompetency and undue influence, a finding that there was no incompetency or undue influence is sufficient, without finding as to the donor's physical condition or other facts stated as inducement to the ultimate facts.

3. Where one brings an action against two parties for a fund, the judgment being against him as to both, he cannot complain that it is in favor of one defendant as against the other.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. Judgment for defendants. Plaintiff appeals. Affirmed.

Clunie & Clunie and H. C. Campbell, for appellant. William Barber, for respondents.

SEARLS, C. This is an appeal by plaintiff from a final judgment in favor of defendants. The cause comes up on the judgment roll, and, as the appeal was not taken within 60 days after the entry of judgment, the appeal must be determined upon the questions presented by the pleadings, findings, and judgment. An appeal from an order denying a new trial in the same case, (No. 15,398,) this day decided, (35 Pac. 317,) contains a sufficient reference to the facts in the case, and they will not be repeated here.

The first finding is to the effect that all the allegations of plaintiff's complaint, from the commencement thereof down to and including the averment that the moneys referred to in the complaint, viz. $7,045.89, were still in charge of the defendant bank, are true. It is objected to this finding that it is impossible to determine from it the averments found true, and those not sustained. It is as comprehensive and explicit as the complaint to which it refers, and, as it finds all the averments of the complaint true down to and including a given averment, we fail to see any difficulty in determining precisely what the court means. The averments thus found true may be epitomized as follows: Defendant Arabella D. Godfrey is a widow; the other defendant is an incorporated savings bank. On the 1st of October, 1888, Albert G. Wheelock (plaintiff's testator) had deposited $7,045.89 in the bank for loaning and safe-keeping, and had received in evidence thereof a bank book, in which he was credited for the amount as a deposit. On or about October 1, 1888, defendant Godfrey presented to the bank this deposit book, with an assignment thereof in writing, purporting to be executed by Wheelock, assigning the said money and account, and demanded a transfer and delivery to her of said moneys. The bank, in pursuance of said demand, transferred to her credit on its books the amount, and gave her a deposit book, crediting her therein for the amount. The money has not been drawn from the bank, and it is still in its charge and custody. The court then proceeds to find at length, what need only be referred to briefly, that on October 1, 1888, the said instrument of transfer was signed, executed, and delivered by Wheelock to defendant Godfrey, and that, when so executed and delivered, he was not of weak or unsound mind, or mentally incompetent to make the transfer, but was of sound mind, and competent to make such transfer; that the assignment was not procured by or through undue influence or control by Godfrey over Wheelock, nor by any unfair advantage, nor by any advantage taken of the mental or physical weakness or unsoundness of mind of Wheelock; that he was not induced to sign the assignment or transfer by any fraud or undue influence of defendant Godfrey or any one else; that the assignment and delivery were not procured by duress, fraud, or undue influence, etc., by Godfrey or any one else; that Wheelock was free from fraud, duress, menace, or undue influence at the time and in the matter of the making, signing, and delivery of said assignment. The court then finds the allegations of the complaint in reference to the death of Wheelock, his last will, and proceedings had thereunder as true.

These findings cover all the material issues in the case. It was not necessary to find whether or not Wheelock had been ill or paralyzed, or as to his physical condition, or any other fact stated in the complaint, merely as inducement to the ultimate facts, which were that he was mentally incompetent, and that defendant Godfrey knowingly and fraudulently took advantage of his weakness, and, by undue influence, by duress, and by obtaining control over him, induced and procured him to sign, execute, and deliver to her an assignment of his bank book and of the money in bank. The findings are full and complete on the material issues. The objection to that portion of the judgment which awarded the money in bank to defendant Godfrey, as against the bank, is not open to attack by this appellant, who was plaintiff in the court below. The judgment is against plaintiff, and in favor of both the defendants as to him. If he was not entitled to it, manifestly he is not, and cannot be, injured by any judgment in the premises awarding it, as between the defendants. That is not his affair, but theirs. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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4 Cal. Unrep. 419

MIETZSCH v. BERKHOUT et al., Superintendent of Public Streets. (No. 15,011.)

(Supreme Court of California. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ILLEGAL ASSESSMENT—REMEDY—INJUNCTION—WHEN MAINTAINED.

1. St. 1889, p. 70, §§ 10–15, regulating the procedure for widening streets, provide that the commissioners must file with the clerk of the board of supervisors a report specifying each lot, etc., assessed for the improvement, with the name of the owner and a plat of the assessment district; that the clerk must give notice requiring persons interested to show cause, at a time named, why such report should not be confirmed, etc. *Held*, that a lot owner who failed to object to an assessment, and to proceed as provided by such statute, could not maintain an action to declare the assessment void, and enjoin the execution of a deed pursuant to a sale of the assessed property to pay the assessment.

2. Where a city lot is assessed only $2.50 for a street improvement, and sold for nonpayment, and the owner could redeem from the sale by paying $3.90, the maxim, "De minimis non curat lex," applies, and a court of equity will not restrain the execution of a deed pursuant to such sale, if invalid.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by E. Mietzsch against Amelia Berkhout and James Gilleran, as superintendent of public streets of the city of San Francisco, Cal., for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. A. W. Linforth, for respondents.

BELCHER, C. Proceedings were regularly instituted for the widening of Mission street, in the city and county of San Francisco, and for the condemnation for that purpose of a strip of land 16½ feet wide, along the southeasterly side of said street. The proceedings resulted in a judgment of condemnation and in assessments upon certain lots of land owned by the plaintiff, to help pay the expenses of the improvement. The assessments not being paid, the said lots were sold thereunder to one William Kreling, who received certificates of purchase therefor, and assigned the same to the defendant Amelia Berkhout. There was no redemption of any of the property so sold, and at the proper time the said assignee served on the plaintiff the usual and required notice, that she would apply for deeds of the lots pursuant to the said sales. The defendant James Gilleran, the then superintendent of streets in and for the said city and county, was about to execute and deliver the deeds so applied for, and thereupon the plaintiff commenced this action to obtain a decree restraining the execution and delivery thereof. A summons was duly issued, and served on each of the defendants, but they failed to appear, and their defaults were entered. Thereafter, the case was submitted to the court below for decision, and after consideration the court made and filed its findings of facts and conclusions of law, to the effect that all the allegations of the complaint were true, but that the plaintiff was not entitled to the relief demanded, and that judgment should be entered in favor of defendants. Judgment was accordingly so entered, from which the plaintiff appeals.

In the proceedings for condemnation above referred to, the appellant here was a party defendant; and from the judgment entered in the case, and an order denying a new trial, an appeal was taken by the defendants to this court, where the judgment and order were affirmed. City and County of San Francisco v. Kiernan, 33 Pac. 720. Most of the questions involved in this case were involved in that, and were decided against the contention of appellant. They must therefore, upon this appeal, be treated as settled, and need not be further considered.

It is claimed, however, that one of appellant's lots was assessed for a larger portion of the costs, damages, and expenses resulting from the proceedings to effect the widening than it should have been, and hence that the entire proceedings, as to him, were invalidated. The order of the board of supervisors, under which the proceedings were initiated and carried on, defined the district to be benefited by the widening, and upon which the costs, damages, and expenses thereof should be assessed, as the land extending along each side of Mission street, as widened, from Twenty-Sixth street to the San Mateo county line, and having a uniform width of 1,000 feet on each side of the street; and it declared that after deducting from the total costs, damages, and expenses of the widening the amount assessed to the railroad company occupying the street, the remainder should be assessed as follows: One-fourth upon the lands and improvements thereon lying within a uniform distance of 100 feet easterly from the southeasterly line of the street, as widened; one-fourth upon the lands and improvements lying between 100 feet and 1,000 feet easterly from the southeasterly line of the street; and the other two-fourths upon the lands and improvements similarly described on the northwesterly side of the street: "provided, that all lots or parcels of land within 100 feet of the southeasterly or northwesterly lines of Mission street, * * * not fronting directly on the line of said street, shall, for the purposes of this assessment, be assessed as though the same were outside the line of said 100 feet, as hereinbefore provided, and be assessed as herein provided for the assessment of land and property distant more than 100 feet from the southeasterly and northwesterly lines of said street." The appellant owned six lots subject to assessment under the said order. Three of these lots the complaint describes as lots 51, 52, and 53, "as designated upon a certain map of the Bernal Homestead Association," on file in the office of the recorder of the city and county, and as "forming a complex of lots or parcels of land designated as, and subdivided into, lots 2, 4, and 5 of block 166 in the report, and on the map, plans, and diagrams of the Mission street widening commissioners." The complaint further describes lots 51 and 52 as commencing at the corner of Mission street and Allison avenue, and extending thence along Mission street 104 feet 4 inches, and along Allison avenue 42 feet 9 inches, with a width or length at the other end or side of 96 feet 2 inches; and it describes lot 53 as located in the rear of the other two lots, and fronting on Allison avenue, with a uniform width of 50 feet and a length of 120 feet. It is alleged that the larger part of lot 53 was within the 100-feet limits, as above defined, and was assessed as within those limits, when the whole lot should have been assessed as within the 900-feet limits; and it is claimed that the assessment so made "presented an incontestable violation of the order under which it was sought to levy the assessment." The statute regulating the mode of procedure provided, in substance, that the commissioners appointed for the purpose must make and file with the clerk of the board of supervisors their report, specifying each lot, subdivision, or piece of property assessed, with the name of the owner thereof, if known, and a plat of the assessment district, showing each block and lot, or portion of lot, assessed, and its dimensions, designated and described by an appropriate number; that upon the filing of the report and plat the clerk must give notice thereof by publication for at least 10 days, requiring all persons interested to show cause before the board on or before a day named, why such report should not be confirmed; that all objections must be in writing, and filed with the clerk, and by him laid before the board; that the board must fix a day for hearing the objections, and the clerk must notify the objectors thereof; that at the time fixed the board must "proceed to pass upon the report, and may confirm, correct or modify the same, or may order the commissioners to make a new assessment, report and plat;" that the clerk must forward to the street superintendent a certified copy of the report, assessment, and plat, as finally confirmed and adopted, and that such certified copy shall thereupon be the assessment roll; and that, immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained and described therein. St. 1889, p. 70, §§ 10–15. It appears from the complaint that the abovementioned provisions of the statute were complied with; that written objections were filed by a number of persons interested, and were considered and acted upon by the board; and that, after modifying the report in a few details, the board "undertook and attempt .. to confirm and adopt, and in form confirmed and adopted, the said report, assessment, and plat." It does not, however, appear that any objection was made by appellant to the assessment upon any of his lots. He apparently thought he could safely rest upon his oars till after the sale, and then invoke the power of a court of equity to declare the sale null and void. But we do not think he was at liberty to do that. If the objection now urged had any merit, it should have been presented to and acted upon by the board; and it cannot, in our opinion, be raised for the first time in the courts. See Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. Besides, no diagram or definite description of lot 5, as assessed, is presented, and from the general description we infer that it is the same as lot 53. But it appears from the complaint that lot 5 was sold for $2.50, the full amount of the assessment against it, and could have been redeemed by paying $3.90. This being so, the maxim, "De minimis non curat lex," may well be held applicable to the case.

The other points do not require special notice. The judgment, in our opinion, should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

100 Cal. 626

PRIEST v. BROWN et al. (No. 13.886.)

(Supreme Court of California. Dec. 30, 1893.)

FRAUDULENT CONVEYANCES—RIGHTS OF PURCHASER—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

1. Where the debtor testified that it was his intention, in making a transfer of his property, to prefer certain creditors, and the grantee testified that the debtor said to him at the time that his object was to prefer creditors out of the proceeds, a finding to that effect will not be disturbed.

2. An insolvent debtor, who has the right to prefer certain creditors, is not required, in the exercise of that right, to convey his property directly to such creditors, but he may transfer it to a third person, and pay the proceeds to the creditors.

3. A conveyance by an insolvent debtor with the intention of using the proceeds thereof in discharge of the claims of certain of his creditors, need not be made for cash in hand.

4. The title of a purchaser in good faith of the land of an insolvent debtor is not affected by the fact that the debtor in making the conveyance intended to defraud his creditors.

5. The fact that an insolvent debtor, who conveyed his land with the avowed intention of using the proceeds in payment of the claims of certain of his creditors, did not pay such creditors, will not affect the title of the purchaser, if the purchase was made in good faith.

6. Findings of the trial court upon conflicting evidence will not be disturbed on appeal on the ground that they are against the weight of the evidence.

In bank. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Action by one Priest against Joseph Brown and others. Judgment for defendants. Plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. James A. Waymire, H. C. Campbell, and W. T. Baggett, for appellees.

DE HAVEN, J. This action was brought by the plaintiff to subject certain real property in the city of San Francisco to the payment of a judgment obtained by him against the defendant Joseph Brown on April 5, 1887, for the sum of $8,334.06 and costs of suit. It is alleged in the complaint that this real property was on October 3, 1883, conveyed by the judgment debtor to one A. M. Brown, with intent to delay and defraud the creditors of such debtor. The land was afterwards conveyed to other defendants named, in trust to secure an indebtedness owing from the said A. M. Brown to the San Francisco Savings Union. The superior court found that the deed from J seph Brown to the defendant A. M. Brown was not made with intent to defraud the creditors of Joseph Brown, and upon this finding, and others not necessary to be stated, gave judgment for the defendants. It is manifest that if the finding of the court to the effect that the original conveyance to the defendant A. M. Brown was not fraudulent and void as to the creditors of Joseph Brown is sustained by the evidence, the judgment and order appealed from must be affirmed without reference to other questions argued by counsel. It is earnestly urged in behalf of appellant that this finding is contrary to the evidence. It appears from the record that at the date of the transfer Joseph Brown was insolvent, and he testified to the effect that his object in making it was to prefer certain of his creditors. The purchaser, A. M. Brown, was his nephew. He was a captain in the United States army, with a salary of $2,000 per year, but without other property. The property transferred was substantially all the debtor, Joseph Brown, had. It had a rental value of about $1,000 per year, and the purchase price agreed to be paid therefor was $9,000, $500 of which was paid in cash, and the balance in the negotiable notes of the purchaser, maturing at different periods from 6 to 24 months from date. None of the creditors to be preferred knew anything of the transfer, and, of course, did not give their assent to it at the time, but Joseph Brown testified that he afterwards sent the notes to the persons for whom he intended them when he made the sale. The notes sent to his sister were returned to him by his direction, and one or more of the other notes again came into possession of the debtor, and these seem to be the only ones that have been paid, and they were paid to Joseph Brown out of money, the greater portion of which was obtained from the rents, and from a mortgage placed upon the property by the purchaser. The purchaser, A. M. Brown, testified, in substance, that at the time of the transfer he was informed by his uncle that his object was to prefer certain of his creditors out of the proceeds of the sale, and that he was willing to assist him in the matter by purchasing the property. In view of the direct testimony of the grantor and grantee to that effect, we cannot say that there was no evidence to justify the trial court in finding that the real intention of the debtor in making the transfer was to prefer a portion of his creditors, and that the conveyance was accepted by the defendant A. M. Brown with knowledge of this intention of his grantor. A transfer made by an insolvent debtor for such a purpose is not fraudulent in the absence of a statute making it so, and while it is true that in this state, under section 55 of the insolvent act of 1880, a conveyance made and accepted with such intent may be set aside by an assignee in insolvency, if made within one month before the commencement of insolvent proceedings by or against the grantor, still, subject to the right thus given the assignee in insolvency to defeat it, such a conveyance is unassailable. This general rule that an insolvent debtor may, when there is no bankrupt or insolvent law making a different disposition of his property, lawfully devote it to the payment of any creditor, or a part of his creditors to the exclusion of others, is thoroughly settled by numerous well-considered decisions. Dana v. Stanfords, 10 Cal. 269; Low v. Wortman, 44 N. J. Eq. 202, 7 Atl. 654, and 14 Atl. 586; Shelley v. Boothe, 73 Mo. 74; Brashear v. West, 7 Pet. 614; Giddings v. Sears, 115 Mass. 505. The same rule is embodied in section 3432 of the Civil Code, which declares: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." It is argued, however, that the facts of this case do not bring it within this rule, because the conveyance here was not made directly to the creditor, and the sale was not made for money in hand, but upon a long credit, represented by the notes of the purchaser; but we do not think these facts make any difference in the application of the rule. It is perhaps true that in most of the cases in which the question of the right of a debtor to give a preference has arisen, the transfer assailed as fraudulent was made directly to the creditor, but, in our opinion, it is not essential to its validity that a transfer for such a purpose should be made to the creditor directly. The insolvent debtor, so long as he retains control of his property, is clothed with the right to dispose of it for the bona fide purpose of providing means for the payment of any of his debts; and he necessarily has the right to determine whether the sale shall be for cash in hand or upon a reasonable credit. Nor can it make any difference whether the transfer is made directly to the creditor by way of preference, or whether the property for which it is exchanged be money or notes, to be used by him for the same purpose. This view is sustained by the following cases: Gregory v. Harrington, 33 Vt. 241; Avery v. Eastes, 18 Kan. 507; Bedell v. Chase, 34 N. Y. 387; Loeschigk v. Bridge, 42 N. Y. 421; Ruhl v. Phillips, 48 N. Y. 125. In Gregory v. Harrington the debtor sold his store and merchandise, taking the notes of the purchaser in payment therefor, and these notes he afterwards turned over to some of his creditors by way of preference; and the court held that the sale was as valid as if it had been made directly to the preferred creditors. The court said: "In this case, if the principal debtor had transferred the property itself to the same persons to whom he transferred the notes he took for it, and for the same purpose, no person would claim that he had not a perfect legal right to do so; or, if he had sold the property and taken the money for it, and had applied the money in the same manner, it would not have been fraudulent. The purpose was not to keep his property away from his creditors, but to pay it to his creditors, he exercising his legal right to prefer such as he chose. Fraud does not consist in transferring property with a view to prefer one creditor to another, but in transferring property with the intent to prefer oneself to all his creditors." It is true that in the case just cited the notes received were actually transferred to the creditors of the vendor; but the failure of the debtor to thus apply the proceeds of a sale would not defeat the title of a purchaser in good faith, who had given his negotiable notes in payment, without any knowledge that the real object of the debtor in making the sale was not to pay his debts, but simply to convert the property into something which might more effectually be placed beyond the reach of his creditors, and for his own benefit. The case is authority for the proposition that a transfer made for the purpose of preferring a creditor is valid, although the transfer is not made directly to the creditor intended to be preferred. In Bedell v. Chase, 34 N. Y. 387, the sale was made upon credit, the vendors taking the purchaser's notes, the last one due in 12 months from date, and the sale was made for the purpose of preferring creditors of the vendors. The sale was upheld. So, also, in Ruhl v. Phillips, 48 N. Y. 125, the sale was of an entire stock of an insolvent copartnership upon credit, the vendee having knowledge of the insolvency, and also of the fact that the sale was made for the purpose of preferring certain creditors of the copartnership out of the proceeds of the sale. The court in that case held that the sale was not necessarily fraudulent because the notes of the purchasers were taken in payment, or because of the intended preference which was known to the purchasers. In discussing the question of preference the court said: "The amount of the notes was not sufficient to pay all the debts of the firm, and it was the object of Many, the member thereof who made the sale, to prefer certain of their creditors, including a copartnership, [of Many, Baldwin & Many,] in the payment of debts due to them, and to indemnify them against liability on indorsements made for their accommodation. This object, although known to Phillips at the time of his purchase, did not render it fraudulent as against the plaintiff or any of the creditors who were not to be so preferred. A debtor, notwithstanding his insolvency, is allowed to make such preference if bona fide; and a sale for that purpose is not invalid." The foregoing cases all proceed upon the principle—which we deem a sound and reasonable one—that a debtor has the lawful right to prefer a creditor; and, this object or purpose being lawful, the manner in which it is to be done, whether by a direct conveyance to the creditor or by a sale to another, either for money or notes, with the intention of applying the proceeds of such sale by way of preference, is immaterial.

It is lastly urged that it was incumbent upon the vendee to see that his notes were applied in payment of the creditors to be preferred, and that, as they were not in fact so applied, or at least some of them were not, the transfer was fraudulent. We think, however, that there was evidence from which the court might have found that all of the notes were transferred to those creditors of Joseph Brown whom he desired to prefer. It is true, some of them got back into his hands in a manner which does not clearly appear; but, whatever the fact may be, whether these notes were or were not given to the creditors of Joseph Brown, the court had evidence before it upon which to base a finding that the defendant A. M. Brown believed at the time of the sale that his notes were to be used in preferring certain creditors of his uncle; and, if he so believed, he was not guilty of any fraud, whatever may have been the real intention of his grantor, and the conveyance cannot be set aside for the fraud of the grantor, in which the grantee did not participate. Bank v. Northrup, 22 N. J. Eq. 58; Foster v. Hall, 12 Pick. 89; Cohen v. Knox, 90 Cal. 273, 27 Pac. 215. Thus, in the case last cited, we said: "Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good, against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose." And of course, if, in such a case, the conveyance is valid when made, it is not rendered invalid by what the grantor may do or fail to do afterwards; if the present fraudulent intention of the grantor alone cannot defeat the conveyance, his subsequent action in furtherance of his own fraudulent design ought not to affect the rights of the grantee. The negotiable notes given by the grantee in this case constituted a valuable and adequate consideration for the transfer, and bring the transaction within the protection of the rule which upholds the conveyance, when the grantee is himself acting in good faith, and without any intention of assisting his grantor in defrauding his creditors.

We have not deemed it necessary to enter into any discussion relating to the weight which ought to be given to what the plaintiff terms "badges of fraud," and other facts appearing in this case, which he claims really outweigh the direct evidence of the defendants Joseph and A. M. Brown upon the issue as to the fraudulent character of the conveyance made by the former to the latter. At most, the matters referred to only make a conflict of evidence upon the main question involved. When this is so, it is the well-settled rule here that the finding of the trial court thereon will not be disturbed by us; and the fact that the evidence bearing in this case upon the matter embraced in the finding consists of depositions does not take the case out of the general rule thus stated. Reay v. Butler, 95 Cal. 214, 30 Pac. 208. Judgment and order affirmed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; FITZGERALD, J.

100 Cal. 664

PEOPLE v. MUNROE. (No. 20,973.)

(Supreme Court of California. Dec. 30, 1893.)

FORGERY — INSTRUMENTS SUBJECTS OF—CONTRACT AGAINST PUBLIC POLICY.

A contract which, if genuine, would be void as against public policy, may be the subject of forgery.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Munroe was convicted of forgery, and appealed. After the judgment was affirmed in department, (33 Pac. 776,) a rehearing was ordered. Affirmed.

W. E. Cox, W. T. Williams, and Edgerton & Adams, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. This case was decided in department, but, a rehearing having been ordered, it is now before the court in bank. The appellant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and order denying his motion for a new trial. It is insisted that the facts charged in the information do not constitute the offense of forgery; and that is the only matter relied upon for a reversal of the judgment which demands our attention. We will not enter into a detailed analysis of the various parts of the writing which is the subject of the forgery here charged, but will view it from the standpoint of appellant's claims, and, for the purposes of this investigation, will concede the writing to be an assignment or sale of the unearned salary of a public school teacher for the next ensuing month, together with an order upon the city auditor of Los Angeles for the warrant representing such salary. That being the fact, it is further claimed that Helen Henry, the purported author of the writing, being a public school teacher, is a public officer, and that the sale or assignment of an unearned salary by a public officer is void, being against public policy, and, the writing being void, it cannot be the basis of a charge of forgery. The information charged that this writing was forged and passed by the defendant with intent to defraud one J. W. Jackson; the evidence disclosing that the writing was assigned to Jackson for a valuable consideration, and that subsequently the warrant was delivered to him by the auditor, and the money paid thereon by the treasurer. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any charter, [then follows a list by name of almost every conceivable kind and character of writing,] is guilty of forgery." Upon a strict construction, it might in good reason be held that the foregoing definition of forgery curtails the elements necessary to be present in order to constitute the offense, as contradistinguished from forgery recognized by various writers upon criminal law. Under our statute we hold burglary to be an entry into a building with intent to commit larceny; and, upon the same lines, it might be held that forging a writing with intent to defraud another is forgery; and, indeed, it is apparent that the character of the writing is quite insignificant, when placed in the balances opposite the other element,—the intent to defraud. But we will take broader ground, and concede the essential ingredients of the crime of forgery to be (1) a false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing. People v. Frank, 28 Cal. 514; People v. Tomlinson, 35 Cal. 506; Ex parte Finley, 66 Cal. 263, 5 Pac. 222. There is some general language in the Tomlinson Case, taken very probably from People v. Shall, 9 Cow. 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals.

Appellant's counsel has cited many cases to the effect that a contract against public policy is illegal and void, and has no standing in courts. He has also cited cases to the effect that a void contract cannot be the subject of forgery. But he has cited no case to the effect that a contract against public policy is not the subject of forgery, and, after diligent examination of authorities, we have failed to find a case to that point, and this court is not willing to be the first judicial body to declare such a doctrine. It would serve no useful purpose to review in detail the cases cited by counsel holding that void contracts are not the subject of forgery. Many of them are cases of nudum pactum, and others follow the very extreme doctrine laid down in People v. Shall, supra, where the learned judge said: "I agree that a man ignorant of the technical requirements of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory. But legal forgery cannot be made out without imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime,—upon criminal breaches of professional obligation." It is sufficient to say that this language carries the principle to limits which we cannot follow. The more liberal doctrine, and the doctrine which, in the interests of good government, should be sustained, is declared in People v. Krummer, 4 Parker, 219, where the court says: "We are never called upon to determine whether, in legal construction, the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." There is no question but that a writing which is a nudum pactum is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a "nudum pactum." A forged contract, even though it covers a subject-matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and thus it satisfies the test which we have laid down. The contract may be such that there would not only be a possibility of its injuring another, but a very strong probability of such injury; for there are many contracts against public policy which, upon their face, present a most innocent and most inviting appearance. Even though a contract presented to a court of justice would be declared void as against public policy, yet aside from that fact it may have a pecuniary value to its owner. It could have such a value as that the theft of it would be the subject of larceny; and it would be anomalous to hold an instrument the subject of larceny, and yet its counterfeit not of sufficient value to form the basis of a charge of forgery. If the stealing of the genuine instrument would be larceny, surely the false making of such an instrument would be forgery. To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a carte blanche to the professional forger, of which he would not be slow to take advantage; and hereafter he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy, for he would thereby be enabled to make a very respectable living,—respectable as to the size of his income, and respectable in that such acts would be no crime.

Contracts against public policy cover a multitude of subjects, and in many cases the determination of their character in this regard calls for the exercise of the nicest discrimination from the most learned judges. From the face of the contract itself, courts will disagree as to its validity or invalidity. All things which are opposed to moral precepts may be said to be against public policy, and thus we have a great and uncertain field opened up before us. Contracts pertaining to restraint of trade and competition in business have been entered into by parties in the utmost good faith, believing that they were making valid contracts, and upon considerations of the gravest character; and still those contracts subsequently have been declared to be invalid as against public policy. It cannot be contended for a moment that such contracts could not be forged. Suppose a contract contained a covenant upon the part of a competing dealer that he would not again engage in business within the state of California. Thus we have a covenant clearly void under our Code, as being in restraint of trade; yet we think such a contract is the subject of forgery. Certainly, that character of instrument might be well calculated to defraud the tradesman still remaining in business. He might be willing to pay large sums of money for that agreement, well knowing at the time that he could not enforce it in law, but knowing his man, and believing the covenants would be considered binding by the party making them, and that no attempt would ever be made to evade them. Such an agreement is of full value until denied. It answers every purpose of its creation until that time, and perchance it may never be denied. The foregoing principle is fully illustrated in Com. v. Pease, 16 Mass. 91. The defendant was charged with theftbote, defined by Blackstone as where a party robbed not only knows the felon, but also takes his goods again, or "other amends," upon agreement not to prosecute. The offense is here recognized as compounding a felony. The question in that case was, would a promissory note of the defendant satisfy the term "other amends?" Parker, C. J., said: "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received; but there seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed."

Obligations ultra vires stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are public records, form the limitation of their powers. Thus the world deals with corporations with a knowledge of the extent of their powers, and ignorance of the law forms no defense to the plea of ultra vires. If this appellant's position be sound, all contracts of corporations which are ultra vires are not the subject of forgery. Neither would bonds of municipal corporations which are ultra vires form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence, and, if ultra vires contracts may not be forged, a rich field for the successful practice of fraud is presented to the forger. In State v. Eades, 68 Mo. 150, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. Vilhac v. Railroad Co., 53 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained upon more substantial grounds. As to what contracts are against public policy, or ultra vires, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view. For the purposes of the case, we conceded at the outset that this instrument would be declared void by a court as against public policy; but, if that question were a live issue in the case, this contract might be declared valid upon the ground that a teacher in the public schools is not a public officer. Certainly, the law as to that point is not so plain but that an ordinary layman, in the exercise of the greatest care, might not be defrauded in taking an assignment of a public school teacher's unearned salary.

There is a further view to be taken of this question, which is also fatal to appellant's claims, and which was incidentally touched upon in noticing the Pease Case. Aside from the nonenforceable character of this contract in a court of justice, it has an inherent, substantial value. It is said in Morton's Case, 2 East, P. C. 955, "That, though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him." It cannot be said that a contract has no value because you have no standing in court to enforce it. Who can say in advance that the money will not be voluntarily paid, as agreed upon by its terms? Who can say that Helen Henry would not have lived up to the very letter of this instrument, if it had been her genuine contract? If her word is as good as it should be; if her conduct of the affairs of life is actuated by those principles of truth and justice which surely should be found in the breast of every teacher in our public schools,—then her act and deed, as evidenced by a writing such as is present in this case, would be a valuable instrument to the holder thereof; just as valuable as though it were enforceable in the courts of the land. If a genuine instrument signed by Helen Henry similar to the forged one found in this case possessed such value, the conclusion is irresistible that the forged paper was such as might defraud another. Again, if the paper had been the genuine act of Helen Henry, and upon the strength of her signature the proper officer had paid the amount it called for to Jackson, the legal holder thereof, however invalid the writing may have been as against public policy, the money would have been beyond the reach of Helen Henry forever. She could not have recovered it from the officer paying it out, or from Jackson who received it. Her mouth would be closed to assert ownership in herself. The writing would serve as a perpetual barrier to the recognition by courts of any claim upon her part; and, for this reason also, the instrument was of such value as to make it the foundation of a charge of forgery. It is ordered that the judgment and order be affirmed.

We concur: McFARLAND, J; PATERSON, J.; HARRISON, J.

De HAVEN, J. I concur in the judgment. The writing alleged to have been forged is one which, if genuine, would be void, because against public policy; but nevertheless such a writing is, in my opinion, the subject of forgery.

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100 Cal. 617

DOLBEER v. LIVINGSTON et al. (No. 19,246.)

(Supreme Court of California. Dec. 30, 1893.)

ESTOPPEL—SIGNING BLANK BOND.

G. signed and delivered a bond to L., knowing that L. expected to obtain the charter of a steamer, and give the same as security therefor. At the time he signed, the date and name of the steamer and name of the payee were left blank, and the blanks were afterwards filled in by L., and the bond delivered to plaintiff, who received it in good faith. *Held*, that G. was estopped from denying the validity of the bond.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by John Dolbeer against J. B. Livingston and W. M. Ginty. From a judgment for plaintiff, defendant Ginty appeals. Affirmed.

C. H. Rippey, for appellant. McNealy, Trippet & Neale, Oscar Trippet, and Trippet, Boone & Neale, for respondent.

BELCHER, C. On July 3, 1890, the plaintiff entered into a written agreement with the defendants, J. B. Livingston and W. H. Clarke, under the firm name of Livingston, Clarke & Co., whereby he leased to them the steamer Farallon for a certain time, commencing July 8, 1890, and upon certain terms and conditions, and, to secure performance of the terms of the agreement on their part, the said defendants delivered to the plaintiff a bond signed by themselves as principals, and by W. M. Ginty and W. H. Clarke as sureties. The plaintiff commenced this action on the said bond, alleging that Livingston, Clarke & Co. had failed to pay the full amount of money due under the charter party for the use of the steamer, and demanding judgment against all of the defendants for the amount so due and unpaid, with interest thereon. The defendant Ginty answered the complaint, and denied that he, as a surety or otherwise, executed to the plaintiff, or at all, the bond sued upon. Upon the issue thus raised the case was tried by the court, without a jury, and judgment given for the plaintiff, as prayed for. From this judgment, Ginty appeals on the judgment roll, and the only point made for a reversal is that the judgment against him is not supported or warranted by the findings.

The court found, among other things, as follows: "That the defendant W. M. Ginty signed and executed the bond set out in said complaint, and marked 'Exhibit B,' and delivered the same to the defendant Clarke, to be delivered as security for any charter party which he or the said Livingston, Clarke & Co. might desire to make; it being then expected that the said Livingston, Clarke & Co. would procure a charter party for one or two steamers,—the Farallon being preferred,—it being known to said parties that the plaintiff was the managing owner thereof. That at the time said bond was signed by the said Ginty the names 'John Dolbeer' and 'Farallon' and the date, 'July 8, 1890,' were not inserted therein, but places therefor were left in blank, and the same was delivered to said Clarke with said blanks; and said blanks were filled in, respectively, with the names 'John Dolbeer,' 'Farallon,' and 'July 8, 1890,' by the said Clarke, before said bond was delivered to the said John Dolbeer. That upon execution of the charter party said bond was delivered to said plaintiff by said Clarke, with said blanks filled in, and said bond appeared to be all right, and all appeared executed in regular form, and, there being nothing upon the face of said bond to excite the suspicion of said plaintiff or any reasonable person, said bond was accepted by the said plaintiff, in good faith, as security for the performance of said charter party as in said bond provided; and thereupon, upon the faith of said bond and said charter party, said steamer Farallon was delivered to the said Livingston, Clarke & Co., as hereinbefore found. That said defendant W. M. Ginty never gave the said Clarke, or any other person, any written authority to fill in said blanks, other than might be implied from his signing said bond, which was regular in all other respects, except said blanks; it being expected and understood by him at the time that the said Livingston, Clarke & Co. would procure a charter party, and that the bond signed by him should be given as security for the same, and it being particularly expected and understood that the steamer Farallon would be chartered of the plaintiff; and with such understanding and expectation the said bond was signed by the said Ginty, and delivered to the said Clarke." Appellant contends that, when the paper in question was signed and delivered by him to Clarke, it was not a bond or instrument imposing any obligation upon him, because of the blanks left in it, and could never become such unless express authority was given to fill the blanks, and that, as no such authority is found to have been given, his plea of non est factum should have been sustained; and in support of this contention he cites, and chiefly relies upon, the cases of Upton v. Archer, 41 Cal. 85, and Arguello v. Bours, 67 Cal. 447, 8 Pac. 49. Respondent, on the other hand, contends that, under the facts found, appellant is estopped to deny that the bond, as delivered to Livingston, Clarke & Co., was a valid instrument, duly executed, and binding upon him, as a surety thereon.

In our opinion, all the elements necessary to create an estoppel are shown here, and respondent's contention should therefore be sustained. It is clear that, when appellant signed the bond, he knew Livingston, Clarke & Co. were seeking to obtain a charter party of a steamer and expected to charter the Farallon from respondent, and give the bond as security therefor; and it was with the expectation and understanding that all this would be done and accomplished that he signed and delivered the bond to Clarke, who was a member of the firm. Now, if he did not intend that Clarke should fill in the blanks, and deliver the bond to respondent, when the trade was completed, then he was guilty of negligence and bad conduct, in putting it in the power of Clarke to mislead and deceive respondent. That respondent received the bond in good faith, having no means of knowing, or reason to suspect, that it was not properly executed, is clear; and, if appellant can now escape liability thereon, it must be in disregard of the maxim of law that, "When one of two innocent persons must suffer by the acts of a third, he by whose negligence it happened must be the sufferer." Civil Code, § 3543. The general rule is that "where a person, by word or conduct, induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." 7 Amer. & Eng. Enc. Law, p. 19. "Estoppel in pais may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Bigelow, Estop. (4th Ed.) 445. "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by such adversary claim." Scott v. Jackson, 89 Cal. 258, 26 Pac. 898. Under these authorities—and many more might be cited to the same effect—the appellant must be held estopped from questioning the due execution by him of the bond in suit.

The cases cited by appellant are not in point. In Upton v. Archer the plaintiff executed a deed of certain real property, leaving a blank for the insertion of the names of the grantees. An agent, with whom the deed was left, sold the property to the defendant, inserted his name in the blank, and delivered it to defendant as the plaintiff's deed. Plaintiff refused to recognize the sale, or receive the purchase money; and it was held that, under the statute of frauds, the agent had no power to fill the blank without authority in writing to do so. This was upon the ground that the deed was a sealed instrument, but all distinctions between sealed and unsealed instruments are now abolished in this state. Civil Code, § 1629. In Arguello v. Bours the plaintiff executed a deed with a blank for the name of the grantee. The deed came into the hands of Bours, and by his direction, in the absence of Arguello, and without any authority from him, one Inglis wrote Bours' name in the blank, and thereupon Bours took the deed, and filed it for record. In neither of these cases was there any claim that the plaintiff was estopped, and in the last-named case, certainly, no such claim could have been set up. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

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4 Cal. Unrep. 424

PEOPLE v. SANDS. (No. 15,369.)[1]

(Supreme Court of California. Jan. 3, 1894.)

JUSTICES OF THE PEACE—FILLING VACANCIES.

1. City justices of the peace are not township or county officers, and the board of supervisors has no authority to fill vacancies therein.

2. Although inferior courts in incorporated cities can only be established by the constitution, (article 6, § 1,) and their jurisdiction, powers, and duties must be fixed by the legislature, (Const. art. 6, § 13,) still a valid provision for filling vacancies may be made by charter.

3. Under a charter providing that the mayor shall appoint suitable persons to fill vacancies in office, he is empowered to fill vacancies in the offices of city justices of the peace.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action in the nature of quo warranto by the people, on the relation of Fred V. Wood, against John A. Sands. From a judgment for plaintiff, defendant appeals. Reversed.

Davis & Hill, for appellant. W. H. H. Hart, Atty. Gen., Jas. C. Martin, and A. A. Moore, for the People.

HAYNES, C. This is an action in the nature of quo warranto, brought by the people on relation of Fred. V. Wood against John A. Sands to try the title of the relator and the defendant, respectively, to the office of city justice of the peace of the city of Oakland. The office became vacant by the resignation of the prior incumbent, and the mayor of the city, acting under the "freeholders' charter," appointed the defendant to fill the vacancy. Sands thereupon qualified, and entered upon the duties of said office. The board of supervisors of Alameda county, assuming that the power of appointment to said office was vested in them, appointed the relator to fill the same vacancy, and he also qualified, and demanded possession of the office. The cause was submitted in the court below upon an agreed statement of facts, which was adopted as a finding, in which it is conceded that each of these persons possesses all the qualifications required by law, and that the sole question is as to where the power of appointment to fill said vacancy is vested. The superior court held that said power was vested in the board of supervisors, and gave judgment in favor of the relator, Wood, and defendant, Sands, appeals therefrom.

Appellant contends that a city justice of the peace is a city officer, and that under the charter of the city the mayor is empowered to fill all vacancies in city offices. If a city justice of the peace is a city officer, the provision of the charter is sufficient in its terms to authorize an appointment by the mayor to fill the vacancy. Its language is as follows: "The mayor shall have the power to appoint suitable persons to fill vacancies in any office, except as in this charter provided." St. 1889, p. 570, § 202. The exception does not affect this case. The contention of respondent, briefly stated, is that city justices are not city officers, but are officers designated by the constitution, and exercising a part of the judicial power therein provided for; that, even if the power of appointment to a vacancy is not enumerated in the general permanent powers of the board of supervisors, a general provision gives them such other power, and charges them with such other duties, as are or may be imposed upon them by law; and among these is the power and duty imposed by section 111 of the Code of Civil Procedure, which reads as follows: "If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term." These provisions, however, cannot be held to give the board of supervisors the power to fill the vacancy in question, if the office of city justice is a city office. Section 103 of the Code of Civil Procedure, as amended by the act of March 31, 1891, (St. 1891, p. 456,) provides that there shall be at least one justice of the peace in each township, elected by the qualified electors of the township, and gives the board of supervisors authority, when, in their opinion, the public convenience requires it, to establish two justices' courts in townships; and further provides: "In every city having fifteen thousand and not more than thirty-four thousand inhabitants there shall be one justice of the peace, and in every city having thirty-four thousand and not more than one hundred thousand inhabitants, two justices of the peace, to be elected in like manner by the electors of such cities respectively, and such justices of the peace of cities, and justices' courts of cities, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. No person shall be eligible to the office of justice of the peace in any city having over fifteen thousand inhabitants who has not been admitted to practice law in a court of record; * * *. Every justice of the peace in any city having over fifteen thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold court. All fees which are by law chargeable for services rendered by such justices of the peace in the cities aforesaid, shall be by them, respectively, collected, and on the first Monday in each month every such city justice of the peace shall make report, under oath of the city treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof." Here it will be seen that not only are different designations given to justices in cities and townships, but that different qualifications are required; that, as to township justices, the board of supervisors have the power to increase the number from one to two, but are charged with no duty, discretion, or power in regard to city justices; that the number and the salary of city justices are definitely fixed by the legislature; that the city must provide suitable places for holding their courts; that the city justices must report to the treasurer of the city, and pay over all fees collected; and by another statute the salary of the justice must be paid by the city. The same distinctive appellation is given in numerous other statutes; as in the municipal government act, sections 390, 397, 402, (Pol. Code, pp. 794, 795;) and also by the act of March 18, 1885, (St. 1885, p. 213.)

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[1] Rehearing granted.

In the county government act, approved on the same day as the above amendment of section 103, Code Civil Proc., it is declared that "the officers of a township are two justices of the peace, two constables, and such inferior and subordinate officers as may be provided by law or by the board of supervisors; provided that in townships containing cities in which city justices are elected, there shall be but one justice of the peace." St. 1891, p. 314, § 58. It is obvious that the local character of justices of the peace is not denied by any provision of the constitution, while all the statutes relating to their election and jurisdiction characterize them as local officers; and if justices of the peace elected by electors of a township, and exercising their jurisdiction therein, make them township officers, as declared by the foregoing statute, it is difficult to perceive why a justice elected by the electors of a city, and exercising his jurisdiction therein, is not a city officer. The constitution and statutes clearly distinguish between county organizations and governments and city organizations and governments. Each have distinct legislative bodies and executive officers. Nowhere is any duty or authority vested in the board of supervisors over municipal matters or officers, except in the case of consolidated city and county governments.

By still another act, approved March 31, 1891, (St. 1891, p. 292,) are city justices recognized as city officers. It is there provided that "the judicial power of every city having thirty thousand and under one hundred thousand inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor, * * * and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police courts." The police court is given by said act exclusive jurisdiction of certain violations of the criminal laws of the state committed within the city, and is also given other powers concerning the violation of the criminal laws of the state, while sitting as a police court; and in a certain class of cities, of which Oakland is one, a clerk is given said court, whose salary is paid by the city, and of whom a bond, to be approved by the mayor, is required; and the city justices, as well as the clerk, are required to report and account to the city; and by section 305 of the municipal corporations act (Deer. Pol. Code, p. 786) vacancies in city offices are filled by the council upon nomination made by the mayor.

The charter of the city of Oakland provides for a police court, to be held by a police judge to be elected by the city, and also provides for the election of two city justices of the peace, but provides that the justices' courts therein provided for are intended to be the justices' courts provided for by general law, and that there shall be only two justices of the peace in said city. In Ex parte Ah You, 82 Cal. 339, 22 Pac. 929, it was held that the police court provided for by the freeholders' charter of the city of Oakland has no legal existence; and in People v. Toal, 85 Cal. 333, 24 Pac. 603, the same conclusion was reached touching a similar provision in the charter of the city of Los Angeles. In each of these cases there was a dissenting opinion, but they have not been overruled, and are therefore authoritative. It follows, therefore, that the act of March 31, 1891, (St. 1891, p. 292,) is in force in the city of Oakland. But it does not follow that, because inferior courts in incorporated cities and towns can only be established by the legislature, under section 1 of article 6 of the constitution, and that their jurisdiction, powers, duties, and responsibilities must also be fixed by the legislature under section 13 of the same article, a valid provision for filling vacancies in city offices may not be made in the charter. Such provision in no way trenches upon the constitutional provisions above cited relating to establishing inferior courts and fixing their jurisdiction; nor can it affect the question that city justices are provided for in the general municipal government act and in the Code of Civil Procedure. They are local officers, elected by the electors of the city, with qualifications different from that of township justices, and adapted to the wants of the city and the requirements of its business, with a special jurisdiction added that is purely municipal. If the naming of officers and prescribing their duties by the legislature can make them other than municipal officers, then the mayor and other officers, who are named in the municipal government act, and whose powers and duties are therein prescribed, are not municipal officers. But it is clear that city justices are not township or county officers, and, if so, it is equally clear that the board of supervisors has no authority to fill the vacancy in question. I advise that the judgment appealed from be reversed, with directions to the court below to enter judgment upon the findings in favor of appellant, and that he be restored to his said office.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below is directed to enter judgment upon the findings in favor of appellant, and that he be restored to his said office.

101 Cal. 26

KENNA v. CENTRAL PAC. R. CO. (No. 14,246.)

(Supreme Court of California. Jan. 3, 1894.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for causing the death of plaintiff's intestate, the court properly granted a nonsuit for the contributory negligence of deceased, where plaintiff's evidence shows that deceased was at work on a tower which stood between two tracks; that his work bench was between the tracks, 75 feet from the tower; that trains ran on such tracks every 15 minutes; that he knew of the danger; that in going from the tower to his bench he walked on the track; that, after he could have seen an approaching train which had passed the tower, he walked 15 feet without turning around to look, and was struck and killed; and that he could have seen his danger, and could have avoided it by a single step into the open space between the tracks.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Kenna, as administrator of Patrick Fallon, deceased, against the Central Pacific Railroad Company, for negligently causing the death of plaintiff's intestate. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Frank Sullivan, for appellant. Frank Shay, for respondent.

HARRISON, J. Action to recover damages for causing the death of Patrick Fallon, the plaintiff's intestate. At the close of the plaintiff's testimony the court granted a nonsuit. The plaintiff moved for a new trial, and from the order denying the same, as well as the judgment, he has appealed.

In January, 1885, the defendant was engaged in erecting a tower on the Oakland mole, and constructing a signal system to be connected therewith. The plaintiff's intestate was employed by the defendant as a plumber, for fitting and connecting pipes to be laid in the tower and alongside its tracks. This tower was about 400 feet from the end of the mole, and a few feet to the south of the Alameda track. There were two tracks for the Alameda trains, and to the north of them were the tracks of the Oakland trains. Between these tracks, and about 100 feet to the east of the tower, there was an open space, in which was placed the plumber's bench. On the 10th of January, Fallon started to go from the tower to this bench for the purpose of cutting a piece of pipe, and while walking upon the end of the ties on the outer or southernmost track, at a point about 75 feet east of the tower, was struck in the back by the locomotive of the Alameda train, and instantly killed. Directly to the south from this place, and 10 feet away, was a pile of ties against which he was thrown, and between this pile and the ends of the ties on which he was walking was an open space or depression in the ground, slightly uneven, and a little lower than the level of the track. The track at this place is laid upon a curve, and the tower aforesaid prevented a clear view of it to the end of the mole, but, from the point at which the deceased was walking at the time he was struck, it could be seen for a distance of about 150 feet. Four trains of cars passed over this track every hour, that is, one Alameda train in each direction at intervals of a half hour, and, in addition to these, the daily San Jose and Livermore trains. It appears from the evidence that the bell upon the locomotive which struck the deceased was not rung, nor was its whistle sounded. There is some uncertainty as to the speed at which it was moving; for, although plaintiff's witness testified that it was going at the rate of 20 miles an hour, the weight and accuracy of his testimony is somewhat impaired by his further testimony that when the train was opposite the tower the deceased was 60 feet away, and that he had walked 15 feet before he was struck by the locomotive. It may be assumed, however, that the defendant was guilty of negligence to such a degree that, in the absence of any other evidence, it would be liable in damages, but the contributory negligence of the deceased was, nevertheless, such as to prevent a recovery against the defendant. It appears from the evidence that Fallon was a prudent, cautious man, 22 years old; that he knew the danger of the place in which he was working; had talked with his uncle about it; had had the experience of several days in which to learn the frequency with which the trains passed over the track, and to become acquainted with the danger; and that owing to the curve in the track, and the obstruction caused by the tower, he could not see an approaching train until it came within a few rods of him. It was therefore incumbent on him to exercise a corresponding care and vigilance to avoid danger, rather than negligently and recklessly expose himself to injury. "His employment and the theater of his services may not be disregarded. They made him conversant with the locality, the character and frequency of trains, the necessity for incessant vigilance to avoid injury, and the fact that no one could venture upon the tracks, and escape injury, without the greatest circumspection." Bresnahan v. Railroad Co., 49 Mich. 413, 13 N. W. 797. The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule. Walking upon the line of a railroad where trains are at any time liable to pass is itself dangerous, and to do so without looking to see whether a train is approaching, is negligence per se. It is a fixed rule that it is the duty of any one, when attempting to cross a railroad track upon a highway, to be vigilant,—to look and to listen before attempting to cross; and a failure to do so is regarded as such negligence on his part as to preclude a recovery. Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow him. "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter. The crossing of the track of a railroad is a different thing. The one is unavoidable, but in the other case he voluntarily assumes to walk amid dangers constantly imminent." Railroad Co. v. Hall, 72 Ill. 222. See, also, Austin v. Railroad Co., 91 Ill. 35; Roden v. Railroad Co., 133 Ill. 72, 24 N. E. 425; McAllister v. Railroad Co., 64 Iowa, 395, 20 N. W. 488; Delaney v. Railway Co., 33 Wis. 76; Railroad Co. v. Depew, 40 Ohio St. 121; O'Donnell v. Railroad Co., 7 Mo. App. 190; Schmolze v. Railway Co., 83 Wis. 659, 53 N. W. 743, and 54 N. W. 106; Baltimore & O. R. Co. v. State, 69 Md. 551, 16 Atl. 212; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835; Holmes v. Railroad Co., 97 Cal. 161, 31 Pac. 834. The deceased, in the present instance, selected the track as his route for his own convenience, and not through any necessity. There was ample space for him to walk in safety and convenience between the track and the pile of tiles. The only reason assigned for his not doing so is that it was not quite as convenient as the track, because it was uneven. It also appears that there was a sufficient space between the Alameda tracks and the Oakland tracks in which to place the plumber's bench, and no reason was shown why he did not cross the tracks at the tower, and go upon the north side of the Alameda tracks. "He voluntarily and needlessly put himself in a highly dangerous place; a place, however, where he might go without incurring any liability as a wrongdoer, but where his own safety required his attention to his surroundings without one moment's interruption. If he risked himself in such a place, he must take whatever injury came from his own want of attention to his danger." Railroad Co. v. Depew, 40 Ohio St. 127. If there were any circumstances which would excuse the apparent negligence of the deceased in walking upon the track without taking any precaution to avoid danger, it was incumbent upon the plaintiff to establish them at the trial. When the facts are undisputed, and the plaintiff's negligence clearly appears therefrom, or when the uncontradicted evidence on the part of the plaintiff is such that the only reasonable construction that can be drawn therefrom is that the injured person did not exercise such care as men of ordinary prudence usually exercise in positions of like exposure and danger, the issue of negligence is a question of law to be determined by the court. There is no issue of fact to be submitted to the jury, but it is the duty of the court to grant a nonsuit. Flemming v. Railroad Co., 49 Cal. 253; Glascock v. Railroad Co., supra. In the present case the facts connected with the killing of Fallon were presented by a single witness on behalf of the plaintiff, and his testimony was clear and unequivocal that, when the train passed by the tower, Fallon could have seen it if he had turned around; that he had time to turn around and look before the engine struck him; that he walked 15 feet after the engine came within the range of view; that he did not turn around and look—did not look at all—to see if the train was coming; that there was a space of 10 feet between the track on which he was walking and the pile of ties, where he could have stepped, and over which he could have walked, instead of walking upon the track; that he could have got out of the way of the engine by stepping a single step into this space. These facts appearing in the plaintiff's testimony, and nothing to impair their effect, the court properly granted the nonsuit. The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.

(101 Cal. 42)

NATOMA WATER & MIN. CO. v. HANCOCK et al. (No. 14,847.)

(Supreme Court of California. Jan. 5, 1894.)

WATERS AND WATER COURSES—RIGHTS IN STREAMS ON PUBLIC LANDS—DIVERSION OF SURPLUS.

The appropriator of water, who constructs a dam across the bed of a stream in public lands for the purpose of raising the surface of the water to a level which will cause it to flow into his canal, does not thereby acquire such exclusive right in the bed and banks of the stream as entitles him to restrain a subsequent appropriator of the surplus water from tapping the stream for its diversion at a point above the dam and below the head of slack water. McFarland and De Haven, JJ., dissenting. 31 Pac. 112, reversed.

In bank. Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

Action by the Natoma Water & Mining Company against John Hancock and Joseph Wild for an injunction. There was judgment for plaintiff, and defendants appeal. Reversed.

For opinion in department, see 31 Pac. 112.

Barclay, Wilson & Carpenter, J. G. Blanchard, and S. Solon Holl, for appellants. Daniel Titus, for respondent.

BEATTY, C. J. This is in action to enjoin the appellants from diverting water from the south fork of the American river at a point immediately above the dam of the respondent, and the principal question involved in the case may be stated as follows: If a prior appropriator of water constructs a dam across the bed of a stream, for the purpose of raising its surface to a level which will cause it to flow into the head of his ditch, does he thereby acquire such an exclusive right in the bed and banks of the stream as far as the slack water extends above his dam that he can enjoin a subsequent appropriator of the surplus from tapping the stream, and diverting such surplus at any point above the dam and below the head of the slack water? The decree of the superior court, from which the defendants appeal, cannot be sustained without affirming this proposition, as will clearly appear from a statement of the case.

The south fork of the American river is a considerable stream heading in the high Sierras, and like other mountain streams varies greatly in volume from year to year and from season to season. It reaches its lowest stage in each year towards the end of the dry season, and when the rains begin (usually in the fall) its flow increases in proportion to the amount of precipitation. Ordinarily, it reaches its highest stages during the winter and early spring, at which period it is subject to heavy floods. After the rains cease in the spring its volume subsides, but its flow is maintained by the melting snows at a comparatively high stage until the latter part of the summer. These are features common to all the streams flowing from the Sierras to the Sacramento valley, and are matters of universal notoriety. Such being the case, it is evident that an appropriation covering the entire flow of the stream at its lowest stages may leave a large surplus of water at flood, or even ordinary stages. The plaintiff in this case in the year 1851 gave notice of his intention to divert and appropriate, for the purpose of placer mining and irrigation, enough of the waters of the south fork to fill at all times a canal 8 feet wide and 4 feet deep, with a current running 10 miles per hour. In pursuance of this notice it proceeded to construct a canal 10 or 15 miles in length, but not of the capacity mentioned in its notice. Its present capacity, as found by the court, is 6 feet wide at the bottom, 8 feet wide at the top, 3 feet deep, and with a grade or fall of 4 feet to the mile. In seasons when the water has been unusually low in the dry summer months, the capacity of the canal was sufficient to take all the water of the river, but ordinarily, at the lowest stages of the stream, considerable quantities of water are discharged over the dam after the canal is filled. The system of head works by which the plaintiff diverts water from the river is of the ordinary type. The upper section of the canal, for a distance of about 300 yards, is of considerably greater capacity than the canal proper, and is furnished with waste gates and sand gates for the discharge of silt and surplus water. At the lower end of this larger section, and at the head of the canal proper, is a gate, by which the influx of the water is controlled. By means of a dam across the stream a short distance below the head of the canal, the water is raised to the proper level to fill it. This dam, which is of stone, is about 300 feet long on its crest. Neither the findings nor the evidence show what its height is; but, according to the only testimony on the point, it sets back the water about three-quarters of a mile,—say 3,000 feet, or 10 times the width of the dam, and 20 times the mean width of what plaintiff calls its pond. The crest of the dam is about 10 inches lower than the level at which the water must be held in order to turn a full supply into the head of the plaintiff's canal, and it appears from the evidence that the dam cannot be made permanently higher without endangering the head of the canal and its banks in times of flood. Ordinarily, the amount of water flowing in the stream is so large that the permanent dam holds it at a sufficient height for plaintiff's purposes, but, as the water falls with the advance of the dry season, and especially during years of extraordinary scarcity, it is necessary to add a false crest of lumber or riprap and gunny sacks, by which the dam is raised so as to prevent any water from passing over it.

Disregarding some minor facts, and some qualifications which it will be more convenient to state in connection with another branch of the case, it may be said that the foregoing statement applies to the whole period of time from the completion of the plaintiff's dam and ditch, in 1852 or 1853, down to the trial of this action. The plaintiff has at all times diverted water to the full capacity of its canal, and applied the whole of it to beneficial uses, for mining and irrigation. It still requires, for irrigation and other useful purposes, all the water so diverted, and, as against a subsequent appropriator, has an undoubted right to continue such diversion unmolested and undisturbed, except in so far as a lawful appropriation and diversion of the surplus at a point above its works may involve the necessity of altering and perfecting the appliances which have thus far proved sufficient to fill its ditch. The question is whether it is any infringement of this right of plaintiff for the defendants, in order to appropriate the surplus and divert it to an irrigating ditch on the opposite side of the river, to tap the stream above the dam and below the head of the slack water. There can be no question, as between the parties to this action, that the defendants have a perfect right to appropriate such surplus by any lawful means of diversion; and the only question is whether the plaintiff can shut them out from access to the stream at all points between the upper and lower ends of what counsel call its pond. The plaintiff's canal is on the south side of the river. The defendants, or some of them at least, are successors in interest to the owners of a mining and irrigating ditch on the north side, which was originally constructed and used as early as 1854, and was known as the "Boyd's Bar Ditch." In March, 1854, the plaintiff entered into a written agreement with the proprietors of the Boyd's Bar ditch, by which it granted to them the right to "put in, insert, and maintain in the dam of said Natoma Water and Mining Company" a box of sufficient size to supply their ditch, reserving the right, in case of a deficiency of water to fill its own canal, to close the gate of the Boyd's Bar ditch, and keep it closed while such deficiency continued. In pursuance of this agreement the predecessors of defendants put in a box two feet square on the north side of the river, and a few feet above plaintiff's dam, through which they have ever since drawn water to supply their ditch. In 1887 the defendants posted a notice of their intention to enlarge their ditch to a capacity of 2,000 inches, the diversion to be made at the Natoma dam. In accordance with this notice they had completed the proposed enlargement up to within a short distance of the dam, when this action was commenced for the purpose of enjoining them from "completing the construction of said ditch, and tapping the said south fork of the American river at the plaintiff's dam, and from taking water therefrom, or from any point above said dam," etc. The enlarged ditch of defendants was of sufficient capacity to carry all the water of the south fork at its lowest stages in a dry year, and, its level being some 10 inches lower opposite the dam than that of plaintiff's canal, it would have been in the power of the defendants upon the completion of their ditch to drain the stream, and deprive plaintiff of all or of a great part of the water to which it is entitled. But they have at all times disclaimed any intention of taking any but the surplus water over and above the quantity to which the plaintiff is entitled by its prior appropriation. In their posted notice of intention they say nothing about surplus water, but by their answer to the complaint in this action, by their testimony at the trial, and by their declarations pending and prior to the commencement of the action, they have uniformly insisted that they have no intention to divert any but the surplus water. There is no finding that they have any other intention, and no evidence upon which such a finding could be sustained. The court, however, does find that, "in order to draw the surplus from plaintiff's dam without taking the water from plaintiff's canal, it would be necessary to raise plaintiff's dam from 22 to 24 inches higher, and also to raise the banks of plaintiff's canal." This finding, and the fact that defendants upon completion of tneir ditch would have the power to drain plaintiff's canal, are the sole grounds upon which the superior court has enjoined the defendants from completing their ditch, and it only remains to consider whether they are sufficient to uphold the decree.

It is to be observed, in the first place, that the defendants are not in any worse position than they would be if they had not succeeded to the rights of the original owners of the Boyd's Bar ditch under the contract of 1854. Claiming, as they do, the privilege granted by that contract, they must concede, as they do concede, the prior right of the plaintiff to all the water carried by its canal at the date of the contract; but as to the surplus they stand upon the same footing as other citizens, and may, like others, appropriate it by any lawful means. This, indeed, is not disputed, and the contention of counsel here is for the identical proposition enunciated in the findings and conclusions of the superior court,—that no subsequent appropriator can tap the stream above the dam and within the slack water, because, if he did, it would be in his power to drain plaintiff's canal; and, even if he strictly limited his diversion to the actual surplus, it would compel the plaintiff to raise its dam and the banks of its canal. As to this last finding it is not sustained by the evidence, because, although there is some slight testimony to that effect, it is contrary to reason. The findings, no less than the evidence, show that there are times when the river carries barely enough water to fill plaintiff's canal. At such times it is necessary to raise the dam by means of a false crest of riprap and gunny sacks, high enough, and to make it tight enough, to prevent any water from flowing over or leaking through. The diversion of the surplus at any stage of the river would impose upon the plaintiff the necessity of doing nothing beyond what it is accustomed to do when from natural causes the surplus gradually diminishes and fails. It would simply have to raise its dam by a false crest, and make it tight enough to prevent any waste. The diversion of a part of the surplus would require a proportionate addition to the crest of the dam, and the whole effect of any diversion above the dam would be to compel the plaintiff to commence the annual operation of building a false crest a little earlier in the season than it has been accustomed to do, and to make it high enough and tight enough to prevent any waste during some years when without such diversion a less efficient crest would serve to fill its canal. This is as plain and self-evident as the proposition that two and two make four, and testimony to the contrary is not worthy of consideration.

The question to be decided, therefore, narrows itself to this: Must the defendants be enjoined from tapping the stream merely because they would thereby gain the power to drain plaintiff's canal, though they disclaim any such intention? Or must they be enjoined from diverting the surplus merely because such diversion would compel the plaintiff to perform its annual task of raising its dam earlier in the season every year, and of making it tight and efficient oftener, than they have been accustomed to do? To answer either of these questions in the affirmative would be equivalent to holding that there never can be a lawful appropriation of the surplus at any point above the plaintiff's dam, for it is self-evident that a ditch heading in the stream above the slack water with a dam sufficient to fill it would give its proprietors the same, or even more complete, power to drain plaintiff's canal than a ditch heading in the slack water; and it is equally evident that a diversion of the surplus, or a portion of it, at any point above the head of plaintiff's ditch, would lower the head of water behind the dam to precisely the same extent that it would be lowered by a diversion of the same quantity from the slack water. It is apparent, therefore, that there is nothing in either of the two grounds upon which the injunction was sought and granted, and upon which it is defended here, that would not equally support a similar decree if the defendants, instead of seeking to put the head of their new ditch in plaintiff's so-called pond, had gone a mile above the head of the slack water for that purpose. But, as above remarked, there can be no question as to the right of any lawful appropriator to divert the surplus either above or below the plaintiff. Suppose the defendants had headed their new and enlarged ditch for a point on the stream entirely above plaintiff's slack water, and an injunction had been sought upon either or both of the grounds I have been discussing. As to the control they would thereby acquire over the flow of the stream, and the mere power it would give them to drain plaintiff's canal, the obvious answer would be: "The defendants have as perfect a right to appropriate the surplus as you have to the quantity first appropriated. They can take it either above you or below you, as their interest or convenience may dictate. They choose to take it below. They cannot divert the surplus without putting in a dam and ditch, and therefore the right to the surplus involves the right to the dam and ditch. It may be true that their dam and ditch will put it in their power to take all the water when the stream is low, and thereby drain your canal; but it does not follow that they will make such unlawful use of their power. They disclaim any intention of doing so. Necessarily, they will be compelled to provide their ditch with a proper head gate, and other suitable appliances for controlling the influx of water, and when the stream falls they can readily limit or shut off the flow into their ditch, so as always to leave you the quantity to which you are entitled. In the mean time they cannot be enjoined from using the means essential to the exercise of their undoubted right merely because they would thereby gain the power to infringe yours. It will be time enough to enjoin them when they threaten or attempt to injure you, and the powers of a court of equity are entirely adequate to the conservation and enforcement of the rights of both parties. If the defendants fail to provide their ditch with proper head works, and you are thereby deprived, or threatened with the deprivation, of any of the water by you first appropriated, an injunction specifically framed to meet the case will compel the defendants to provide suitable works, and to exercise their rights in such manner as to leave yours unimpaired. As to the necessary lowering of your head of water by the diversion of the surplus, that will no doubt cause you some inconvenience and trouble, which you have heretofore escaped; but it is damnum absque injuria." There is but a limited supply of water in this state available for irrigation and other useful purposes, and a paramount public policy requires a careful economy of that supply. So long as there is but a single appropriator of water on a stream it matters not how imperfect or wasteful may be the means by which he diverts the quantity of water to which he is entitled. No one else is affected, and there is no ground for complaint. But when subsequent appropriators divert the entire surplus at points above him he is required to use all reasonable diligence to husband what is left, and if, by such diligence, and the use of ordinary means of diversion, he can obtain all that he is entitled to, he cannot complain on account of the trouble and expense which it may involve.

In the case of Barrows v. Fox, 98 Cal. 63, 32 Pac. 811, (recently decided,) we had occasion to consider this policy of the law of appropriation, and to apply its principle. There a riparian owner of lands below the point at which a portion of the stream had been diverted by a prior appropriator sought and obtained an injunction which in effect required the appropriator to substitute an iron pipe in place of his ditch and flume, in order that he might receive the quantity of water he could put to a beneficial use without diverting so large a quantity from the stream. We held that the decree was in this respect erroneous, because ditches and flumes are the usual and ordinary means of diverting water in this state; and parties who have made appropriations by such means cannot be compelled to substitute iron pipes, "though they may be compelled to keep their flumes and ditches in good repair, so as to prevent any unnecessary waste." Accordingly, we decided that the appropriator had a right to divert from the stream water enough to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch and flume well constructed and kept in good condition. This is but the latest of a long series of decisions recognizing and enforcing the same policy, and the soundness of the doctrine upon which they rest is unquestioned. While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion, in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator, whose means of diversion become insufficient for his purposes, by reason of their inherent defects, when the surplus is diverted above him, must take the usual and reasonable measures to perfect such means. And it is no injustice to this plaintiff to allow the diversion of the surplus waters of the south fork by a lawful appropriator, so long as a resort to the same means it is accustomed to employ in periods of scarcity will enable it to fill its canal.

Having thus, as I think, clearly shown that the doctrine upon which the decree of the superior court is expressly based, and upon which counsel seek to uphold it, involves the absurd conclusion that the surplus waters of the south fork cannot be diverted by a qualified appropriator at any point above the head of plaintiff's canal, I will next consider some of the more technical grounds upon which counsel base their further contention. They seem to claim that, irrespective of any question of actual injury to the plaintiff by a diversion of the surplus, and conceding that it will cause no greater or other inconvenience to take it from the dam than would be occasioned by taking it from the stream above the dam, the plaintiff has, nevertheless, such an exclusive property in the bed and banks of what they call its pond or reservoir, that to take it from the dam would be an invasion of its strict legal rights,—a trespass upon its property. Indeed, the argument of counsel is that they have the same right to the pond that they have to their canal, and, if the defendants can put the head of their ditch in the former, they can with equal right put it into the latter. But clearly this is not so, for, in the absence of any proof of title derived from a paramount source, there is an obvious and radical difference between the canal and the river. The plaintiff made the canal, its bed and banks; it did not make the channel of the river. It has been permitted, for its convenience, to obstruct the flow of the river; to raise its level, and, necessarily, to retard its current, and to widen and deepen it above the dam; but this change in its condition leaves it still a part of the river, and it is difficult to see how those who had a right of access to it before plaintiff's dam was erected have lost such right merely because, by the liberality of the government, the plaintiff has been permitted to raise its level and set back its current.

There is no finding as to the ownership of the soil covered by the dam or either of the ditches. Nor is there any evidence, so far as I can discover, touching the point. In the absence of proof to the contrary, it must be assumed that these lands are public lands of the United States, as they unquestionably were at, and long after, the time when plaintiff constructed its dam and canal and made its appropriation. The rights of plaintiffs are therefore such as have been conferred by the grant or license of the United States. The extent of this grant or license is clearly defined by the act of congress of July 26, 1866. It confirms such rights to the use of water as have been recognized and acknowledged by local laws and customs and the decisions of courts, and grants a right of way for ditches and canals. 14 Stat. 253. It does not grant any land whatever, but merely the right to divert and use the water, and a right of way,—an easement. There is nothing in the letter of the statute or the terms of the grant which authorizes the erection of a dam across a natural stream, but, assuming that the grant of the water right carries with it the right to employ this reasonable and usual means of forcing the water into the canal, it cannot be held to carry anything not necessary to the enjoyment of the right granted, nor to deprive the government of such control of the stream as is essential to the protection of other equally deserving objects of its bounty. To say that the first appropriator gains an exclusive right of access to the river as far above his dam as it sets the water back is to say that he takes as an incident to what is expressly granted something that is in no way essential to the enjoyment of his rights, but is in the highest degree prejudicial to the government by whose liberality he profits, and to all other citizens who may desire to participate in its bounty upon fair and equal terms. Suppose that the land covered by this dam has been granted, or shall hereafter be granted, by the United States to homestead or pre-emption claimants, will any one contend that such grantees have taken or will take it subject to any right of plaintiff, except the mere easement to flow it? It does not seem possible that there can be more than one answer to this question. As against the United States, and those who connect themselves with the United States, the plaintiff does not own a foot of land covered by its so-called pond, or bordering upon it. If the land still belongs to the United States, the defendants are granted, by the same statute under which plaintiff claims, a right of way across it to the river for the purpose of making a lawful appropriation of any water not covered by a prior right, and the plaintiff, by raising the level of the river, has not sequestered one foot of its natural channel, except so much as is covered by the material structure of its dam, or is essential to its support. To call this inclosure formed by the dam and the sides of the canon a reservoir is an abuse of terms. A reservoir may be formed by damming a natural water course where the object is the storage of a large body of water; but the object of this dam is not the storage of water, and there can be no pretense that the plaintiff has any right of property in the body of water it holds back. The whole object of this dam is to raise the level of the stream as a means of diverting a part of it into the canal, leaving the surplus to flow over the dam and down the canon. According to the testimony, the slack water extends more than 3,000 feet above the dam, and the so-called pond or reservoir has therefore a length more than 10 times its greatest width at the dam, and more than 20 times its mean width. Through it there is at all times flowing all the water of the river, out of which the plaintiff has a right to divert a limited quantity, leaving the surplus to flow on. It is therefore vastly more like what nature made it, a part of the river channel, than what counsel call it, a pond. There is no analogy between the point involved in this controversy and the point decided in Rupley v. Welch, 23 Cal. 453. There the plaintiff had constructed a reservoir for impounding the waters flowing down a ravine, which he used for irrigating a garden and orchard. The defendants were not claiming the right to take the surplus, but, as miners, claimed the right to divert "the water"—that is, all the water—from plaintiff's reservoir to their sluices, and had accordingly done so. The report of the case is very meager, but its meaning is perfectly plain to any one who knows how the operation of sluice washing was conducted at that date. The defendants were digging and sluicing above the reservoir, and, of course, could not draw water for that purpose from the reservoir. What they did was to turn the water into their sluice above the reservoir, and discharge it below, thereby diverting it from the reservoir. The question as to their right to tap the slack water in order to appropriate the surplus could not possibly have arisen, and clearly was not decided. The point, and the only point, contended for by the defendants was that a prior appropriation of water for irrigation was of no avail against a subsequent appropriation for mining. The court merely decided that the appropriation for irrigation was as good against miners as against others, and that the defendants could not prevent the water so appropriated from flowing into the reservoir prepared for impounding it. This is a doctrine which, at the present day, no one disputes; but in early mining times the paramount right of the miner was strenuously insisted upon by the miners, and in the mining sections often exercised with a high hand, as it was by the defendants in Rupley v. Welch.

To recapitulate, and to conclude upon this branch of the case: The plaintiff has shown no right to the land above its dam, or to the bed and banks of the stream, except such as it can base upon the act of congress of July 26, 1866, above cited. By that act it has been expressly granted a right to use the water it has appropriated, and a right of way for its ditch. It can take nothing as incidental to what has been expressly granted, except what is reasonably necessary to its enjoyment. Conceding that this includes the site of its dam, and the right to maintain it, and to flow the lands above it, it does not include an exclusive right to the water course above the dam and below the head of slack water, because such right is not only unnecessary to the enjoyment of that which is expressly granted, but it infringes the equal rights of others. If the land above the dam is public land, the same act of congress grants to defendants a right of way over it to the stream, and to all parts of the stream, for the purpose of diverting the surplus. If the land belongs to the defendants, or if they have the grant or license of the private owner, their right of access to the stream is equally undoubted. They are bound only in appropriating the surplus, whether within or above the slack water, to provide proper head works for their ditch to regulate the influx of the water, so that the plaintiff may, at all times, have the quantity by it first appropriated.

These conclusions necessarily involve a reversal of the judgment, but in remanding the cause it is proper to notice other errors assigned. The defendants, for some reason not clearly apparent, set up in their answer the contract of March, 1854, granting to the owners of the Boyd's Bar ditch a right to put a box in plaintiff's dam, etc. They did not allege any infraction or threatened infraction of their rights under that contract, and asked for no affirmative relief. It is not easy to see what bearing the facts connected with that contract have upon the case made by the complaint, or the question which it presents. But at the trial evidence was taken as to those matters, and the court made findings,—not very full or explicit,—upon which are based certain provisions of the decree regulating the exercise by the parties of their contract rights. The effect of the decree is to limit the defendants to a box two feet square and eight feet long, set upon a level grade with the top of the box on a level with the surface of the pond, reserving to plaintiff the right to close this box at all times when there is not a full supply of water for plaintiff's present ditch. Neither the findings nor the evidence supports this part of the decree. It clearly appears from the evidence, and partially from the findings, that the present capacity of the ditch is materially greater than it was at the date of the contract. It is found that the canal was enlarged, and its capacity increased, "in places," in 1862; but it is said the evidence does not enable the court to determine how much. As to the expression "in places," we know what is meant when a ditch owner enlarges his ditch and increases its capacity in places. He does not enlarge it in the large places, but in the small places, and by so doing increases its capacity throughout. The evidence in the record shows without contradiction that plaintiff's ditch was widened to six feet on the bottom wherever it was of less width, as it was in many places. The only conflict is as to whether it was, prior to the enlargement, four feet or five feet wide on the bottom. But, whichever it was, the enlargement was material, and a finding as to its extent was absolutely essential to a decree settling the right of the parties under the contract. On the hypothesis most favorable to the plaintiff the capacity of its ditch prior to 1862 is indicated by a section 5 feet wide at bottom, 7 feet wide at top, and 3½ feet deep, equal to 21 square feet. Its present capacity is measured by a section 6 feet wide at bottom, 8 feet wide at top, and 3½ feet deep, equal to 24½ feet. Its capacity in miners' inches is not found, and the testimony does not show with any degree of certainty what it is; but, assuming that it is 2,450 inches, each square foot of the section would represent 100 inches, and the 3½ added in 1862 would represent 350 inches. The right to this quantity of water perpetually, or to a half or a quarter of it, is too important to be decreed away without a finding, and without evidence to support a finding. But the superior court seems to have thought it unnecessary to consider the evidence on this point, because, in its opinion, the acquiescence of the defendants and their predecessors for nearly 30 years in the enlargement of plaintiff's ditch raised an estoppel against them. But the defendants were not complaining of the enlargement of the canal, or of its increased capacity. They never had a right, either under their contract or independent of it, to complain of such enlargement. They could only object to the closing of their ditch or the box that supplied it when there was more than sufficient water to supply the canal according to its capacity at the date of the contract, but not sufficient to supply it as enlarged. And the evidence shows that their box never was closed by plaintiff after the enlargement of its canal. Nor is it found that the plaintiff ever did any other act adverse to the rights of defendants under the contract in such manner or for such time as to gain a prescriptive right. The decree is also unsupported by any finding as to the dimensions and setting of the box through which the defendants are entitled to draw water from the dam under the contract. The contract does not specify a box eight feet long, or of any length, nor at what level it shall be set. The evidence of all the witnesses, except one, who does not pretend to have measured the box actually used by defendants, or to have had any occasion to observe it with attention, is that it was only three or four feet long; and this is material, for if a box is set level the longer it is the less water it will deliver. It is also an objection to the decree that the level at which the box is to be set is not definitely fixed. The level of the water behind the dam is not a practicable gauge, for the evidence shows that this varies greatly according to the stage of the river. If upon a retrial of the cause the rights of the parties under the contract are again submitted for decision and regulation, the court should find the extent to which the plaintiff's canal was enlarged in 1862, and precisely and definitely the dimensions and setting of the box which the defendants and their predecessors put in and used in pursuance of plaintiff's grant. The judgment and order of the superior court are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; FITZGERALD, J.

McFARLAND, J. I dissent in toto, and adhere to the former opinion in department. 31 Pac. 112.

PATERSON, J., (concurring.) As I understand this case and the principles involved, the plaintiff is entitled to water sufficient to fill its ditch to its capacity at the time of the contract with the Boyd's Bar Company in 1854, or to such increased capacity as it has acquired the right to fill, by prescription or otherwise, since that time; and when there is not sufficient water for this purpose may shut down the defendant's gate until there is a sufficient supply. The defendants are entitled at the proper point to draw from the surplus water; that is, water which would flow over the dam after the plaintiff's ditch is filled. In determining how, when, and where this surplus may be taken, all the circumstances of the case must be considered. The plaintiff is bound to use reasonable care in diverting sufficient water to fill its ditch, so as not to occasion unnecessary waste of the surplus water. To do this it must raise its dam to a height sufficient to fill its ditch whenever the stage of the water renders it necessary to do so. That is to say, plaintiff is not entitled to a flow of eight or any other number of inches of water above and over the crest of the dam, simply to fill its ditch, because it has always heretofore enjoyed the same, but, when desiring to obtain a flow of water through its ditch to its full capacity at low stages of the water, it must raise the crest of its dam to a level with the top of its ditch, if necessary to fill it, and prevent surplus water, which the defendant desires to use, from flowing over the dam. Whether the defendants are entitled to tap the stream or pond at any particular point is a question for the court to determine upon all the circumstances. The plaintiff has the right to build and maintain its dam, and to flow back the waters to any extent upon the public domain necessary to fill its ditch in a reasonable manner; and defendants have no right to interfere with plaintiff's works or possessions so as to injure or endanger its dam or other structure, or to render its diversion of water sufficient to fill its ditch more difficult or expensive than it was before, and while operating in a reasonable and careful manner. But when the purpose of plaintiff's dam has been accomplished it cannot prevent others from enjoying the use of the waters running to waste, unless they are proposing to take the same at a point or in a manner that will interfere with the free use and enjoyment of its water right or other property. Whatever structures it has found necessary to build are its property, and, whether they be dam or side walls, probably no one would be permitted to cut through or under them under any circumstances. But that is not a question in this case. Here the side walls are natural banks of rock, and the area above the dam which the plaintiff is entitled to flow and exclusively occupy is, as stated before, a question for the court to determine upon all the circumstances of the case.

It does not clearly appear whether the question of reasonableness of the plaintiff's claim of exclusive control of all the slack water entered into the judgment of the court below, but the latter seems to have placed its decision squarely upon the proposition that the defendants are not entitled to tap the pond of water for the purpose of drawing water into its ditch at any point along the line of slack water. There are other reasons, we think, why the case ought to go back for further consideration. The court found (finding 4) that a temporary crest or "flashboard" eight inches in height is sufficient at low stages of the water to fill plaintiff's canal to its full capacity, and yet in finding 5 held that, "in order to draw the surplus from the plaintiff's dam, without taking the water from plaintiff's canal, it would be necessary to raise plaintiff's dam from 22 to 24 inches higher, and also to raise the banks of plaintiff's canal." There is here an apparent inconsistency. If the finding quoted be correct, the plaintiff would be entitled to an injunction, because, as stated before, the defendants have no right to impose any additional burden upon the plaintiff, except such as is necessary to preserve the surplus water from waste, or subject its dam or ditch to any additional danger.

The evidence shows that the plaintiff's ditch was enlarged at different points since the date of the Boyd's Bar ditch contract, but the court does not find whether these enlargements increased the capacity of the ditch. It simply finds that "at the point where this widening of the canal occurred the capacity was increased, but to what extent the evidence does not enable the court to determine." The rights given to the defendants by the contract referred to ought not to be affected by any subsequent alteration of the plaintiff's ditch, and, unless the plaintiff has acquired the right to use the ditch in an increased capacity through the acquiescence of the defendants, the judgment is erroneous in that regard. In its conclusion of law the court found that "by reason of the long acquiescence of the defendants, for a period of about 25 years, without objection, in such increased capacity of plaintiff's canal as may have resulted from the widening of portions of the canal in 1862 and 1864, the defendants are now estopped from making any complaint of said widening of said canal, and are not entitled to any relief with respect thereto." It is earnestly claimed by appellants that there is "not a scintilla of evidence to sustain the finding or conclusion of law that defendants lost or plaintiff acquired any right by acquiescence or by estoppel of any kind." This contention is based upon the proposition that the defendants' gate has never been shut down since the plaintiff's ditch was widened; that there has always been sufficient water for both ditches as they now exist; that plaintiff had a right to enlarge its ditch to any size it chose, as long as it did not interfere with the defendants' ditch; that, as no right was interfered with, there was no ground for objection, and no suit could have been maintained until defendants' rights were interfered with. The legal propositions involved in this contention are sound, but whether they are supported by the record, as claimed, we deem it unnecessary to determine, as the case must go back for another trial.

GAROUTTE, J. I concur in the reversal of the judgment, and also in the views of Mr. Justice PATERSON upon the principal question discussed.

DE HAVEN, J., (dissenting.) I dissent from the judgment. Upon the main question therein discussed I concur in the opinion written by Mr. Justice McFARLAND in deciding this case in department, but, after a more careful examination of the judgment appealed from, I think it erroneous in so far as it reserves to the plaintiff the right to close the box through which the defendants are to divert the water to which they are entitled under the Boyd's Bar ditch contract whenever there is not sufficient water to supply the capacity of plaintiff's ditch as at present constructed. It is not clear to me from the evidence that the capacity of this ditch has not been materially increased since the date of the Boyd's Bar ditch contract, but the court below has failed to make any finding whatever in relation to the fact. The cause should be remanded, with directions to the court below to find whether the capacity of plaintiff's ditch has or has not been increased, and thereupon to modify its judgment so as to permit the defendants to exercise all the rights enjoyed by their predecessors under the contract above referred to, —the full rights given by that contract,—unaffected by any subsequent alteration of plaintiff's ditch.

(100 Cal. 593)

In re LUX'S ESTATE. (No. 15,346.)

(Supreme Court of California. Dec. 30, 1893.)

EXECUTORS—FAMILY ALLOWANCE PENDING ADMINISTRATION.

1. When an inventory, completed, signed, and delivered by the appraisers to the executors, is presented by the latter's attorney to the judge in chambers to procure an order for payment of the appraisers, and the order as made recites that the appraisers have completed their work, the inventory is "returned," within Code Civil Proc. § 1464, entitling the widow to reasonable provision for her support till such return, though the executors do not attach their affidavits of the completeness of the inventory, as required by section 1449, and the inventory is not actually filed with the clerk till long afterwards.

2. Code Civil Proc. § 1466, requiring the court, after return of inventory, to make a reasonable allowance for support of the family, to continue during administration if the property set apart to them be insufficient, applies to a widow to whom sufficient property has not been set apart, though she have enough of her own. Sawyer v. Sawyer, 28 Vt. 245, followed.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal of Miranda W. Lux, the widow, from an order relating to her allowance for support pending administration. Reversed.

Garber, Boalt & Bishop, for appellant. D. M. Delmas and J. H. Campbell, for respondents.

DE HAVEN, J. This is an appeal by Miranda W. Lux, widow of Charles Lux, deceased, from an order of the superior court, made May 17, 1892, allowing her the sum of $1,000 per month as an allowance for her support, from August 30, 1888, to November 16, 1891. Charles Lux died testate in March, 1887, leaving an estate of the value of $4,000,000 or more, of which 90 per cent. was the partnership interest of the deceased in the firm of Miller & Lux. The indebtedness of the estate appears to be about $4,000. Under the partnership agreement, as well also as by the terms of the will, the surviving partner was given seven years after the death of the other within which to settle the business of Miller & Lux. The order appealed from is the second order for family allowance. The first was made May 4, 1887, prior to the return of the inventory of the estate, and allowed the widow $2,500 per month from the date of the decedent's death "until said inventory is returned, or until the further order of this court;" and it appears that this allowance was actually received by her up to the 16th of November, 1891, the date when, under the terms of the order now under review, the family allowance ceased. The order setting apart to the widow the exempt property to which she was entitled by section 1465 of the Code of Civil Procedure was not made until March, 1892. The court below found that the inventory of the estate was returned on August 30, 1888, but it also appears that the same was not filed until May 16, 1890. It is claimed by the appellant that the first order in relation to the family allowance remained in force according to its terms until the date of the order appealed from, and that, if it did not, but is to be construed as terminating upon the return of the inventory, the date when the inventory was filed, or when the executors attached thereto their affidavits, as required by section 1449 of the Code of Civil Procedure, is the time of its return, and the finding of the court that it was returned prior thereto, upon August 30, 1888, is against the evidence; and that under either construction the order appealed from is erroneous—First, because it is retroactive, and attempts to deprive her of a portion of the allowance to which she was entitled under the first order, and which had actually been paid to her in obedience to its directions before the last order was made; and, second, because it does not provide for a family allowance during the entire period of the settlement of the estate; and, lastly, that the allowance of $1,000 a month is not sufficiently large, and is not a reasonable one, in view of the value and condition of the estate.

1. The order of May 4, 1887, as already stated, made a family allowance to the widow of $2,500 per month "from the date of the death of the deceased until said inventory is returned, or until the further order of this court." The words, "or until the further order of this court," were not intended to continue the allowance beyond the date of the return of the inventory, and until some further order of the court in the matter, as argued by appellant; but the true construction of the order is that the allowance thereby given shall terminate upon the return of the inventory, or before that time if the court shall so order. The order simply refers to two events, upon the happening of either one of which the allowance is to cease. This is not only the natural construction of its language, but makes the order itself in harmony with section 1464 of the Code of Civil Procedure. That section is as follows: "1464. When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead * * * and are also entitled to a reasonable provision for their support, to be allowed by the superior court or a judge thereof." The order referred to in this section may be made at once upon the filing of the petition for letters, and when the court is without the definite information concerning the value of the estate which is afforded by the inventory and appraisement; and that the allowance here provided for is intended to be in the nature of a preliminary or temporary allowance, not extending beyond the return of the inventory, becomes clear when this section is read in connection with section 1466, following, which imposes upon the court the duty to make a further allowance after the return of the inventory, if the property set apart to the family is insufficient for their support, and which allowance is to be of a more permanent character, and to continue during the administration of the estate, unless the estate is insolvent, in which case it is not to continue longer than one year.

2. The order appealed from was made May 13, 1892. It is entirely retroactive in its effect, and gives to the widow $1,000 per month, commencing August 30, 1888, the date of the return of the inventory as found by the court, and ending November 15, 1891. The appellant claims that this order covers a portion of the time when the order of May 4, 1887, was in force, and is erroneous, because it reduces the family allowance during such period, and attempts to deprive her of a part of the allowance to which she was entitled by that order. The decision of the question thus presented depends entirely upon the fact as to when the inventory was returned. If the finding of the court below as to the date of its return is sustained by the evidence, then the order under review is not open to the objection that it interferes with any rights which vested in appellant by virtue of the prior order of May 4, 1887. It appears from the record that the inventory and appraisement was actually completed by the appraisers, and signed and delivered by them to the executors of the estate on August 20, 1888; and it was presented by the attorney for the executors to the judge of the superior court at his residence, on August 30, 1888, for the purpose of procuring an order fixing the compensation of the appraisers, and on that day an order was made, fixing such compensation, and directing its payment, the order reciting that it appeared to the court that the appraisers had completed the work of appraising the estate. At the time the inventory was so presented to the judge the executors had not attached thereto their affidavits, as required by section 1449 of the Code of Civil Procedure, and did not fully comply with the law in this respect until February, 1890; and the inventory was not actually filed with the clerk until May 16, 1890. On the day when the inventory was presented to the judge for the purpose of procuring the order fixing the compensation of the appraisers, it was ver-

bally agreed between the attorney for the executors and the attorney for certain devisees named in the will that the inventory need not be in fact filed, and that it might be retained in the custody of the attorney for the executors, but should be treated for all purposes as filed on that day. The will of the deceased provides that no inventory of the estate shall be filed, and the attorneys doubtless proceeded upon the assumption that they could properly so far comply with this direction as not to place the inventory on file for public inspection. We have alluded to this verbal stipulation, not because we think it affects the question we are now discussing, but simply as a matter established by the evidence. Assuming the foregoing facts to be true, when was the inventory returned? The filing of an inventory with the clerk of the proper court would certainly constitute its return, but, while this is so, we do not think such filing an indispensable step which must be taken in order to effect the return of such a paper. An inventory is returned within the meaning of the law when it has been completed by the appraisers, and presented to the court or judge for information, and as a basis for some judicial action to be taken in the proceeding for the settlement of the estate to which it relates; and if the inventory was completed so as to have a legal existence when it was presented to the judge of the superior court on August 30, 1888, such presentation was sufficient to constitute its return. The fact that it was so presented to the judge at his residence, and the order fixing the compensation of the appraisers was there signed, is not material. The order was one which the judge had a right to make at chambers, and he could properly receive and act upon the inventory there. Code Civil Proc. § 166. A judge's chambers are not confined to some particular room in the courthouse or other place for the usual transaction of judicial business not required to be done in open court. Von Schmidt v. Widber, (Cal.) 34 Pac. 109. "Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops when absent from home; or it may be done in transitu on the cars in going from one place to another within the proper jurisdiction of the court." In re Neagle, 14 Sawy. 265, 39 Fed. 833. But it is further contended by appellant upon this point that the inventory was not completed when presented to the judge of the superior court on August 30, 1888, nor until the executors attached thereto their affidavits, as required by law. Section 1449 of the Code of Civil Procedure does make it the duty of the executor or administrator to indorse upon or annex to the inventory, after it is completed by the appraisers, an affidavit to the general effect that the inventory contains a true statement of all the property of the decedent of which he has any knowledge, and of all claims which the decedent had against him; but, in our opinion, this affidavit is not necessary to give a legal existence to the inventory itself. An inventory may be said to be completed when the work of the appraisers has been concluded, and the instrument showing the result of their labors has been signed and delivered by them. The purpose of the statute in requiring the affidavit mentioned in section 1449 of the Code of Civil Procedure is to furnish an additional assurance that the inventory contains a full statement of all the property of the estate known to the executor or administrator, and also to obtain his solemn admission that he is properly chargeable in his accounts with all that is shown by the inventory; and the court may, upon its own motion, or upon the application of any person interested in the estate, compel the executor or administrator to comply with this section; but the failure of the executor or administrator to discharge this duty would not render the inventory, properly signed and delivered by the appraisers, of no effect as an inventory. Our conclusion is that the finding of the court that the inventory was returned on August 30, 1888, is sustained by the evidence, and that the order appealed from is, therefore, not in conflict with the previous order of May 4, 1887, and does not deprive the appellant of any rights vested in her by that order.

3. The order appealed from in effect was a denial of the petition of the widow for an allowance for her support during the progress of the settlement of the estate. The order was retroactive, and the allowance therein given ceased on November 15, 1891, more than six months prior to its date. Did the court err in refusing to continue the allowance after that date, and until the distribution of the estate in whole or in part? Section 1466 of the Code of Civil Procedure provides that, if the property set apart for the use of the widow and minor children "be insufficient for the support of the widow and children, or either, the court * * * must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which in case of an insolvent estate must not be longer than one year after granting letters testamentary, or of administration." The court below found that the property set apart to the widow is insufficient for her support, and also made additional findings to the effect that the deceased in his will bequeathed to her a legacy of $500 per month during her life, and a life estate in certain property from the rents and sale of her interest in which she had received $137,000, and that the deceased also provided in his will, as well as by agreement with his partner, Miller, that said Miller should pay to her monthly such sum as might be needed for her support. It is claimed by respondents that these findings show that the widow has sufficient property of her own to support

herself, and that, under such circumstances, she was not entitled to any allowance whatever from the estate, and therefore she cannot be heard to complain because the order appealed from does not continue the allowance during the administration of the estate; and in support of this proposition it is argued that the object of the statute is "to meet the actual wants and necessities of the widow and her family," and that when, as in this case, the widow is childless and has abundant private means of her own, there are no wants or necessities to relieve, and the law does not contemplate that any allowance shall be made for her support. But, however the rule may be in other states, (and there are decisions which seem to support this contention of respondents,) we do not think section 1466 of the Code of Civil Procedure can be so construed. Its language is express and mandatory, and in the language of the counsel for the appellant "the duty of maintaining the family, which the law imposed upon the deceased husband or father in his lifetime, is continued against his estate pending its administration," if the estate is solvent. It declares that the court must make a reasonable allowance out of the estate if the property set apart to the family is insufficient for their support; and for the court to hold that no allowance shall be made to the widow if she has sufficient property of her own, although the property set apart to her is insufficient of itself for her support, would be, in effect, an amendment of the law by judicial construction. There was nothing actually decided in Estate of Walkerley, 77 Cal. 643, 20 Pac. 150, in conflict with this conclusion, although it may be conceded that there are expressions in the opinion which, considered apart from the facts before the court, lend some support to the argument of respondents on this point. Of course we are not to be understood as holding that the value of the property set apart for the use of the family, under section 1465 of the Code of Civil Procedure, or the income of such property, is not to be considered in determining what is a reasonable allowance to be made from the remaining portion of the estate for the support of the family during the progress of the settlement of the estate; nor that such order for family support, when made, may not be subsequently modified by the court if the condition of the estate or the relation of the family thereto should change; as if, for instance, it should appear that the value of the estate was materially less than shown at the date of the order sought to be modified, or that its indebtedness is greater than was then supposed, or in the event of a partial distribution to the widow or children before the final distribution of the estate.

The law of Vermont in regard to the family allowance is substantially the same as that of this state, and in Sawyer v. Sawyer, 28 Vt. 245, the supreme court of that state held that the widow's financial ability to support herself without aid from the estate was immaterial in considering the question of her right to a family allowance. In that case it was urged that the widow was not entitled to such allowance, because she was in receipt of a pension, and was living with her father, who was wealthy, and who made no charge against her for her support. In answer to this argument the court in that case, in an opinion delivered by Redfield, C. J., said: "The exceptions claimed in the present case are, first, on the ground of the pension which the widow obtained as such upon the decease of her husband. This is no different in principle from her being possessed of ability to maintain herself in any other mode so as not to require assistance from the estate, and, indeed, the general ability of the appellee, or the widow in this case, from her living with her father, and the wealth of the family, and the very great improbability of his making any personal claim against his daughter for her board, was also alluded to in the argument, and is stated in the case, and seems to us to come fairly under consideration in the same connection; but we are not prepared to say that any such exception can fairly be ingrafted upon the statute. If it had been the purpose of the legislature to allow maintenance only in case of such widow and children as were without the means of subsistence in any other mode, it is difficult to conjecture how it occurred that the provision should have been expressed in the general and unlimited manner it here is. It is incomprehensible that, if the provision were intended only for the indigent and necessitous, it should have been made general." This decision of a learned court upon a statute similar to section 1466 of the Code of Civil Procedure is entitled to great weight, and we adopt it as expressing our own views of the proper construction to be given that section.

4. In view of the conclusion reached upon the preceding point, it is unnecessary for us to express any opinion upon the question of the reasonableness of the amount allowed by the court for the period covered by its order. The amount of the allowance is a question which rests very largely in the discretion of the superior court, and its action in the matter will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. Of course, as was said in Re Stevens, 83 Cal. 325, 23 Pac. 379: "The court is not restricted, in making this allowance, to a bare support of the widow. Regard should be had * * * to the mode in which she lived during the lifetime of her husband." The allowance is to be sufficient to provide all the necessaries of life, and this will include all those things which are reasonable and proper for use in the home and in social intercourse, in view of the condition and value of the estate, and the station and surroundings of the family. The order appealed from will be reversed.

and the superior court will, upon the evidence already before it, and such further evidence as the parties may desire to present, make an order for an allowance to the widow, to continue during the progress of the settlement of the estate, and in such amount as it shall deem reasonable, and without regard to the fact that she may have separate property sufficient for her support. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

(100 Cal. 606)

In re LUX'S ESTATE. (No. 15,345.)

(Supreme Court of California. Dec. 30, 1893.)

EXECUTORS—ACCOUNTING—FAMILY ALLOWANCE PENDING ADMINISTRATION.

When the court grants an order for family allowance for a past period pending administration, payable in 20 days, the executors, having without an order paid the widow more than the sum allowed, are entitled to a present credit for the sum allowed.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal by the executors from an order denying them credit for a certain item in their account. Reversed.

Garber, Boalt & Bishop, for appellants. D. M. Delmas and J. H. Campbell, for respondent.

DE HAVEN, J. This is an appeal by the executors of the estate of Charles Lux, deceased, from an order settling the first and second accounts filed by them in the course of the administration of the estate. Many of the questions arising upon this appeal were involved in Re Lux's Estate, 35 Pac. 341, (No. 15,346, recently decided by this court,) and were passed upon in the opinion in that case. It was there held that the family allowance fixed by the order of May 4, 1887, terminated upon the return of the inventory of the estate, and that the finding of the superior court that such inventory was returned on August 30, 1888, was sustained by the evidence. As these questions were there presented upon substantially the same record as the one before us, the decision in that case is decisive of the same matters presented on this appeal.

The only question requiring discussion at this time relates to the refusal of the court to allow the executors any credit whatever for the sum of $97,500, paid by them to the widow as a family allowance between August 30, 1888, and November 16, 1891. At the time this money was paid there was no order of the court authorizing the executors to make such payments; but afterwards, on March 25, 1892, and before the date of the order settling the accounts, the court made an order for a family allowance to the widow, in which the court "ordered and decreed that an allowance of one thousand dollars per month from the 30th day of August, 1888, until the 15th day of November, 1891, making altogether the aggregate sum of $39,000, be paid within twenty days by the executors of Charles Lux, deceased, to said Miranda W. Lux." This order was a determination by the court that the widow was entitled to a family allowance of $1,000 per month for the period therein named, and the executors, having paid the same, were entitled to a credit in the statement of their accounts for the amount thus fixed by the court as a reasonable and proper sum to be paid to the surviving widow for that purpose. The fact that the order made such allowance payable within 20 days after its date does not affect the right of the executors to a present credit, as it was shown that an amount far in excess of that allowed by the order had already been paid by them to the widow as a family allowance for the period of time covered by the order; and the fact that such payments were made without a previous order of the court does not deprive the executors of the right to a credit therefor, to the extent that the court found such advances were reasonable and proper. In the matter of paying a family allowance, "the administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement." 1 Woerner, Adm'n, § 92; Sawyer v. Sawyer, 28 Vt. 248; Simmons v. Byrd, 49 Ga. 288. It follows that the court erred in refusing to credit the executors with that portion of the advances made by them to the widow on account of the family allowance, which the court found to be reasonable and proper for that purpose. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

(100 Cal. 609)

In re LUX'S ESTATE. (No. 15,146.)[1]

(Supreme Court of California. Dec. 30, 1893.)

EXECUTORS—ACCOUNTING—LIABILITY FOR INTEREST.

1. Code Civil Proc. § 951, requiring one appealing from an order to furnish copies of the order and of the papers used on the hearing, and Sup. Ct. Rule 32, requiring such papers or evidence to be authenticated by bill of exceptions, when no other mode is provided, do not demand a bill on appeal from an order settling an executor's account, where the clerk's certified transcript contains the accounts, reports, and exceptions, (these being pleadings which the clerk must attach to the judgment, under Code Civil Proc. § 670, to form the judgment roll,) as well as the judgment and findings, (which last are properly a part of the judgment,) the errors being thus assigned on the face of the record.

2. Under Code Civil Proc. § 1585, giving the surviving partner possession of the firm assets till the business is settled, while paying the executor from time to time any balance to which deceased would have been entitled, it is not error to settle an annual account of ex-

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[1] Rehearing denied, 35 Pac. 639.

ecutors without an accounting between them and the surviving partner, though such partner himself be one of the executors.

3. Where executors, one of whom is the widow, have in good faith, but without an order of court, paid said widow a family allowance in excess of what the court afterwards allows, they are liable for interest on the excess at the legal rate, compounded annually.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal of certain devisees from an order settling an annual account of the executors. Reversed.

Garber, Boalt & Bishop, for appellants. D. M. Delmas and J. H. Cambell, for respondent.

DE HAVEN, J. The superior court made an order settling certain accounts rendered by the executors of the estate of Charles Lux, deceased, to which accounts exceptions had theretofore been filed by certain devisees named in the will of the deceased. This appeal is taken by said devisees, and is from so much of the order as fails to charge the executors interest upon money which the court found was improperly paid by them to the widow as a family allowance, and in so far as it fails to require a full accounting of the partnership affairs of the firm of Miller & Lux, of which firm the deceased was a member at the time of his death. The transcript on appeal as amended contains the accounts of the executors, and reports accompanying them, the objections or exceptions to the accounts, the findings of the court thereon, and the judgment or order settling the accounts. There is no bill of exceptions in the record, but the papers just referred to are certified by the clerk of the court from which the appeal is taken to be copies of the originals on file in the matter of the estate of Charles Lux, deceased. The respondents have made a preliminary motion to dismiss the appeal upon the ground that the papers contained in the transcript are not authenticated by a bill of exceptions as required by rule 32 of this court. Section 951 of the Code of Civil Procedure makes it the duty of a person appealing from an order to furnish this court with a copy of the order appealed from, and copies "of papers used on the hearing in the court below," and rule 32 of this court provides that such papers or evidence must be authenticated by a bill of exceptions, when no other mode of authentication is provided by law. This rule was only intended to apply to those appeals in which the order is sought to be reversed, because of matters alleged to be shown by affidavits or evidence used or taken upon the hearing in the court below. Such was the case of White v. White, 88 Cal. 429, 26 Pac. 236, cited by respondents. But a fair interpretation of its language, as well as a consideration of its object, will show that this rule of the court can have no application when the order appealed from is attacked for matters appearing upon its face, or upon the face of the record of which it forms a part. The settlement of the accounts of an executor or administrator, though sometimes spoken of as an order, is in effect a judgment; and it was held in Estate of Page, 57 Cal. 238, that in a proceeding for the settlement of such an account "the petition and account, and the written objections filed to it, are the pleadings which the clerk of the court is required to attach to a copy of the judgment, (section 670, Code Civil Proc.,) and these constitute the judgment roll;" and to the same effect is the earlier and well-considered case of Estate of Isaacs, 30 Cal. 106; and while, in such a proceeding, it is not incumbent upon the court to make and file express findings, still, when the account is assailed in any particular for matters not appearing upon its face, the court may properly make express findings upon such issues, as was done in Estate of Moore, 96 Cal. 522, 31 Pac. 584, and when it does so such findings become as much a part of the judgment roll as the judgment or order itself, or the account and exceptions thereto, which constitute the pleadings of the parties. If the findings in this case are to be regarded as a part of the judgment roll, as we think they must, then every objection urged by the appellants to the order appears upon the face of the judgment roll, and in such a case a bill of exceptions has no office to perform, its only purpose being to make that matter of record which would not otherwise appear as such. The record here being sufficient to present the questions raised by the appellants upon this appeal, the motion to dismiss the appeal must be denied.

2. The court did not err in settling the accounts of the executors in the absence of an accounting between them and the surviving partner of the firm of Miller & Lux. The acounts filed were not intended to serve as a final account. The purpose of an executor's account is to show what property of the estate has come into his hands, the disbursements made by him, and the balance, if any, remaining in his possession. Under section 1585 of the Code of Civil Procedure the surviving partner has the right to retain possession of the partnership assets until the business of the partnership is settled, paying to the executor from time to time any balance to which the deceased partner would have been entitled. The court may, upon application of the executor, compel the surviving partner to render an account of the partnership business, and the executor in a proper proceeding may doubtless, if good cause appear therefor, be required to demand an accounting from the surviving partner, and return the same into court; but the failure of the executor to apply for an order requiring the surviving partner to account

is no reason why the court should refuse to settle an annual account of the executor, which, as we have seen, is only intended to show what property has been received by him, and what he has done with it; and the fact that in this case the surviving partner is also one of the executors of the estate of the deceased partner is not any reason for refusing to settle his accounts as an executor because of the absence of a statement showing the condition of the partnership affairs. Of course, when any portion of the assets of a partnership have come into the hands of an executor as such, he must charge himself therewith in his accounts.

3. The findings of the court show that Miranda W. Lux is the widow of the deceased, and also one of the executors of his will, and on May 14, 1887, the superior court made a family allowance to her of $2,500 per month, to continue until the return of the inventory or the future order of the court; and that the inventory was returned on August 30, 1888, but the executors continued thereafter, until November 16, 1891, to pay to the widow the sum fixed as a family allowance in the order of May 14, 1887, thus paying to her for that purpose the sum of $97,500, without any order of the court therefor. It is further found that on March 25, 1892, the court, upon petition of the widow, made an order directing the executors to pay to her as a family allowance "the sum of $1,000 per month during the period extending from the 30th day of August, 1888, to the 15th day of November, 1891." The court, in its order settling their accounts, refused to allow the executors credit for any part of the $97,500 so paid out by them during the period of time covered by the second order for a family allowance, and also refused to charge them interest thereon. The contention of the appellants here is that the court erred in holding that the executors ought not to be charged with interest upon this sum so advanced by them to the widow. We think the findings, when read in connection with the accounts filed, show that these payments were made to the widow, who was also one of the executors, to be used by her for her own personal benefit and advantage. Upon these facts the executors are chargeable with legal interest, computed with annual rests, upon so much of the sum so paid as appears to have been improperly advanced by them for the private use of one of their number. When an executor uses the funds of an estate in his own business, or for any purpose of his own, the rule in this state is to charge him with legal interest, compounded with annual rests. Estate of Clark, 53 Cal. 355; Estate of Stott, 52 Cal. 403; In re Hilliard, 83 Cal. 427, 23 Pac. 393. It is true that in this case there was no actual bad faith or intentional wrongdoing upon the part of the executors, and they doubtless supposed that such expenditure or use of the funds of the estate would be approved by the court. The payments, however, not being authorized by a present order of the court, were made at their peril, and to the extent that they were not approved by the subsequent order of the court constituted a wrongful use of the money of the estate for the personal advantage of one of the executors, all of the executors consenting to such use. The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him in his own business, is not adopted for the purpose of punishing him for any intentional wrongdoing in the use of such fund, but rather to carry into effect the principle enforced by courts of equity that the trustee shall not be permitted to make any profit from the unauthorized use of such funds. Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Cruce v. Cruce, 81 Mo. 684; Schieffelin v. Stewart, 1 Johns. Ch. 620. The rule is intended to secure fidelity in the management of trust estates, and where, as in this state, the conventional rate of interest exceeds the statutory rate, the executor should be charged with legal interest, compounded annually, in order to fully reach the profit realized by him from the use of the trust fund. The court, in settling the accounts in this case upon the findings which appear in this record, should have allowed the executors credit for the sum named in the second order as a family allowance during the period covered by the accounts, and then have charged them legal interest, computed with annual rests, upon the excess paid by them as a family allowance to the widow for the same period. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

In re LUX'S ESTATE. (No. 15,107.)

(Supreme Court of California. Dec. 30, 1893.)

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of Charles Lux, deceased. Appeal of certain devisees from an allowance to the widow. Reversed.

Garber, Boalt & Bishop, for appellants. D. M. Delmas and J. H. Campbell, for respondent.

PER CURIAM. This is an appeal by certain devisees named in the will of Charles Lux, deceased, from the same order for a family allowance involved in the case of In re Lux's Estate, 35 Pac. 341, (No. 15,346, just decided,) and the judgment in that case disposes of all the points urged by the appellants here for a reversal of the order adversely to their contention. The motion of respondent to dismiss the appeal is denied on the authority of In re Lux's Estate, Id. 345, (No. 15,146,) and, as the order here appealed from was reversed in Re Lux's Estate, Id. 341, (No. 15,346,) the same order will be made on this appeal, but without costs to the appellants. Order reversed, without costs.

101 Cal. 10

PAYNE et al. v. ENGLISH et al., Harbor Commissioners. (No. 15,269.)

(Supreme Court of California. Jan. 3, 1894.)

BOUNDARIES—ARTIFICIAL—UNLOCATED HIGHWAYS.

In 1852 the city of San Francisco leased a block, represented on the then official city map as "Block No. 12 of the South Beach Water Lots," and described as bounded by a line beginning at the southwest corner of B. and T. streets; thence southwest, along B. street, 825 feet, to F. street; thence southeast 275 feet, to C. street; thence northeast 825 feet, to T. street; and thence 275 feet, to the place of beginning. The block and surrounding streets were covered by water from 1852 to 1865, so that there could be no marks to show the corners of the block and the street lines. In 1865 a plank driveway was laid along the southerly side of B. street, from T. street to F. street. In 1866 the city surveyor surveyed the southerly line of B. street, and the lessee of the block then filled in along such line. In 1867 the owners of the opposite block built along the northerly side of B. street, which, as thus established, has ever since been a recognized thoroughfare of the city. *Held*, that the location of block 12 may be determined by reference to B. street as now located.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Suit by Warren R. Payne and S. P. Dewey to enjoin William D. English and others, as the state board of harbor commissioners, from building a wharf in front of plaintiffs' lot. Judgment for plaintiffs. From an order denying a new trial, defendants appeal. Affirmed.

F. S. Stratton and T. C. Coogan, for appellants. Cope, Boyd, Fifield & Hoburg, for respondents.

BELCHER, C. This is the second appeal in this case. On the first appeal the judgment, which was in favor of the defendants, was reversed, and a new trial ordered. 79 Cal. 540, 21 Pac. 952. The second trial resulted in a judgment for the plaintiffs, and the present appeal is from an order denying the defendants' motion for a new trial.

The facts of the case are very fully stated in the opinion rendered on the former appeal, and need not be repeated here at length. The plaintiffs allege that they are, and for more than 30 years have been, the owners of that certain lot or parcel of land in the city and county of San Francisco, bounded by Berry, Channel, Third, and Fourth streets, and having a width, between the two first-named streets, of 275 feet, and a length, between the two last-named, of 825 feet. The defendants, in their answer, admit that the plaintiffs are the owners of the lot or parcel of land described in their complaint, except a strip of the uniform width of 30 feet, extending along the southeasterly side thereof; and they allege that this strip of land is, and for more than 30 years has been, a portion of Channel street, and that plaintiffs have not now, and never had, any right, title, or interest therein or thereto. The court found that the original plaintiffs were, at the commencement of the action, and for more than 30 years prior thereto they, and those under whom they claim, had been, the owners of that certain lot or parcel of land particularly described in the complaint; "that no portion of said lot or parcel of land is, or ever was, a part of Channel street;" and "that the southerly portion of said lot or parcel of land, mentioned and referred to in the answer of defendants, as a strip of the uniform width of thirty feet, and extending from Third street to Fourth street, being a distance of eight hundred and twenty-five feet, is not, and never was, a portion of Channel street." Whether this finding as to the 30-foot strip was justified or not is the principal question presented for decision.

The deed under which the plaintiffs claimed title was executed in 1852, and described the premises conveyed as "beginning at the point forming the southwesterly corner of Third and Berry streets, and running thence southwesterly, on the line of Berry street, three hundred varas, to Fourth street; thence southeasterly, along the line of Fourth street, one hundred varas; thence northeasterly, at right angles, along Channel street, three hundred varas; and thence northwesterly, along the line of Third street, one hundred varas, to the place of beginning." The distances named in the deed are equal to 825 and 275 feet, and the premises described are therefore of the dimensions claimed by plaintiffs. In 1852, and thereafter until 1865 or 1866, the land conveyed by the deed, and the streets surrounding the same, were covered by the navigable waters of the bay of San Francisco. Channel street was then, and still is, an arm of the bay, extending up several blocks past and beyond the block in question; and in 1868 an act was passed by the legislature which declared that a canal 140 feet wide, located in the middle of Channel street, should forever remain open for the purposes of drainage and navigation. When the deed was made, there was an official map of the city, called the "Eddy" or "Red-Line" map, on which the land conveyed was represented as block No. 12 of South Beach water lots, but there were then, and could be, no marks or monuments upon the ground designating the corners of the blocks or the lines of the adjacent streets. In 1865 piles were driven and planked over along the southerly side of Berry street, as now established, between Third and Fourth streets, so as to form a driveway thereon, and within a year or two thereafter the street was filled in to about its present grade, and made 82½ feet wide. In 1865 or 1866 the owners of block 12, or their tenants, began to erect buildings along the northerly line of their block, and at their request the city surveyor surveyed and marked out for them the southerly line of the street. They continued this building until 1867, when nearly the whole front of the block was built upon. They also built several wharves leading back from the rear of their buildings to the north line of Channel street, as they locate it. In 1867, also, the owners of the opposite block, on the northerly side of Berry street, began to build along the street, and they continued this work until nearly the whole front of the block was built upon. As thus established and built upon, Berry street has remained ever since—now nearly or quite 25 years—a recognized thoroughfare of the city, which has been, and is, largely used by the public for the purposes of traffic over it. At both trials it was claimed by defendants that the plaintiffs' block of land was only 240 feet wide, and on the first trial the court found, upon evidence which this court held inadmissible, that it was only 245 feet wide. This claim is practically abandoned now, but it is insisted that "while plaintiffs' deed may properly be construed as calling for a tract of land 275 feet in width," still it is necessary for them to locate their grant upon the ground, which could not be done by measuring from the present practical location of Berry street. The answer raises no issue as to the location of Berry street, and the record contains no evidence tending to show that it is not correctly located. On the contrary, the evidence on the part of defendants refers to the southerly line of the street as correctly fixing the northerly line of block 12. George F. Allardt, a civil engineer and surveyor of long experience, was called as a witness for defendants, and testified that in 1868 he was the chief surveyor of the board of tide-land commissioners, and as such made a survey and map of the block in question, as well as other blocks on Mission bay, and the streets surrounding them. He was asked: "Where did you get the data from which you located the northerly line of Channel street? A. From the maps on file in the city and county surveyor's office, and the maps on file in the secretary of state's office. The southerly line of Berry street being visible on the ground by reason of improvements, in order to find the northerly line of Channel street, which is the southerly line of block 12, it was only necessary to measure the distance so obtained in the data referred to. It was only necessary to measure the two hundred and forty feet which I found on these maps. Q. You stated that the southerly line of Berry street was a well-defined line by buildings being erected upon it? A. Yes, sir. Q. And you assumed that the northerly line of Channel street was two hundred and forty feet from that point, didn't you? A. I so measured it on the ground. I assumed it, and measured it on the ground I located."

Now if, as defendants contend, Berry street, as now located, cannot be looked to for the purpose of determining the location of block 12, because it was practically located after the deed to plaintiffs was made, then it would seem to be impossible to mark out on the ground the northerly and southerly lines of the block, and the grant must therefore ever remain a float. But we do not think this can be so. When Berry street was established and built upon, and was accepted, recognized, and used by the city authorities and the public, it became a street of the city, and presumably the street referred to in the deed. The following language used by this court in deciding the case of Orena v. City of Santa Barbara, 91 Cal. 621, 28 Pac. 268, is applicable to the case in hand: "In determining the line of the street, measurements on that street would naturally be of more value than elsewhere; but if they, or the places where they were, cannot be located, it would be important to ascertain the boundaries of the street as actually opened and used; and if such location has been generally acquiesced in by the public, by landowners, and the municipality, in the absence of more certain evidence, it will be conclusive." And again: "In order to build cities and towns, there must be some finality as to the location of blocks and streets." It must be held, therefore, that the court below was fully justified in finding that the 30-foot strip in controversy was not a part of Channel street.

Counsel for defendants next call attention to the late decision of the United States supreme court in the Chicago Water Front Case, 146 U. S. 387, 13 Sup. Ct. 110, and urge that, under the law as declared in that case, "plaintiffs cannot assert title and claim as against the state, where such assertion will actually interfere with the paramount interests of commerce." We are unable to see how that case can control or affect the decision in this. As has been stated, the defendants admit the plaintiffs' ownership of block 12, and only deny that the strip in controversy is a part of that block. This question having been decided against their contention, they, as members of the board of state harbor commissioners, are by the statute given no control over the strip. Pol. Code, § 2524. We advise that the order appealed from be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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101 Cal. 70

SAN JOAQUIN LAND & WATER CO. v. BEECHER. (No. 18,216.)

(Supreme Court of California. Jan. 6, 1894.)

CORPORATIONS—SUBSCRIPTIONS—ACTION ON ASSESSMENT.

1. A subscriber to stock becomes liable to suit for delinquent assessment thereon by the directors, under Civil Code, § 349, where a majority of the subscribers have met and organized for the objects and with the capital and number of shares specified in the subscription agreement, and have elected the directors who levy the assessment.

2. In a suit on an assessment, the subscriber cannot show, in contradiction of the secretary's minutes, that the directors were not elected by ballot.

3. Under Civil Code, § 331, authorizing directors, when one-fourth of the stock is subscribed, to levy and collect assessments on the "subscribed capital stock," a notice describing the assessment, in conformance with section 335, as "levied upon the capital stock," will sustain a collection on the stock subscribed.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against J. L. Beecher on a subscription to stock. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of the corporation plaintiff, and from an order denying defendant's motion for a new trial. On the 19th day of November, 1887, the defendant, and over 60 other persons, entered into a written agreement with each other, and one with the other, to form a corporation under the name of the San Joaquin Land & Water Company, for the purpose of procuring water rights, purchasing and constructing dams, reservoirs, canals, aqueducts, etc., and to conduct, supply, and sell water for mining, farming, irrigation, and other purposes; to buy, sell, let, cultivate, and improve lands, etc.,—in certain named counties of the state of California. The capital stock of the corporation, it was provided, should be $1,000,000, divided into 10,000 shares of $100 per share. The parties to the agreement each agreed to take the number of shares set opposite his name thereunto subscribed, and to pay 20 per cent. of the par value of the shares so subscribed, within five days after the articles of incorporation were filed in the office of the county clerk of the county of San Joaquin; payments to be made to F. M. West, at the Stockton Savings & Loan Society, at Stockton, Cal. They further nominated and appointed L. U. Shippee, J. L. Beecher, (the defendant and appellant herein,) and George Gray as their agents, and the agents of the corporation to be formed, to negotiate for the purchase of any one or more water rights, canals, reservoirs, etc., for said corporation, and to pay for the same by drawing from West the money to be paid in by them under the contract, and further provided that all contracts of the agents should be binding upon them and the corporation to be formed. The contract was signed by all the parties thereto, the appellant included, and the number of shares subscribed by each affixed to his name; the aggregate of all the shares subscribed being in excess of 3,000, of which number the appellant herein subscribed for 100 shares. Questions growing out of and relating to the validity of this agreement have been twice before this court for adjudication, viz. in West v. Crawford, 80 Cal. 19, 21 Pac. 1123, and in Water Co. v. West, 94 Cal. 399, 29 Pac. 785. In each of these cases the body of the agreement above specified is set out at length. Hence, it is not deemed necessary to repeat it in full here. On the 17th day of December, 1887, appellant, and a majority of the persons who had signed said agreement, including persons who had subscribed for a majority of the shares of stock therein subscribed, met in the city of Stockton, county of San Joaquin, Cal., and organized for the purpose of forming a corporation in accordance with the agreement. The appellant herein was selected and acted as the presiding officer of said meeting. Nine of the persons who had signed the agreement of November 19th, including the appellant, were selected, voted for by the parties to the agreement, and elected directors of the corporation for the first year. A committee to prepare a set of by-laws was appointed, and an attorney chosen to prepare articles of incorporation. A list of the subscribers to the capital stock was ordered to be placed in the hands of the president (appellant) until such time as the directors should be elected and qualified. Articles of incorporation of the San Joaquin Land & Water Company, the plaintiff and respondent herein, were prepared, with the name, capital stock, number of shares, and for the objects and purposes specified in the agreement aforesaid, and with the shares subscribed and names of subscribers as in said agreement, which articles of incorporation were signed by the nine persons who had been selected as directors, who duly acknowledged the same (appellant included) on the 19th day of December, 1887, before a notary public; and thereafter, and on the 20th day of December, 1887, said articles so executed were filed in the office of the county clerk of the county of San Joaquin; Stockton, in said county, being named as the principal place of business of said corporation. A certified copy of the articles was duly filed in the office of the secretary of state for California, and on the 21st day of December, 1887, a certificate of incorporation of respondent was duly issued by said secretary of state under the seal of the state of California. On December 23, 1887, the board of directors met at the office of appellant, and organized by electing appellant president, to act until by-laws were adopted, and transacted corporate business, such as issuing a call for a meeting of stockholders for January 14, 1888, to adopt by-laws; appointing a committee of three, including appellant, with full power to purchase water rights, etc. Appellant, as such president, gave notice, etc., of the meeting of stockholders, as provided for by the directors, which meeting assembled January 14, 1888, pursuant to call. Appellant called the meeting to order, stated its object, and it appearing upon a call that stockholders representing

2,200 shares of the subscribed capital stock were present, and that number being a majority of the capital stock subscribed, viz. a majority of 3,302 shares, by-laws were thereupon adopted, a board of nine permanent directors elected, to which board power to purchase water rights was unanimously granted. On the same day the new board of directors organized by selecting L. U. Shippee as president, George Winter as secretary, and appellant as treasurer. Thereupon, other corporate business was transacted. Appellant acted for a time as treasurer of the corporation, and paid to it the 20 per cent. on the 100 shares of stock subscribed by him in the agreement of November 19, 1887. Under the by-laws the board of directors held monthly meetings at the office of the corporation, in the city of Stockton, on the first Thursday of each month. On the 7th of August, 1890, the corporation, being largely in debt, levied an assessment of $10 per share upon the subscribed capital stock of the company, payable September 20, 1890, etc., and provided for giving notice thereof as provided in sections 337–339, Civil Code. Notice was given of the levy of the assessment, in which notice it was stated that "an assessment of $10 per share was levied upon the capital stock of the corporation," which notice appellant contends should have stated, "upon the subscribed capital stock." On October 3, 1890, at a meeting of the board of directors, the assessment was declared delinquent, and a resolution adopted waiving proceedings for collecting such assessment by sale, etc., and electing to collect the assessment by action at law, etc., as provided in section 349, Civil Code, whereupon, after notice and demand, this action was brought, a trial had before the court without a jury, and, upon the written findings filed, judgment was entered in favor of plaintiff and against defendant for $1,000 and interest.

The first point made by appellant is that no action will lie against a stockholder of a corporation to recover assessments against members who have subscribed for shares of stock, when there is no express agreement to pay such assessment, and that plaintiff's only remedy, if any, is the sale of the delinquent shares pursuant to statute. In support of this proposition, we are referred to Turnpike Corp. v. Gould, 4 Amer. Dec. 80; Turnpike Corp. v. Adams, 5 Amer. Dec. 81; Cotton Mills v. Abbott, 9 Cush. 423; In re South Mountain Con. Min. Co., 8 Sawy. 366, 14 Fed. 347. These cases, except the last cited, arose in Massachusetts, in which state there was no express statute authorizing an action to recover an assessment levied by a corporation, and in which state—contrary, as we think, to the great weight of authority—the courts hold that a mere subscription for shares in a corporation, without an express promise to pay therefor or to pay assessments thereon, raises no implied promise to pay such assessments as may be levied by the corporation, and that the only remedy of the latter is by a sale of the delinquent shares under the statute. In New York it is held that an agreement to take a certain number of shares of the capital stock of a corporation thereafter to be formed creates, if not an express, certainly an implied, promise to pay for the shares; and this implied promise will sustain an action by the company, on its complete incorporation, against the stockholders, to recover calls duly made upon the stock. The interest acquired by the subscriber upon the incorporation of the company is held a good consideration to support the implied promise to pay for such stock, and raises a sufficient mutuality of contract between him and the company to render the contract a binding one on him. Railroad Co. v. Dudley, 14 N. Y. 336; Thomp. Liab. Stockh. § 105; Railroad Co. v. Mason, 16 N. Y. 451. The right of action, in such cases, is held cumulative to the right of the corporation to forfeit the shares of stock for nonpayment of calls under the statute. It is not deemed necessary to quote the decisions at length upon this point. That they are not uniform is very apparent, and it may well be concluded that to settle this disputed question was one of the objects of adopting section 349 of our Civil Code, which is as follows: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof." It will be perceived the Civil Code provides two methods for the enforcement of the liabilities of stockholders to the corporation, by reason of assessments levied upon the capital stock,—one by a sale of the stock, in pursuance of the plan devised in the statute; the other by an action at law, at the option of the board of directors. The latter method would seem equally valid, and may, in many cases, be much more efficacious than the former.

In Re South Mountain Con. Min. Co., 8 Sawy. 366, 14 Fed. 347, which was the case of a mining corporation, Sawyer, Circuit Judge, distinguished mining corporations from the ordinary corporations, and held them to be, in many particulars, sui generis, and denied an application of an assignee in bankruptcy of such a corporation for an order requiring the levy of an assessment on the stockholders for the payment of corporate debts, to be enforced by actions in personam against delinquent shareholders. That the doctrine of this case, if it can be upheld, is to be confined strictly to the class of corporations to which it applied, is abundantly established by the later decisions of this court. Harmon v. Page, 62 Cal. 459;

460; Baines v. Babcock, 95 Cal. 583, 27 Pac. 674, and 30 Pac. 776. Sawyer, J., did not, however, hold that an action could not be maintained to recover from a stockholder an assessment. In referring to that question, he says: "I am not prepared to say now that an assessment properly levied by the directors of a corporation, under the statute, may not be collected by a personal action, instead of a sale of stock. I do not think it necessary to go so far as to sustain the order of the district court, of which a review is now sought; and I therefore express no opinion upon that point, either way." Actions have been repeatedly brought and maintained without question under this section, and no good reason is apparent why it should not be done as against the stockholder in a corporation organized like the present, under the general law of the state. Railroad Co. v. Spreckles, 65 Cal. 193; Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859. The agreement of November 19th, to form the corporation plaintiff herein, and to take the number of shares specified, was, as to incorporating, executory; but when the promoters met, and organized the corporation, under the name, for the objects, with the capital stock, the number of shares, etc., as specified in the agreement, and named the parties to said agreement, with the shares subscribed by each in the articles of incorporation, as subscribers to the capital stock, to the extent of the shares agreed to be by them, respectively, taken, it was an acceptance by the corporation of such parties as stockholders, and they became thereby and thenceforth bound as such. Railroad Co. v. Mason, 16 N. Y. 452; Hotel Co. v. Friedrich, 26 Minn 112, 1 N. W. 827. It was not necessary to the validity of the corporation, or to the subscribers becoming stockholders, that they should all sign the articles of incorporation. Those who sign articles of incorporation act as the agents of the others. Railroad Co. v. Hildreth, 53 Cal. 129; Plank Road Co. v. Griffin, 21 Barb. 454. In another action growing out of this agreement, (94 Cal. 399, 29 Pac. 785,) and in Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, this court held that these preliminary agreements inured to the benefit of the corporations thereafter formed, as contemplated by the agreements. To constitute the subscribers stockholders, it was not necessary that the certificates of stock should have issued to them. Civil Code, § 323; Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110.

There are four separate appeals submitted here, by as many defendants, depending upon the same general principles, but differing somewhat in the evidence establishing the facts as to their becoming stockholders, and the foregoing remarks are indulged in part as applicable to all of the appellants. So far as this appellant is concerned, he signed the articles of incorporation, acted as an officer of the company, and in various ways attested his position as a stockholder in the company. In view of the reasoning in Power Co. v. Johnson, supra, in Hotel Co. v. Callender, supra, in Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, and in the two appeals heretofore prosecuted in matters growing out of the same agreement involved here,—all recent cases,—it is not deemed necessary to extend the reasoning upon the point that the agreement of November 19th was valid and binding upon the subscribers, and sufficient, upon the organization of the corporation, and acceptance by it of their subscriptions, to constitute them stockholders in the corporation which they had agreed to form, and in which they had bound themselves to become such stockholders.

The objection that the directors of the corporation were not elected by ballot, as required by law, and hence had no power to levy the assessment in question, is untenable: (1) The minutes of the secretary show that the directors were elected by ballot. (2) If not properly, they were at least nominally, elected, organized as a board of directors, and acted as such; and, being de facto officers, their acts as such are valid.

It is further objected that the assessment in question, of $10 per share, was levied on the subscribed capital stock of 3,302 shares while the notice to the stockholders informed them that the board of directors had levied an assessment of $10 per share on the capital stock, instead of upon the subscribed capital stock. By section 331 of the Civil Code, the directors were authorized, after one-fourth of its capital stock had been subscribed, to levy and collect assessments upon the subscribed capital stock "in the manner and form, and to the extent provided herein." The 3,302 shares of stock subscribed were in excess of one-fourth of 10,000 shares, into which the capital stock was divided, and the shares so divided became the basis for the assessment, the capital stock upon which the assessment was to be levied. The notice required to be given to stockholders of calls must be such as the charter requires, or, what with us is the same thing, such as the statute prescribes; and in the absence of an express provision in the charter or articles of association, or the law under which they are formed, it is said no notice is requisite. Mor. Corp. § 147. Our Civil Code, § 335, prescribes the form of a notice to be given to stockholders of the levy of an assessment, which form was followed in the present case. In describing the assessment, it describes it as being "levied upon the capital stock of the corporation," instead of upon the subscribed capital stock. The legislature had authority to designate the form of notice to be given, and having done so, and the secretary having given the notice thus provided, it was sufficient.

The other matters discussed in the brief of appellant are not material to the result. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SAN JOAQUIN LAND & WATER CO. v. BELDING. (No. 18,215.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against Charles Belding. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed, upon the authority of Water Co. v. Beecher, 35 Pac. 349, (No. 18,216, this day decided.)

SAN JOAQUIN LAND & WATER CO. v. HEWLETT. (No. 18,217.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against H. H. Hewlett. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed upon the authority of Water Co. v. Beecher, 35 Pac. 349, (No. 18,216, this day decided.)

SAN JOAQUIN LAND & WATER CO. v. HITCHCOCK. (No. 18,218.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against J. R. W. Hitchcock. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed, upon the authority of Water Co. v. Beecher, 35 Pac. 349, (No. 18,216, this day decided.)

101 Cal. 15

WULZEN v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO.

(No. 14,401.)

(Supreme Court of California. Jan. 3, 1894.)

CERTIORARI — REVIEWING ACTS OF CITY COUNCIL — CONDEMNATION OF LAND FOR STREET — DUE PROCESS OF LAW.

1. The action of a city council, to whom power has been delegated to appropriate land for public use, in passing a resolution of intention to extend a street, and in declaring the width and length of such extension, is not subject to review on certiorari, as such action is the exercise of a purely legislative function.

2. Personal notice to those whose lands are to be taken for public use is not necessary to constitute due process of law.

3. Act March 6, 1889, relating to the taking by a city of land for public improvements, requires the city council, before making any improvement, to post near the land affected, and to publish, notice of the intention to make the improvement and of the character of the improvement. *Held*, that a fulfillment of these requirements constitutes due process of law in the matter of giving notice to those whose lands are to be affected.

4. An order of a city council, to whom has been delegated power to appropriate land for public use, declaring that certain land is hereby "condemned, appropriated, acquired, set apart, and taken for public use," is subject to review on certiorari, as such order is the exercise of a function judicial in its nature.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition by D. H. Wulzen for a writ to have an order of the board of supervisors of the city and county of San Francisco reviewed. From a judgment dismissing the petition, petitioner appeals. Reversed.

J. C. Bates, for appellant. Pierson & Mitchell, for respondent.

PER CURIAM. The appellant here filed his petition in the court below to obtain a writ of review under section 1068 of the Code of Civil Procedure, to annul a certain order of the board of supervisors of the city and county of San Francisco, (a copy of which, marked "Exhibit C," is made a part of the petition,) which purported on its face to take and condemn petitioner's land, with that of many others, for an alleged public use, in the extension of Market street in a general southwesterly direction, from its present terminus to the Pacific ocean. The order sought to be brought under review follows the resolution of intention of the board, (which is also set out at length in the petition, and marked "Exhibit A,") and the portion thereof against which the objections of petitioner are more particularly directed is as follows: "Section 1. Market street is hereby declared to be an open public street of the city and county of San Francisco, from its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly, with a uniform width of 120 feet, to low-water mark of the waters of the Pacific ocean. The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways." The petition avers that no compensation was made to petitioner for his land taken, and also that it is not, and never has been, for the public use or convenience, or necessary thereto, to open or extend said Market street, and specifies reasons for this conclusion. An order requiring defendant to show cause why a writ of review should not be allowed issued, in answer to which defendant appeared, and for cause answered "that the proceeding sought to be reviewed herein was not, and is not, a judicial act, but was and is a legislative act, and not the subject of review on a writ of certiorari." Upon a hearing the court below sustained the position taken by defendant, and denied the writ and dismissed the petition. From the judgment, petitioner appeals.

It is admitted on all hands that certiorari does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions which are not judicial in their character. People v. Board of Ed. of Oakland, 54 Cal. 375; Myers v. Hamilton, 60 Cal. 289; Williams v. County of Sacramento, 65 Cal. 160, 3 Pac. 667; Bixler v. Board, 59 Cal. 698; People v. Bush, 40 Cal. 344. At the oral argument much stress was laid by counsel for appellant upon the insufficiency of the notice provided by the statute to be given to the owners of property to be affected by the improvement. The position taken was not that the notice must be "due process of law," in the strict sense of the term, as defined in proceedings taken in the courts, but that it must be its equivalent, with only such modification as the nature of the proceedings and the surroundings render necessary. Justice Bradley, in discussing what is due process of law in Davidson v. New Orleans, 96 U. S. 97, uses the following language: "In judging what is due process of law, respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law." In commenting upon the above quotation in Lent v. Tillson, 72 Cal., at page 414, 14 Pac. 71, Temple, J., says: "In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And, further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practical or usual." In the present case the statute of March 6, 1889, (St. 1889, p. 70,) under which the proceedings were taken, requires that before ordering any work done or improvement made, as authorized by section 1 of the act, the city council shall pass a resolution of intention to do the work or make the improvement, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the boundaries of the district to be affected or benefited by the improvement, and to be assessed to pay expenses. Notices are required to be posted upon the contemplated improvement, not more than 300 feet apart, and not less than three in any case, which shall be headed, in letters of not less than one inch in length, "Notice of Public Work," and shall contain notice of the passage of the resolution of intention, its date, and, briefly, the work or improvement proposed, "and refer to the resolution for further particulars." A like notice is required to be published for 10 days in a daily newspaper (if any) published and circulated in the city where the work is to be done, etc. Within 10 days after completion of publication, all parties in interest objecting may file their objections, when a day for hearing their objections must be fixed, the parties objecting notified, and a hearing had; and, if the objections are sustained, all proceedings are stopped; if overruled, or if no objections are filed, the council is deemed to have acquired jurisdiction to order the work done or improvement made. The notice was given by posting and publication, as prescribed by the statute.

The terms "due process of law," or "due course of law," or "law of the land," all of which signify the same thing, are sometimes defined as "law in its course of administration through courts of justice." As applied to judicial proceedings, this definition is concise and precise, but in a broader sense the term signifies such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. Administrative process, it has been said, of the customary sort, is as much due process of law as judicial process. To settle the question as applied to a given state of facts, we have but to examine the previous condition of things in use, and regarded as essential to the protection of the rights of the individual under such circumstances; and, if in substantial compliance with such essentials, the course prescribed may be said to be in consonance with the law of the land, and to constitute due process of law. The power of taxation is confided to the legislative department of the government, and "an act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation." Cooley, Tax'n, pp. 48, 49. It was said in Kelly v. Pittsburgh, 104 U. S. 80: "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."

The burden sought to be laid upon property holders in this case is not, it is true, "taxation," in the strict sense of the term. Hagar v. Supervisors of Yolo Co., 47 Cal. 234. It is an assessment for a local—for a municipal—improvement, which is sought in the proceedings under review; but in principle it is in most respects subject to like considerations with cases of taxation. The determination as to whether or not the right of eminent domain should be exercised, and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question, and not a judicial one. Its determination rests exclusively with the legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern. The question as to whether a given use is in fact a public use may be inquired into by the courts; but that question determined in the affirmative, as it must be here, and the power of the court is confined to seeing to it that the burdens cast upon the citizen are in conformity with the methods prescribed by the legislature, and that those methods are not in conflict with the fundamental rights of the people. Gilmer v. Lime Point, 18 Cal. 257; Railroad Co. v. Moss, 23 Cal. 324; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771; In re Fowler, 53 N. Y. 62; People v. Smith, 21 N. Y. 595. In the case last cited it was said: "The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute, which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public is interested. There is no restraint upon the power, except that requiring compensation to be made; and, where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority." We think the consensus of opinion—the weight of authority—is to the effect that, in a case like the present, the legislative authority would have a perfect right, without any notice to the parties to be affected by its action, in the absence of a statute requiring notice, to open up Market street, and determine the district to be affected thereby, the latter of which was done and upheld in the case of the widening of Dupont street. Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. In that case it was said, in substance, that the parties affected had no constitutional right to be heard until the assessment was made. The notice in the present case is made necessary by the act under which the council received its authority, and was in accord with the requirements of the act, and was as specific and certain as is practical under such circumstances, and was substantially such as has been approved in many cases in this state and elsewhere. To require such a notice to name all the persons to be affected, and to be served upon them personally, would, for a variety of reasons, require an impossibility.

We are of opinion, therefore: (1) That the proceedings of the council in passing the resolution of intention, and in declaring the exterior boundaries of the district to be affected by the contemplated improvement, were legislative in character. (2) In matters of taxation and assessment the state is not bound to accord personal service of process upon the citizen. (3) That the notice and the mode of its service was in obedience to the requirements of the statute, and not violative of any inherent or constitutional right of the persons to be affected thereby, and hence in accord with the law of the land, and amounted to due process of law in such a case.

No objections were filed, so far as appears, to the improvement, or to the extent of the district of lands to be affected or benefited by such improvement; hence, under section 5 of the act, the council "is to be deemed to have acquired jurisdiction to order any of the work to be done or improvements to be made." Thereupon the city council passed the ordinance set out in the transcript and marked "C," which it is claimed by appellant was the exercise of judicial power, and in excess of the jurisdiction conferred upon the city council by the act of March 6, 1889. That order or ordinance (Order No. 2,319) purports to be an order for "opening and extending Market street from its present termination, in a southwesterly and westerly direction, to the Pacific ocean." By section 1, "Market street is declared to be an open public street of the city and county of San Francisco, from its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly, with a uniform width of 120 feet, to low-water mark of the waters of the Pacific ocean. The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways, to wit." Then follows a description of the proposed street. Section 2 names and appoints three commissioners to assess the benefits and damages resulting from the opening and extending the street. as provided for in resolution of intention, and to have and exercise general supervision of the proposed work and improvement until the completion thereof pursuant to the provisions of an act of the legislature, etc., describing the objects of the act approved March 6, 1889, (St. 1889, p. 70, etc.)

The questions presented are: (1) Was the act of the board of supervisors judicial in its character and effect? and, if so, (2) was it in excess of the jurisdiction conferred upon the board? The passage of ordinary resolutions for opening streets in cities by the board of supervisors or city council, under the authority conferred by the act of March 6, 1889, and providing for commissioners, etc., is clearly, we think, a legislative act. A legislative act is said to be one which predetermines what the law shall be for the regulation of future cases falling under its provisions, while a judicial act is a determination of what the law is in relation to some existing thing done or happened. Mabry v. Baxter, 11 Heisk. 690; Sinking Fund Cases, 99 U. S. 761. In the case last cited it was said: "Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus, an act of the legislature of Illinois authorizing the sale of the lands of an intestate to raise a specific sum to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts, which could not be performed by the legislature. Lane v. Dorman, 3 Scam. 238." Whenever an act determines a question of right or obligation, or of property, as the foundation upon which it proceeds, such an act is, to that extent, judicial.

The order in question went beyond the legislative function of declaring a street an open and public one. It purported to and condemned, appropriated, acquired, set apart, and took for public use all the land within the exterior boundaries of the street, except that already held by the city. To condemn land is to set it apart or expropriate it for public use. "To appropriate" is to make a thing one's own; to make it the subject of property; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure. "To acquire" is, in the law of contracts and descents, to become the owner of property; to make property one's own. "To take" signifies "to lay hold of," and, when applied to land, implies "to gain or receive into possession; to seize; to deprive one of the possession; to assume ownership. Thus, it is a constitutional provision that a man's property shall not be taken for public uses without just compensation." Black, Law Dict. tit. "Take." The terms used in this order are the usual and apt ones made use of in proceedings in the courts for the final condemnation of land under the exercise of the power of eminent domain. They are not the usual expressions made use of in the exercise of legislative power. The jurisdiction of the board conceded, and the terms used were sufficient to divest the title of the petitioner, and vest it in the public, to appropriate the property to a public use. It was the exercise of judicial power. It will not do to say that the board of supervisors had no such power, and therefore we must presume that in the order they merely intended their action as preliminary to proceedings to condemn, should they become necessary. The order in question speaks in no uncertain terms. It uses language capable of only one interpretation, and that as showing an intent to condemn the land indicated in praesenti. The order included not only a legislative expression of the will of the board adopting it that a street should be opened, but, in addition thereto, sought to perform the judicial act of taking the land of citizens, rendered necessary under the legislation involved in the order. To the extent which it sought to accomplish this last object it was judicial.

As to the action of the board, so far as judicial, being in excess of its jurisdiction, we entertain no doubt. It is true that boards of supervisors, city councils, and like local boards and commissions are not within the inhibition of section 1 of article 3 of our state constitution, and may be invested with powers belonging to either or all of the three departments of our government. People v. Supervisors, 8 Cal. 60; People v. Provines, 34 Cal. 532; Kimball v. Alamenda Co., 46 Cal. 19. The objection to that portion of the order is not simply that it seeks to exercise judicial power, but that it involves an exercise of such power not conferred by any statute, and in a manner which no statute can authorize. When land within a street is "condemned, appropriated, acquired, set apart, and taken for public use," it would seem that the last act in the series essential to vest in the public a right to its use as a thoroughfare is accomplished. It is evidence, not of an intention to take and condemn the land in the future, as provided in the statute we have referred to, but of a present condemnation, segregation, and dedication to the use of the public. It follows from these views that the court below erred in holding that Order No. 2,319 was and is not a judicial act, and the judgment of the court below is reversed, and the cause remanded.

BEATTY, C. J. I concur in the judgment.

BRICKELL v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO.

(No. 15,027.)

(Supreme Court of California. Jan. 3, 1894.)

In bank. Appeal from superior court, city and county of San Francisco.

Petition by Brickell for a writ to have an order of the board of supervisors of the city and county of San Francisco reviewed. From a judgment dismissing the petition, petitioner appeals. Reversed.

J. C. Bates, for appellant. T. Z. Blakeman and John D. Durst, for respondent.

PER CURIAM. On the authority of Wulzen v. Board, 35 Pac. 353, (No. 14,401; this day decided,) the judgment is reversed.

101 Cal. 32

GOULD v. STAFFORD. (No. 19,214.)

(Supreme Court of California. Jan. 4, 1894.)

Water Rights—Injunction—Amended Answer—When Proper—Law of the Case—Diversion by Tenants—Liability of Riparian Owner.

1. In an action by a lower to restrain an upper riparian owner on the same stream from diverting water through a certain small flume by temporary dams, the answer averred, inter alia, that defendant, as such owner, and also by prescriptive right, was entitled to divert more water than such flume could carry. *Held*, that it was not an abuse of discretion, after reversal on appeal of the judgment rendered, to permit defendant to file an amended answer omitting such defense, and averring that at the time of the alleged diversion a part of his riparian land was leased to certain tenants over whom he had no control, and who were alone liable if more water was diverted through the flume than the leased land was entitled to.

2. As an amendment to a pleading may be allowed to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other particulars," (Code Civil Proc. § 473,) the court may allow an amendment to an answer, though it is mainly to correct a mistake of law made by defendant's attorney.

3. The court found, on sufficient evidence, that defendant leased part of his riparian land, and by agreement constructed such flume to carry water to the leased land; that the tenants were bound to keep it in repair, and "had actual and exclusive possession and control of" it and the premises; that defendant "had nothing to do or say as to the quantity of water that was diverted into said flume;" that he did not cause the water to flow through such flume, but that such tenants caused it to so flow; and that before suit was brought no notice was given him that there was a wrongful diversion of such water, nor any demand made to abate the alleged nuisance. *Held*, that defendant was not liable for such diversion.

4. In view of such findings, it was immaterial whether the court erred in findings as to the quantity of water to which plaintiff was entitled, the quantity of which he was deprived, and the damage done him, or in permitting defendant to cross-examine plaintiff's witness touching the diversion of water by third persons.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Frederick S. Gould against O. A. Stafford for damages, and to enjoin the diversion of water. From a judgment for defendant, plaintiff appeals. Affirmed.

For prior reports, see 18 Pac. 879, and 27 Pac. 543.

Geo. H. Gould and John J. Boyce, for appellant. B. F. Thomas, for respondent.

McFARLAND, J. This action was brought by plaintiff, who is a lower riparian proprietor on a stream, to restrain the defendant, who is an upper riparian proprietor on the same stream, from diverting water therefrom. Judgment went for defendant, and plaintiff appeals. The case has been here twice before. 77 Cal. 66, 18 Pac. 879; 91 Cal. 146, 27 Pac. 543. On the first appeal a judgment in favor of defendant was reversed on account of defective finding, and it was said in the opinion that under the pleadings, as they then stood, evidence of diversions of water by third persons would be admissible only as to the amount of damages (which were waived by plaintiff;) and that findings as to the acts of certain Chinamen and others were irrelevant, and against the admissions of the answer. Certain principles as to riparian rights were also stated for the guidance of the court on another trial. When the case went down to the trial court, defendant asked leave to file a certain amended answer, to which the plaintiff objected. The court allowed it to be filed, and plaintiff excepted, preserving his exception in a bill of exceptions; but on the second trial judgment was rendered for plaintiff, so that the objection to the amended answer was not presented to this court on the second appeal. Upon the second appeal the judgment for plaintiff was reversed, mostly upon points which do not arise on the present appeal. When the case went down the second time, plaintiff, in addition to the exception which he had preserved as before stated, moved the court to strike out the said amended answer, and, his motion having been denied, he again excepted.

The point most elaborately argued by appellant is that the court erred in permitting respondent to file his amended answer. It appears that the alleged wrongful diversion was made through a small flume, into which the water was turned from time to time by temporary obstructions or dams across the stream. In the original answer it was averred, among other things, that defendant, as a riparian owner, and also by virtue of a prescriptive right, was entitled to divert more water than said flume could carry; and he thus justified the diversion. In the amended answer he omitted the defense just stated, and averred that during the time of the alleged diversion a part of his riparian land was leased to certain tenants over whom he had no control; and that if during said time more water was diverted through said flume than said leased riparian land was entitled to, said tenants alone are liable therefor to plaintiff. And it is to this difference between the two answers that plaintiff mainly objects. We cannot say that the court abused its discretion in permitting the amended answer. The rule is that courts will be liberal in allowing an amendment to a pleading when it does not seriously impair the rights of the opposite party, and particularly an amendment to an answer. A defendant can generally set up as many defenses as he may have. Appellant contends that the affidavits upon which the motion to amend was made show that it was based mainly on a mistake of law made by respondent's attorney; but, assuming that to be so, still the power of a court to allow an amendment is not limited by the character of the mistake which calls forth its exercise. The general rule that a party cannot be relieved from an ordinary contract which is in its nature final, on account of a mistake of law, does not apply to proceedings in an action at law while it is pending and undetermined. Pleadings are not necessarily final until after judgment. Section 473, Code Civil Proc., provides that the court may allow an amendment to a pleading to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other particulars." The true rule is well stated in Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. In the case at bar evidence of the lease was given at the first trial, and we cannot see that the amendment before the second trial put plaintiff in a position any different from that which he would have occupied if the amendment had been made before the first trial.

Appellant contends that the court erred in allowing respondent to ask, on cross-examination of Packard, a witness for appellant, certain questions touching the diversion of water by third persons, and argues that said questions were contrary to the law of the case as settled by this court on the first appeal. We think, however, that, considering the testimony of the witness in chief, the said questions were not beyond the legitimate scope of cross-examination. As to "the law of the case," it may be remarked that what the court said on the first appeal related entirely to the attempt of the defendant, under the pleadings as they then stood, to prove diversions by third persons as a defense. It had nothing to do with the question of proper cross-examination, and, of course, nothing to do with the right of respondent, under the present answer, to show the acts of his tenants. But in fact this point, and all other points made by appellant, except his objection to the amendment of the answer, are unimportant and immaterial if the findings of the court are to stand to the effect that if any damage was done to appellant by the alleged diversion of water it was done, not by respondent, but by his tenants, for whose acts he is not responsible. The court found that respondent leased a portion of his riparian land to certain tenants for a term of five years, and agreed to construct, and did construct, a six-inch flume, by which the water of the stream could be carried to the leased land, the tenants to keep the flume in repair; that respondent "had nothing to do or say as to the quantity of water that was diverted into said flume;" that during the times stated in the complaint the said tenants "had actual and exclusive possession and control of said premises and of the flume;" that during said time respondent did not erect any dam or obstruction across said stream, or prevent any part of its waters from flowing down the same, or cause any part thereof to be wasted or carried away from appellant's riparian land; that all of the water which flowed through said flume was caused to so flow by said tenants, over whom respondent had no control; and that, prior to the commencement of this action, no notice was given respondent that there was a wrongful diversion of water through said flume, nor any demand made to abate the alleged nuisance. It is apparent that if these findings of fact are justified by the evidence, and constitute in law a defense, then it would be useless to inquire whether the court committed any error in arriving at the other findings about the quantity of water to which appellant was entitled, the quantity of which he was deprived, the damages done him, etc.

We do not deem it necessary to discuss here the general principle of law which applies to the question whether or not, in any particular case, a landlord is responsible for wrongful acts or nuisances done or created by his tenants. The general rule is, itself, well established; but its application to particular facts is often difficult, and there have been many decisions where the rule was invoked. Sufficient was said on the subject in the opinion of this court on the last appeal, both as to the rule and as to its application to the particular facts in the case at bar. 91 Cal. 146, 27 Pac. 543. It is enough to say here that the evidence is not insufficient to support the findings on this subject above specially stated; and that those findings justify the legal conclusion that respondent was not liable, under the circumstances, for the said diversions of water by his tenants. This being so, the judgment must be affirmed. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

100 Cal. 496

DOUGHERTY et al. v. BARTLETT et al.

(No. 15,265.)

(Supreme Court of California. Dec. 23, 1893.)

TESTAMENTARY TRUST—EQUITABLE ACTION TO ENFORCE—WHEN MAINTAINABLE.

Beneficiaries under a will cannot maintain a suit in equity against the executors and trustees under the will as such, and also as individuals, to enforce the performance of the trust, for an accounting of the trust estate, and to declare void certain orders of the probate court in relation to such estate, before a final settlement of the accounts of such trustees, and distribution by the probate court.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Bill by Mary S. Dougherty and others against Columbus Bartlett, Martin Bacon, and Frank Barker, as trustees and executors under the will of William Walkerly, deceased, and also as individuals, to enforce the performance of the trust, for an accounting, and to declare void certain orders of the probate court relating to such estate. From a judgment sustaining a demurrer to and dismissing the bill, plaintiffs appeal. Affirmed.

The plaintiffs are nieces and nephews of the decedent, and allege in the bill, in substance, various wrongful and fraudulent acts and omissions on the part of defendants in connection with the management of the estate, resulting in loss and waste; the appropriation of trust funds to their own use; collusion with the widow of deceased, whereby she has obtained and is about to obtain more than she is entitled to under the will; and that certain orders of the probate court, setting apart certain property as a homestead for the widow, making family allowances, and appointing and compensating an attorney to represent absent or minor heirs, were void for want of jurisdiction.

B. B. Newman, (Fox & Kellogg, of counsel,) for appellants. H. C. Firebaugh, for respondents.

DE HAVEN, J. The demurrer to the complaint was properly sustained. Until distribution of the estate of William Walkerly, deceased, by the probate court, the respondents, Bartlett, Bacon and Barker, hold the property of said deceased as executors of his will, and they must account to the probate court for all property of the estate of said deceased received by them as such executors, and for their management of the same prior to its distribution under the will of deceased; and it is for the court to determine what, if any, commissions the said named respondents shall be entitled to receive for their services as executors of said will, and also to determine in the settlement of the accounts of the said executors what moneys expended by them in the discharge of their duties were properly expended, and so chargeable to the estate represented by them, and whether they have exercised ordinary care in the management of the property of said estate, or whether they have mismanaged the same, or permitted waste thereof. It was a question solely for the consideration of the probate court whether an attorney should be appointed to represent absent or minor heirs, and, if so appointed, the amount of compensation to be allowed him. The probate court also had jurisdiction to make the order setting apart a homestead for the widow of the deceased, Walkerly, and to make the order for a family allowance; and no facts are alleged in the complaint showing that such orders were fraudulently procured by the defendants, or either of them, as the result of any misrepresentation or concealment of facts; nor does it even appear from the allegations of the complaint that the court committed any error in making such orders, even if we could review the same in this action. The fact, if it be one, that the defendant Blanche M. Walkerly openly asserts that she will commence legal proceedings against the other defendants, as trustees under the will, to compel them to to pay her out of the trust estate the further sum of $21,000, does not give to plaintiffs any cause of action against her or the other defendants. It is unnecessary to attempt any synopsis of the voluminous complaint filed in this action, or to notice more particularly its several allegations. We do not understand from the complaint that the executors, who are also the trustees under the will of the deceased, have failed "to annually distribute the residue of the rents and profits of the trust estate" among the nephews and nieces of the deceased, as directed by the will, or that this is an action to enforce this particular duty of the defendants, who are named as executors and trustees under the will; and we express no opinion upon the question whether such an action could be maintained in a court of equity prior to the distribution of the estate under the will. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

101 Cal. 89

COOK et al. v. FOWLER et al. (No. 19,220.)

(Supreme Court of California. Jan. 8, 1894.)

ACTION BY PARTNERSHIP — SUFFICIENCY OF COMPLAINT.

In an action by a copartnership, the failure of plaintiff to make, file, and publish a

certificate stating the names and place of residence of the copartners, as required by Civil Code, §§ 2466, 2468, is matter of defense, and compliance with such provisions need not be averred and proved by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Neil Cook and Sterling Cook, copartners under the name of Cook Bros., against Tilman Fowler and others, on a promissory note. From a judgment for plaintiffs, defendants appeal. Affirmed.

Thomas Rhodes, for appellants. Venable & Goodchild, for respondents.

SEARLS, C. Defendants appeal from a final judgment against them and in favor of plaintiffs for $561.75 and costs upon a promissory note made by defendants. There is no statement or bill of exceptions. There is but a single point made by appellant. It is that the complaint shows that plaintiffs were copartners under a designation not showing the names of the persons interested as partners, and that they have failed to aver or prove a compliance with the provisions of sections 2466 and 2468 of the Civil Code, by filing and publishing a certificate stating the names and place of residence of the copartners as therein provided. The point is not well taken. The failure to make, file, and publish the certificate in question is matter of defense, to be set up by defendants, and, not having been so taken, is waived. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, and 15 Pac. 451; Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(101 Cal. 105)

EGENER v. JUCH et al. (No. 19,155.)[1]

(Supreme Court of California. Jan. 11, 1894.)

ATTACHMENT—NONRESIDENTS

Persons actually in the state, engaged in professional work, are not "nonresidents," within the meaning of Code Civil Proc. §§ 537, 538, authorizing attachment in certain cases.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George Egener against Emma Juch and others. From an order dissolving the attachment issued, plaintiff appeals. Affirmed.

Jay E. Hunter and Creighton & Creighton, for appellant. W. E. Dunn, for respondents.

McFARLAND, J. This is an appeal by plaintiff from an order of the lower court dissolving an attachment. The validity of the attachment depended upon the question whether or not the respondents were "not residing" or "nonresidents" of this state at the time the writ issued. Code Civil Proc. §§ 537, 538. At that time they were actually in the state engaged in their professional work, and were served personally in the state with summons. The affidavits used on the motion conflicted as to where their legal residence was, and, considering the decision of this court in Hanson v. Graham, 82 Cal. 631, 23 Pac. 56, to the effect that "the residence referred to by the attachment law is an actual, as contradistinguished from a constructive or legal, residence or domicile," we cannot say that the court below was wrong in holding that respondents were not nonresidents, within the meaning of the sections of the Code above referred to. The order appealed from is affirmed.

We concur: DE HAVEN, J., FITZGERALD, J.

(101 Cal. 107)

WATTERSON v. SALDUNBEHERE. (No. 18,172.)

(Supreme Court of California. Jan. 17, 1894.)

WATER RIGHTS—APPROPRIATION—JOINDER OF CAUSES.

1. The right to the use of water flowing in a stream may be acquired by actual appropriation, without compliance with the provisions of Civil Code, § 1410 et seq., for acquisition of water rights.

2. One may in the same action seek damages for injury to water rights and injunction.

Commissioners' decision. Department 1. Appeal from superior court, Mono county; W. H. Virden, Judge.

Action by Mark Watterson against Domingo Saldunbehere. Judgment for plaintiff. Defendant appealed. Affirmed.

N. D. Anderson and Chas. L. Hayes, for appellant. Richard S. Miner, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for the diversion and pollution of a stream of water in Mono county, and to obtain an injunction restraining the further diversion and pollution thereof. The plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals.

The facts of the case may be briefly stated as follows: Prior to March 23, 1881, one J. P. McLaughlin made application at the proper United States land office to purchase certain land situate in Mono county, and containing 221 55-100 acres, under the desert-land act of March 3, 1877. On the day named he received from the receiver of the land office a final receipt showing full payment of the land applied for. On July 22, 1887, McLaughlin, by a bargain and sale deed duly executed and recorded, conveyed to the plaintiff the said land, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging. On September 18, 1891, a United States patent for the said land was issued in the name of McLaughlin, and thereafter delivered to the plaintiff. Extending through the said land, for a distance of about one and a half miles, was a small, natural water course, known as "Dexter Canyon Creek," which carried, in ordinary seasons, about 150, and never more than 250, inches of water. For more than 10 years before the commencement of this action, plaintiff and his grantor had appropriated, and been using, during the spring, summer, and fall months, when not interrupted by defendant, all the waters of this stream for irrigating the said land, for watering stock, and for domestic, culinary, and other useful purposes, and all the waters of the stream were necessary for such purposes. By thus using the water to irrigate the land they had reclaimed the same, or a large part thereof, from its desert condition, and made it productive and valuable grass land. In June, 1892, plaintiff was irrigating his land, and was raising thereon a valuable crop of grass, and was also pasturing thereon, and watering from the stream, about 3,000 head of sheep. The defendant was engaged in the business of raising and grazing sheep, and was traveling about with them from place to place to find pasturage. Early in June, 1892, he drove about 6,000 head of his sheep upon the land lying along the banks of the said creek, and some two and a half miles above the plaintiff's land, and kept them there for more than a month. He allowed his sheep to pass over, into, and up and down the stream, thereby breaking down its banks, which were sandy and friable, and causing large quantities of sand and sediment to fall into the water, and to be carried down and deposited upon plaintiff's land, to its injury. The water was also made unfit to be used for the purpose of irrigating plaintiff's land or watering his sheep, and he was damaged thereby. Early in July, defendant constructed a ditch, and by means of it diverted from the stream about one-sixth of all the water flowing therein, and threatened to continue such diversion. Plaintiff commenced this action on the 21st of July, 1892, and obtained a temporary injunction, which, by the final judgment, was made perpetual.

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[1] For opinion on rehearing, see 35 Pac. 873.

The findings are 18 in number, and are very full and explicit. The contention of appellant is that 14 of these findings, covering all of the disputed questions in the case, were not justified by the evidence, and hence that the judgment should be reversed. It would subserve no useful purpose to review the findings separately, and state the evidence which tends to support them. After carefully going over the record, I am satisfied that there was evidence amply sufficient to justify them all, and that the judgment cannot, therefore, be reversed on this ground.

The objection that neither McLaughlin nor the plaintiff ever made any valid appropriation of the water, for the reason that they never complied with the provisions of the Civil Code for the acquisition of water rights, (section 1410 et seq.,) is without merit. The evidence clearly shows that McLaughlin and the plaintiff had actually appropriated and used the water for more than 10 years before the defendant interfered with it, and the law is now settled that, where there has been an actual appropriation of water, a right to it is acquired, without following the course laid down in the Code. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, and 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, (Cal.) 34 Pac. 324.

There was no error in overruling the demurrer to the complaint. The two causes of action were properly united, and each stated facts sufficient to entitle the plaintiff to the relief demanded.

There was no error in the refusal of the court to grant the defendant's motion for a nonsuit. The evidence clearly showed that the plaintiff had been damaged by the acts of defendant, and was entitled to relief.

There was also no error in the ruling of the court sustaining the plaintiff's objection to the following question asked the witness Juan Inda by defendant: "Did you herd and water sheep on the North fork of Dexter Canyon creek in the years 1885, '86, '87, '88, '89, '90, '91, and '92?" The objection was that the evidence sought, as to all the years other than 1892, was immaterial and incompetent, and we think it was clearly so. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

100 Cal. 635

BROWN v. CAMPBELL et al. (No. 15,057.)

(Supreme Court of California. Dec. 30, 1893.)

ATTACHMENT—PROPERTY SUBJECT TO LEVY—LIMITATION OF ACTIONS—RES JUDICATA.

1. An attachment of property fraudulently conveyed by a judgment debtor, at the time of the attachment standing in the names of the fraudulent grantee and trustees in a trust deed of the property made by such grantee to secure a debt, is in legal effect an attachment of the surplus moneys arising from a subsequent sale of the property under the trust deed.

2. A foreign judgment does not make one a judgment creditor in California, within the rule permitting only judgment creditors to attack a conveyance for fraud; and, until a judgment is obtained in California on the foreign judgment, the statute of limitations does not begin to run.

3. Though a judgment has not been appealed from, it is not a bar to a subsequent action between the same parties, involving the same subject-matter, if the time for appeal has not expired, since the action in which such judg-

ment was rendered must be deemed still pending. Code Civil Proc. § 1049.

4. Findings will not be disturbed on appeal where there is a substantial conflict in the evidence.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Brown against Campbell and Kent, trustees in a trust deed executed by plaintiff, to recover surplus moneys left after a sale of the property under the trust deed, and payment of the debt secured thereby. One Priest, who claimed the surplus, was made a defendant, and filed an answer and cross complaint, and the Anglo-Californian Bank was permitted to intervene. From a judgment for defendant Priest, and an order denying a new trial, plaintiff and the Anglo-Californian Bank appeal. Affirmed.

James A. Waymire and Wm. T. Baggett, for appellants. T. Z. Blakeman and H. C. Campbell, for respondents.

DE HAVEN, J. This action was originally brought by the plaintiff against the defendants Campbell and Kent to recover the sum of $2,549.50, surplus in their hands, arising upon the sale of certain real property conveyed to them in trust to secure an indebtedness of plaintiff to the San Francisco Savings Union. These defendants answered, admitting that, after the payment of plaintiff's indebtedness secured by the trust deed, there remained in their hands the sum demanded by plaintiff; but they also alleged that one Priest claimed to be entitled to recover such surplus, and they asked for an order requiring him to be brought into court as a party to the action, and that they be permitted to pay the fund in controversy into court, to be disposed of by the judgment in the action. This order was made, and thereafter Priest filed an answer, and also a cross complaint, in which he alleged, in substance, that, prior to the sale of the real property by the defendants Campbell and Kent under the deed of trust, he had levied an attachment upon such property in an action brought by him against one Joseph Brown in one of the superior courts of this state to enforce a personal demand, and in that action he recovered a judgment on April 5, 1887, for a sum exceeding $8,000; and that he again attached the same property, prior to the sale under the trust deed, in another action brought by him in this state against Joseph Brown, and in which latter action he recovered a judgment against Brown, on January 8, 1888, for the sum of $9,353.50. The cross complaint further alleges "that both of said judgments are for one and the same cause of action, and both were recovered against the said Joseph Brown (who was not a resident of the state of California) upon constructive service of summons." Priest further alleged in his cross complaint that the land sold under the trust deed was the property of his said debtor, Joseph Brown, and was by him conveyed to the plaintiff on October 3, 1883, for the purpose of hindering, delaying, and defrauding the creditors of such debtor. The Anglo-Californian Bank was also permitted to intervene, and claims a right to a portion of the fund in controversy by virtue of a mortgage executed by the plaintiff subsequent to the date of the deed of trust above referred to. The plaintiff and the intervener demurred to the cross complaint of the defendant Priest, upon the ground, among others, that the cause of action therein stated is barred by certain sections of the Code of Civil Procedure, prescribing the limitation for actions, and, the demurrer being overruled, they filed an answer to the cross complaint. The action was tried by the court without a jury, and, upon the findings made, judgment was rendered in favor of the defendant Priest, in accordance with the prayer of his cross complaint. The plaintiff and the Anglo-Californian Bank, intervener, have appealed.

The questions arising upon this appeal are: First. Did the defendant Priest secure a lien upon the fund in controversy by reason of the attachment proceedings in either of his actions against Joseph Brown? Second. Is the cause of action stated in the cross complaint barred by the statute of limitations? Third. Is the right of Priest to the relief given him by the judgment appealed from barred by a judgment in a former action brought by him against the plaintiff and the other defendants, and which involved substantially the same matters embraced in the cross complaint in this action? And, lastly, are the findings of the court justified by the evidence?

In an action against a nonresident for the recovery of money, when there has been no personal service of process on the defendant within the state in which the action is pending, and no appearance therein by the defendant, no judgment can be given, other than one in the nature of, or having the effect of, a judgment in rem, against such property of the nonresident as may have been specifically attached in such action. Anderson v. Goff, 72 Cal. 65, 13 Pac. 73; Blanc v. Mining Co., 95 Cal. 524, 30 Pac. 765; Pennoyer v. Neff, 95 U. S. 741; Cooper v. Reynolds, 10 Wall. 308. In this latter case, in discussing the effect of a judgment in an action brought to establish a personal demand against a nonresident only constructively served with process, and in which an attachment is levied upon the property of the defendant, Mr. Justice Miller, speaking for the supreme court of the United States, said: "If the defendant appears, the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court; but, if there is no appearance of the defendant, and no service of process upon him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. * * * No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit." Such being the well-established rule of law, it follows that, inasmuch as Joseph Brown was a nonresident, and not personally served with process within this state in either of the actions of Priest v. Brown, the question whether there was made in either of those actions any valid attachment upon the property involved here is a material one; for, unless such attachment was made, the defendant Priest is not entitled to subject the fund in controversy here to the payment of either of the judgments obtained by him against Joseph Brown. It is argued by the appellant that the attachment in neither of the actions of Priest v. Brown binds the surplus which afterwards came into existence by the sale of the real property upon which the attachments were previously levied. This contention, although a plausible one upon its first statement, is, in our opinion, not sound. The attachment, at least in the second action of Priest v. Brown, was levied upon the entire interest of the judgment debtor in the land described in the trust deed. If, as the court below found, that land was originally conveyed to the plaintiff by the judgment debtor for the purpose of defrauding the creditors of the latter, and the trust deed was accepted by the San Francisco Savings Union without notice of this fact, then the interest remaining in the judgment debtor, subject to attachment and execution by his defrauded creditors, was the entire interest reserved to the fraudulent grantee by the terms of the trust deed, viz. the right to a reconveyance upon payment of the indebtedness secured by the deed, and, in case of default in its payment, and a sale of the land in accordance with the terms of the trust deed a right to the surplus which might come from the proceeds of the sale after satisfaction of the debt secured. This right so reserved constituted an equitable interest in the land, and it was this equitable interest which was attached by the defendant Priest; and, when the land was subsequently sold under the trust deed, the attachment immediately fastened upon the surplus moneys realized by the sale. The right to recover these moneys in the event of a sale of the land by the trustees was a part of the thing attached in levying upon the entire equitable interest reserved to the fraudulent grantee by the trust deed. A conveyance by the plaintiff of all his interest in the land attached prior to its sale under the trust deed, would have vested in his grantee, without notice of the rights of the creditors of Joseph Brown, the equitable right to such surplus, (Eddy v. Smith, 13 Wend. 488,) and the same right would have passed to a purchaser under an execution sale of plaintiff's interest in the land (Coats v. Stewart, 19 Johns. 298;) and, if the right to recover such surplus follows a conveyance of the land out of which the surplus arises, and passes under an execution sale of the land itself, it would seem clear that such right would also be subject to the lien of an attachment levied upon the land, or upon such an interest therein as gives to the owner the right to demand and recover such surplus from the person in whom the legal title may have been vested in trust. "An equity of redemption in real estate is subject to the lien of a judgment. If, before the sale under a decree of foreclosure, the judgment is docketed against the defendant, it would be a lien on the surplus proceeds arising from the sale." 2 Freem. Judgm. (2d Ed.) § 349. And we think it equally true that if, before the sale of the equity of redemption, either under a decree of foreclosure or under a power, a valid attachment is levied upon the equity of redemption, such attachment is a lien upon the surplus proceeds, and they would be subject to be applied, upon execution, to the satisfaction of a judgment in favor of the attaching creditor in the action in which the attachment is issued. If it were otherwise, the lien of an attachment upon such equity of redemption could be defeated by a sale of the property out of which the equity arises, thus destroying the whole object of the attachment, and rendering it entirely barren of any beneficial results to the plaintiff procuring the issuance of the writ. Our conclusion upon this point is that the defendant Priest, by virtue of the attachment proceedings in Priest v. Brown, acquired the right to subject the surplus proceeds arising from the sale of the land attached to the satisfaction of the judgment obtained by him in that action. The attachment of the judgment debtor's interest in the land then standing in the names of his grantee and the trustees named in the trust deed, was, in legal effect, an attachment of the surplus moneys arising from the subsequent sale.

2. The cause of action stated in the cross complaint is not barred by either section 343, or subdivision 4 of section 338, of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution

would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor is thus stated at page 522, second edition, of Bump on Fraudulent Conveyances: "No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered, and defrauded by the conveyance." In accordance with this rule, it has been held in this state that the statute of limitations does not begin to run against such an action by a creditor until he has obtained such a judgment against his debtor, because until then he has no right of action. Forde v. Insurance Co., 50 Cal. 302; Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244. Nor would the cause of action then accrue if the creditor had not discovered the facts constituting the fraud upon his rights. Gates v. Andrews, 37 N. Y. 657. In construing a statute of the state of New York similar to subdivision 4 of section 338 of the Code of Civil Procedure, as applied to an action by a creditor to set aside a fraudulent conveyance of his debtor, the court of appeals in that state, in the case last cited, say: "It is urged by the counsel for the respondents that the construction of the above clause is that the action shall be deemed as accruing upon the discovery of the fraud by the party aggrieved thereby, whether his right of action is then perfect or not. I think this construction erroneous. The provision is not that the cause shall be deemed to accrue upon such discovery, but to prevent the running of the statute it shall not be deemed to have accrued before such discovery; thereby providing for a class of cases where the right of action was perfect, but became barred by the statute before the discovery of the facts upon which such right depended." The earliest of the judgments referred to in the cross complaint, and sought to be enforced against the money in controversy here, was not obtained until April, 1887, and the cross complaint in this action was filed in February, 1889, less than two years thereafter. It is true that both judgments mentioned in the cross complaint are based upon a judgment obtained in Texas by the defendant against plaintiff's grantor in the year 1884; but the existence of this Texas judgment in favor of defendant did not make the defendant Priest a judgment creditor in this state, within the meaning of the rule which permits only judgment creditors to attack a conveyance made by the judgment debtor to defraud his creditors. The Texas judgment created an obligation in favor of the defendant, and against plaintiff's grantor, Joseph Brown, but it was an obligation which could not be enforced in this state without suit; and, until defendant recovered his judgment upon it here, he occupied only the position of a creditor at large, without any right to subject any specific property of his debtor within this state to the satisfaction of the obligation created by such foreign judgment. Buchanan v. Marsh, 17 Iowa, 494; Crim v. Walker, 79 Mo. 335; Claflin v. McDermott, 12 Fed. 375; Tarbell v. Griggs, 3 Paige, 207.

3. The plaintiff and the intervener also pleaded, in bar of the right of the defendant Priest to the relief demanded in the cross complaint, a judgment of the superior court of the city and county of San Francisco, entered on November 24, 1888, in the action of Priest v. Brown et al., and the said defendant also pleaded the pendency of the same action in abatement of this. In that action the defendant Priest was plaintiff, and the other parties hereto were defendants, and it involved substantially the same matters alleged in the cross complaint; and it was therein adjudged that the conveyance made by Joseph Brown to the plaintiff in October, 1883, was not made with intent to hinder, delay, or defraud the creditors of the former. That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross complaint, and upon which he demanded the relief given him by the court below. It had not become final when the cross complaint was filed, nor yet when the action was tried; and the doctrine of res adjudicata only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the cross complaint was filed, and, although no appeal had been taken therefrom, the action was still pending within the legal meaning of that term, (Code Civil Proc. § 1049;)[1] and the judgment was not a bar to a retrial of the matters alleged in the cross complaint, under the rule announced by this court in Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Naftzger v. Gregg, (Cal.) 33 Pac. 757; In re Blythe's Estate, (Cal.) 34 Pac. 108. But while the judgment in Priest v. Brown et al. was not, for the reason stated, a bar to the cause of action alleged in the cross complaint, still the pendency of that action would have been good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstand-

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[1] Section 1049 provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

ing the affirmative relief demanded by the defendant Priest in his cross complaint, and the refusal of the court to have granted either of such motions would, perhaps, have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in Priest v. Brown et al. as an estoppel, and as ground for a judgment in his favor. Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might well have continued the case, of its own motion, until the final determination of the former action.

4. It is claimed that the findings are not sustained by the evidence. We think, however, the case falls within the rule which does not permit us to disturb the findings of the trial court when there is a substantial conflict in the evidence relating thereto. We do not deem it necessary to particularly discuss some of the minor points made in the brief of the attorney for the appellant. We have considered them all, and find no error which would justify us in reversing the judgment and order appealed from. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

DONNELLS v. MARTIN. (No. 15,465.)

(Supreme Court of California. Jan. 19, 1894.)

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Donnells against Martin. Judgment for defendant. Plaintiff appeals. Affirmed.

Craig & Meredith, for appellant. J. C. Campbell, for respondent.

PER CURIAM. The findings support the judgment, and there are no specifications of error or insufficiency of evidence. The judgment and order are therefore affirmed.

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DUFF et al. v. DUFF. (No. 14,968.)

(Supreme Court of California. Jan. 2, 1894.)

PLEADING—AMENDMENT—NEW TRIAL—EVIDENCE —FINDINGS.

1. After a new trial has been granted, it is not error to refuse permission to file a new answer, which does not present any new issue or defense.

2. On motion for a new trial as to the whole case the court may grant it in part and deny it in part, thereby leaving its former determination upon a portion of the issues to remain.

3. Where the order granting a new trial states that it is ordered as to the issues whether there was a valuable consideration paid by defendant for the property, and whether he is the owner thereof, and a consideration of the entire order shows that the concluding clause was used as the equivalent of the conclusion of law to be drawn from the finding on the issue of payment of a valuable consideration, the only triable issue is the payment of a valuable consideration.

4. On a new trial it is proper to exclude evidence on the issues formerly determined, and as to which a new trial has not been granted. Beatty, C. J., dissenting.

5. Admissions by a grantee that he held the property in trust for the grantor are admissible to show that he did not pay a valuable consideration therefor.

6. It is proper for the findings, on a trial of the issue for which a new trial has been granted, to set forth the proceedings on the former trial, the subsequent order granting the new trial, and the findings made on the former trial modified by the order, in addition to the finding on the issue tried.

In bank. Appeal from superior court, Humboldt county; Edwin A. Davis, Judge.

Action by Julia K. Duff and another against Robert P. Duff. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. M. Buck, W. C. Belcher, and Horace L. Smith, for appellant. J. H. Gillett, J. G H. Weaver, L. D. McKisick, and Wilson & Wilson, for respondents.

HARRISON, J. Upon a former trial of this action the court rendered its decision in favor of the plaintiffs for a portion of the property involved, and in favor of the defendant for another portion. Both parties moved for a new trial, and the court below denied the motion of the defendant and granted that of the plaintiffs, limiting the new trial to the determination of a single issue. From these orders, and the judgment against him, the defendant appealed, and this court affirmed the orders and judgment appealed from. 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265. When the cause again came on for trial in the court below, the defendant, Robert P. Duff, asked leave to file an amended answer, which was refused by the court, and this ruling is now assigned as error. The answer which was presented, and which he asked leave to file, did not, however, present any new issue, or any defense to the action, which was not embraced in the original answer, and the court did not err in denying his request to file it.

At the trial the court excluded certain evidence offered by the appellant, and it is now urged by him that under the order for a new trial he was at liberty to offer any evidence which would tend to establish his ownership of the property as to which the new trial was ordered; while, on the part of the respondents, it is claimed that the new trial was limited to ascertaining whether the appellant had paid a valuable consideration for this property. The closing part of the order by which the new trial was granted, as shown by the record before us, is as follows: "The motion of the plaintiffs is granted, and a new trial ordered as to the issue

Was there a valuable consideration paid for the property conveyed by deed to R. P. Duff in blocks 28 and 51, and is he the owner thereof?" It is claimed by the appellant that in the order itself the word "issue" is written "issues," and the original order has been produced in support of this claim; but, as we view the case, this variance is immaterial. The order itself is in the nature of a "speaking order," inasmuch as it contains matter which is explanatory and illustrative of the mere direction which is given by it. The cause had been tried, and all of the issues of fact found in favor of the plaintiffs, except that the court found that the appellant had paid a valuable consideration for the lands described as being in blocks 28 and 51. Upon the decision thus made the defendant moved for a new trial, alleging as the grounds that the several findings against him were unsupported by the evidence; and in the same order by which a new trial was granted to the plaintiffs as to blocks 28 and 51 his motion for a new trial was denied, and this order was affirmed by this court. It was thus definitely adjudged that William R. Duff was the owner in fee of these blocks in 1863; that Richard Duff entered into the possession thereof as his servant and agent, by virtue of the power of attorney executed to him, and that under this power of attorney he made conveyances of these blocks to Robert P. Duff; that William R. Duff did not in his lifetime, or the plaintiffs thereafter, have any knowledge or information of the said conveyances until within three years before the commencement of this action; and that the plaintiffs' cause of action was not barred by the statute of limitations. The court, in its order granting the new trial as to these blocks, expressed its satisfaction with its previous findings of fact and conclusions of law in every respect except the finding as to the payment of a valuable consideration for the property in these blocks, and expressly declared that all of the findings in relation to the statute of limitations, discovery of facts constituting the fraud, and every issue upon which it was necessary to pass showing the plaintiffs' right to maintain the action, were applicable to these blocks; but was of the opinion that it had not properly weighed the evidence that had been presented upon this question. Accordingly, it granted the motion of the plaintiffs upon the single issue which it had found against them in its decision, viz. the payment of a valuable consideration for the conveyance of these blocks. The right of a party to move for a new trial upon a single issue is well established, (Town Co. v. Neale, 78 Cal. 63, 20 Pac. 372;) and, if the motion be made for a new trial as to the entire action, the court may grant it in part and deny it in part, leaving its former determination upon a portion of the issues to remain. This court has frequently remanded a cause with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record. Marziou v. Pioche, 10 Cal. 545; Soule v. Dawes, 14 Cal. 247; Argenti v. San Francisco, 30 Cal. 463; Kinsey v. Green, 51 Cal. 379; Glascock v. Ashman, 52 Cal. 420; Billings v. Everett, Id. 661; Goodlett v. Investment Co., 94 Cal. 303, 29 Pac. 505; Tunis v. Association, 98 Cal. 285, 33 Pac. 63. The trial court has the same right in this respect before an appeal as this court has after an appeal to limit the scope of a new trial, and the affirmance by this court of such order establishes the correctness of the order made in the individual case.

The closing part of the order, "and is he the owner thereof," is not to be regarded as an additional issue of fact to be also tried anew by the court. While ownership is sometimes called an issuable fact, it is also a mere conclusion of law, dependent upon the actual facts in the case; and the circumstances under which the term was here used show that such is the interpretation to be placed upon it. If the entire question of ownership in these blocks was to be again investigated, the direction for a new trial as to the payment of a valuable consideration therefor was unnecessary and meaningless; for if the appellant was to be at liberty to establish a title in himself, independent of such payment, or to show that he had become the owner through another source than by means of such payment upon the conveyance to him from Richard Duff, it was idle for the court to direct a new trial upon this issue. A consideration of the entire order shows that this closing clause was used by the court as an equivalent of the conclusion of law to be drawn from the finding of fact that should be made upon the evidence that might be presented on the issue of payment of a valuable consideration.

The evidence which the appellant sought to introduce was not only irrelevant to this issue of payment before the court, but it did not tend to establish any ownership in him. The value of this property at the time of the conveyance to him, or of the property whose title was determined at the former trial, as well as the fact that the plaintiffs had received the benefit of certain property not involved in the litigation, was irrelevant to any question of ownership, and could not have tended to establish any ownership in the appellant. Whether William R. Duff was indebted to his father in an amount greater than the value of the property at the time it was conveyed to Robert P. Duff was also irrelevant for the purpose of establishing ownership. The statement by the appellant in his offer to make such proofs that said indebtedness "still exists" was in disproof of the proposition that it formed the consideration for the conveyance, or that the value of this property had been applied as a part payment upon that indebtedness. It did not appear that the indebtedness was a valid, existing obligation against William R. Duff; and the note which was offered in proof thereof by its terms had long since been barred by the statute of limitations. The offer by the appellant to show that he had been in adverse possession of these blocks since 1869 was inconsistent with his previous testimony that he did not take such possession until after the death of his father in 1874, but a sufficient reason for excluding this testimony was that this issue of the statute of limitations had been passed upon at the former trial, and was not now open for investigation. The same observation may be made upon the offer to show that William R. Duff knew about the transfer of these blocks from his father to the appellant. The court properly excluded the offer to show this fact by the deposition of Charles Duff, for the reason that the property in question was not conveyed until after the alleged interview between him and William R. Duff.

The court did not err in receiving the deposition of Ryan. His testimony that the appellant had admitted to him that he held the property in trust tended to show that he did not pay a valuable consideration for it.

After the trial upon the issue for which the new trial had been granted, the court, in making its finding thereon, set forth the proceedings upon the former trial, and the subsequent order of the court granting a new trial, and to the findings that had been made upon the former trial, as modified by the aforesaid order, added its own finding upon the issue tried by it. There was nothing improper in this action of the court. As several of the findings upon the former trial were applicable to the property involved in the subsequent trial, and had been affirmed by both the trial court and this court, it was a matter of convenience that all the findings which related to this property should be placed together, in order that the entire record, including the judgment to be entered thereon, might be more readily examined and understood. If instead of so doing the court had merely found upon the issue upon which the new trial had been granted, the legal effect and result would have been the same, for the conclusion of law to be drawn and the judgment to be entered in the case would not depend upon such finding alone, but would find their support in the entire record. Whichever course the court should adopt would be immaterial, so far as the rights of the parties are concerned, but for the sake of convenient reference the course adopted by the court is preferable. The objection that the other findings were not supported by any evidence at the last trial is trivial, and merits no consideration, as the court expressly states that it adopts the said facts found by the judge from the testimony introduced in the action at the former trial as findings of fact herein, so far as the same are applicable to this property. See Chandler v. Bank, 73 Cal. 320, 11 Pac. 791, and 14 Pac. 864. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.; PATERSON, J.

DE HAVEN, J., being disqualified, did not participate in the foregoing decision.

BEATTY, C. J., (dissenting.) With respect to most of the points discussed in the foregoing opinion I concur in the conclusions of the court, but upon one proposition I am obliged to dissent. The findings made on the former trial of the case upon the issues arising under the plea of the statute of limitations do not, as I construe them, apply to those lots (in blocks 28 and 51) as to which the judgment was in favor of defendant, and as to which a new trial was ordered; and therefore I think it was essential to make such findings on the last trial in order to sustain a judgment against the defendant as to those lots. If I am correct in this view, the trial court erred in excluding the evidence offered by the defendant relating to those issues. It is no doubt true that the evidence adduced at the former trial would have sustained findings against the plea of the statute as fully with respect to blocks 28 and 51 as with respect to the other tracts, and the terms of the order granting a new trial show very clearly that the trial judge would have made such findings applicable to all the lots if he had deemed it material. But in fact they were not so made by their terms, and I am satisfied that the judge had no power to extend their operation by his order granting a new trial. I am the more inclined to give weight to this objection because I have never been able to concur in the decision against the defendant upon the questions affecting the integrity of the original transaction out of which the litigation has arisen, and because I am convinced from reading the opinion of the judge who presided at the last trial that he decided the issue to which he confined the evidence—the question, that is to say, whether the defendant paid a valuable consideration for the lots in blocks 28 and 51—not upon his own unbiased views as to the effect of the evidence before him, but upon a mistaken view as to the effect of the judgment of this court affirming the order granting the plaintiffs a new trial. 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265. He seems to have held that, because the evidence on the last trial was substantially the same as that upon which this court sustained the order for a new trial, he was therefore bound by our decision to find the issue against the defendant; but our judgment had no such effect. When a new trial has been ordered by the superior court of an issue as to which the evidence is conflicting, this court affirms the order, even though the evidence may appear to preponderate in favor of the findings vacated by the order; and the effect in all cases is to leave the superior court free to find the fact according to its own independent view of the weight of the evidence, whether it is the same or different from that given at the former trial. The result of this erroneous view of the effect of our former judgment has been to deprive the defendant of a fair trial of the question which most directly involves the whole merits of the controversy. For these reasons I dissent from the judgment.

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RANDALL v. DUFF et al. (No. 15,253.)

(Supreme Court of California. Jan. 6, 1894.)

JUDGMENT—RES JUDICATA.

An attorney in fact, without consideration, conveyed land to D., who mortgaged it. The true owners sued D. to set aside the conveyance, and filed a lis pendens. Afterwards, the mortgagee foreclosed without making such owners parties, and R. bought the land, and obtained a deed. He then sued to quiet title against such true owners, and they filed a cross bill, asking to be allowed to redeem. *Held*, that the final findings and judgment in the suit by such owners against D. were conclusive against R., though neither he nor the mortgagee was a party to it.

In bank. Appeal from superior court, Humboldt county; E. A. Davis, Judge.

Action by A. W. Randall against Julia K. Duff and Agnes Duff, heirs at law of William R. Duff, deceased, and William L. Duff, administrator, to quiet title. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

S. M. Buck and W. C. Belcher, for appellant. E. W. McKinstry, Crittenden, Foote & Van Wyke, and L. D. McKisick, for respondents.

BEATTY, C. J. The opinions delivered upon a former appeal herein (see 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610) contain a sufficient statement of the nature of the controversy. The facts of the case of Duff v. Duff (which is inseparably connected with this case) will be found fully set out in an opinion just filed disposing of the third appeal in that case, (35 Pac. 437,) and in the reports of the two former appeals, (71 Cal. 513, 12 Pac. 570, and 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265.) By our former judgment herein the cause was remanded for a new trial, which has been had, resulting in a judgment for the defendants, from which the plaintiff appeals.

The last trial took place subsequent to the affirmance by this court of the judgment and orders under review on the second appeal of Duff v. Duff, 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265, and the principal errors assigned by the plaintiff in support of his present appeal are based upon the several rulings of the superior court, to the effect that the judgment and findings given and made on the second trial of Duff v. Duff, and affirmed here, as above stated, were admissible in evidence and conclusive against him. It is contended that these rulings were erroneous, because this plaintiff was not a party, and is not in privity with any party, to Duff v. Duff. It is true he was not a party to that action, and equally true that there was no reason for making him a party, unless, after his acquisition of R. P. Duff's interest, he had chosen to come in and defend. When the action was commenced, neither he nor the mortgagees under whom he claims had the slightest interest in the controversy, which involved nothing except the question of ownership of the mortgaged premises, subject to their liens. They had no more interest in the result of that controversy than they would have had in a subsequent conveyance of the mortgaged premises by the mortgagor to a third party; and no more right to control or influence its issue than they would have had to prevent such conveyance. The court in that case was dealing only with the right of redemption, and, the validity of their liens being unassailed, it was no concern of the mortgagees which of the contending parties might be adjudged the owner. If that controversy had been concluded by a final judgment in favor of the plaintiffs before the foreclosure proceedings, (as it has been since,) it would scarcely be contended that the mortgagees could have compelled the plaintiffs in the foreclosure suits to retry in every such suit all the issues which had been fully litigated and finally determined in their favor as against the mortgagor. To any claim or attempt to do so the obvious answer would have been that a decree for the sale of all the interest of both sets of contending claimants, and a proper application of the proceeds, was all the relief to which the mortgagees were entitled, so far as the mortgaged premises were concerned; and that, as to the surplus proceeds of the sale and the right of redemption, the decree in Duff v. Duff was conclusive, being a determination between the only parties interested. And as this would have been so in the case supposed, it must be equally so in the case as it is, for, as to the right of redemption, Randall claims and can claim only through Robert P. Duff, and that by title subsequent to the commencement of the action of Duff v. Duff and notice of lis pendens.

The doctrine upon which the plaintiff relies to carry the inception of his title back beyond the commencement of the action of Duff v. Duff, and to the date of the mortgages, has no application to this case. It may be true that the title of a purchaser at foreclosure sale relates back to the mortgage as against the parties to the foreclosure, but it does not cut out the title of a subsequent purchaser, or the lien of a subsequent incumbrancer by recorded conveyance who has not been made a party. On the former appeal of this case we decided that these defendants held substantially the same relation to the mortgagees as a subsequent grantee by recorded conveyance, and to cut off their right of redemption it was equally essential to have made them parties to the foreclosure suits, which was not done. If they had been made parties, this long controversy need never have arisen. Their interest in the land, as well as that of Robert P. Duff, would have passed by the foreclosure sale; and, unless a redemption had been made within six months, the absolute ownership would have vested in the purchasers as of the date of the mortgages. Or, if a redemption had been made, the purchasers and the mortgagees would have had their money, with interest and costs; everything, in short, to which they or either of them had any vested right at the date of the filing of notice of lis pendens in Duff v. Duff; and it would have made no sort of difference to them whether the redemption was made by one or the other of the parties to the action of Duff v. Duff. Whoever redeemed, they would have got all they were entitled to receive. But for some reason the mortgagees of R. P. Duff omitted to make the successors of William R. Duff, of whose claim to the ownership of the mortgaged premises they had at least constructive, and therefore legally sufficient, notice, parties to their foreclosure suits; and whether this omission was due to want of actual knowledge of the matters being litigated in Duff v. Duff, or to a deliberate choice, founded upon whatever motives, the inconvenient consequences must fall upon those to whose fault the omission was due, and not upon innocent parties. Among the consequences of the omission to make the successors of William R. Duff parties to the foreclosure of the Ritchie and Fiebig mortgages was the necessity of prosecuting another action in some form to bar or determine their right of redemption; and the present action by the purchaser under the foreclosure proceedings, though in form an action to quiet title, is in effect nothing more nor less than a suit to foreclose the mortgages as against the plaintiffs in Duff v. Duff, just as their cross complaint is in effect a suit to redeem.

In the form which the litigation assumed through the mistake or choice of the plaintiff and his predecessors he was subjected to the necessity of relitigating in this action the validity and amount of the mortgage liens, but the mortgagees could not by their disregard of the regular procedure for the enforcement of their rights compel the defendants to relitigate with them or their successor, in what is practically another suit to foreclose their mortgages, the rights finally determined in the action of Duff v. Duff. As to all the rights involved in that action plaintiff is the successor of Robert P. Duff, with notice of lis pendens, and a judgment that binds his grantor is equally binding upon him. The fault of his argument on this branch of the case is that it ignores the double relation in which he stands to the premises in controversy. To establish his right he must show himself the successor of the mortgagees, and also of the owner of the land, or right of redemption. As to the latter, he has nothing to rely upon except a proceeding which undoubtedly vested him with whatever interest Robert P. Duff had; but it has been determined in an action between Robert P. Duff and the defendants, of the pendency of which he and his predecessors had notice before the commencement of the proceedings under which he claims, that Robert P. Duff had no title, and that what was apparently his property was, in fact, the property of the defendants. As to the interest so litigated, the judgment and finding are necessarily conclusive, not only upon Robert P. Duff, but upon all who claim under or through him by virtue of such proceeding. We do not find anything in the decisions cited by appellant in support of his contention which is not easily reconcilable with what has been said upon the points discussed, and the propositions laid down are of such an elementary character that we do not deem it necessary to cite the authorities which support them. For the reasons given we do not think the court erred in any of its rulings upon the effect of the judgment and findings in Duff v. Duff, or in admitting (under the stipulation of the parties) the testimony given by R. P. Duff in that action, or the testimony of Ryan.

The second principal assignment of error relates to the rulings of the court construing and applying the order granting a new trial to the plaintiffs in Duff v. Duff upon a single issue. All the questions presented by this assignment have been settled by the recent decisions filed in Duff v. Duff, 35 Pac. 437, which involved substantially the same questions, and it must be held upon the authority of that case that the superior court did not err in any of these rulings. The same may be said of the rulings referred to in the third specification of error. Substantially the same rulings were considered and approved in Duff v. Duff, and can no longer be questioned.

The remaining specifications of error relate to that part of the interlocutory and final decrees in regard to the accounting. With respect to these matters we cannot say that the findings as to the various items and amounts debited to the respective parties are unsupported by the evidence, or that the charge against plaintiff for rents that he might have realized by proper management of the property after it came into his possession was unauthorized. He was not a mortgagee in possession, and was not entitled to the benefit of the rule applicable to that case. So far as relates to his possession of the property, he stood in the shoes of R. P. Duff, and is accountable to the defendants for the rents and profits to the same extent that Duff would have been. But plaintiff was also the successor to the mortgagees, and entitled, as against the defendants, to receive all that was equitably due on the mortgages, including interest on the amount secured up to the date of payment or tender. The superior court allowed him interest on said amount, and other sums with which he is credited only up to March 15, 1885, the date of the filing of the cross bill, upon the ground that it contained a sufficient tender by defendants to stop interest. We do not think, however, that anything contained in the cross bill amounts to a sufficient tender or offer to redeem to stop interest, and therefore we think the court erred in not allowing interest to the plaintiff on the amounts credited to him down to the date fixed by the decree for computing the interest on defendant's credits; wherefore the judgment of the superior court is affirmed in all respects except as to this matter of interest, as to which the judgment is reversed, and the cause is remanded to the superior court with directions to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly.

We concur: HARRISON, J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; FITZGERALD, J.

DE HAVEN, J., being disqualified, did not participate in the foregoing decision.

101 Cal. 37

PARK & LACY CO. v. WHITE RIVER LUMBER CO. et al. (No. 18,205.)

(Supreme Court of California. Jan. 5, 1894.)

SALE OF PERSONAL PROPERTY — WHAT CONSTITUTES — "LEASE" — REPLEVIN — WHEN MAINTAINED.

1. Where the owner of personal property delivers it to another under a writing called a "lease," whereby the title is to remain in the "lessor," and the "lessee" agrees to pay, at a time named, a certain sum as "rent," and providing that, in case of failure to pay such sum at the time specified, any sum paid shall be forfeited, and the "lessor" be entitled to take possession of the property, but that on payment of such sum the title shall pass to the "lessee," the transaction is a sale, and not a lease.

2. Where personal property is delivered to the purchaser under a conditional contract of sale, whereby the seller, on failure of the purchaser to pay the purchase price, may recover the property, an action and recovery of judgment by the seller on the purchase-money note is a confirmation of the sale, and he cannot thereafter maintain an action to recover the property.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the Park & Lacy Company against the White River Lumber Company and Warren D. Parson to recover possession of certain personal property. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

J. A. Hannah, for appellants. Bradley & Farnsworth and H. A. Powell, for respondent.

GAROUTTE, J. This is an action to recover possession of certain personal property or its value. Defendants appealed from the judgment, and order denying a motion for a new trial. Plaintiff, being the owner of certain personal property, consisting of machinery, etc., gave to defendants a writing, the substantial portions of which are as follows: "Lease. The Park and Lacy Company, of San Francisco, Cal., lessors, hereby lease unto the White River Lumber Company and Warren D. Parson, of Tulare county, Cala., lessees, the following property, for the period of nine months from the 15th day of June, 1889, to wit: [Then follows a description of the property.] Said property is to be used only at Arbor Vitae, Tulare county, state of California, and said lessees are to pay to said lessors, at San Francisco, for the use of said property, the sum of $3,064, payable as follows: All on the 15th day of March, A. D. 1890. Said lessees agree that they will pay the rent at the times and in the manner aforesaid. * * * It is further agreed that time is of the essence of this agreement, and, upon a failure of the lessee strictly to keep and perform any of the covenants or provisions hereof by them agreed to be performed, then and thereupon, without any notice, this instrument shall be deemed to be canceled, and of no further effect as against lessors, and all right and interest of lessee in or to said property shall cease; and all rent by lessee theretofore paid shall belong to lessors as full payment for the prior use of said property, and lessors shall be entitled to take unto their possession all of said property. Said lessors further agree that, upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall (but not otherwise) have the right to purchase said property by the prompt payment to lessors of the sum of $3,064." During the progress of the trial, respondent's counsel admitted that the $3,064 referred to in the last clause of the contract was the same sum of money that was to be paid as rent, and that, upon the payment of said sum, the title to the property would pass to defendants; and, indeed, it is fairly apparent from the writing itself. This sum of money was not paid at the time agreed upon, and subsequently the present action was brought to secure possession of the property.

The nature of the judgment to be rendered in this case is determined entirely by the construction to be given the writing from which we have quoted. In addition to this writing, upon the same date a mortgage was given to plaintiff by one Hilton, upon certain real estate, to secure a promissory note for $650, payable by defendants to plaintiff, and also to secure the sum of $3,064, specified in the so-called "lease." This paper was not a lease. Calling it a lease did not establish the fact. This is peculiarly a case where there is nothing in a name, for the contents of the paper determine its true character. It is said in Heryford v. Davis, 102 U. S. 235: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provisions it contains disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." That the writing is not a lease is settled beyond all dispute by the one fact that, upon the payment of the amount stated in the contract, the title was to pass irrevocably to defendants. This contract either transferred the title of the property to defendants, and thus is a sale, perfect and complete, or it is a conditional sale; and, as to the character of the judgment that should be rendered, it is immaterial which of these constructions be placed upon it. If it was an absolute sale at the time it was entered into,—and the fact that a mortgage was given to secure the amount therein specified (which was nothing less than the purchase price) is strongly indicative that such was its legal effect,—then plaintiff has no title in the property, and no right to its possession. If it was a conditional sale, the transfer of title being dependent upon a payment of the purchase price, plaintiff still is not entitled to recover, for the following reason: Several months prior to the commencement of the present action, plaintiff brought suit against these defendants and Hilton, mortgagor, to recover upon the aforesaid note, and also to recover the said sum of $3,064, and asked that the real estate mortgaged to secure these amounts be sold, etc. That case went to trial upon issue joined, and, as appears by the opinion of the judge, while a foreclosure of the mortgage was denied, judgment was ordered against these appellants for the full amount claimed by the complaint. The course thus pursued by plaintiff defeats its rights in the present action, if the writing be construed as a conditional sale. If the money had been paid as agreed, the title would have passed to defendants; and, the money not being paid as agreed, the plaintiff could either recover the property or sue for the purchase price. But the pursuit of one remedy necessarily excluded the other. It was not entitled both to the purchase price and the property; and an action brought to recover the purchase price, as was done in this case, is a ratification of the sale. This principle is forcibly put in Bailey v. Hervey, 135 Mass. 174: "They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby confirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue, and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price; but, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. * * * They had thus made a decisive election to treat the transaction as a sale before reclaiming the goods, and under such an election the title passed to Bailey." See, also, Butler v. Hildreth, 5 Metc. (Mass.) 49. For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 115

HOWELL v. HOWELL. (No. 18,250.)

(Supreme Court of California. Jan. 20, 1894.)

APPEAL—DISMISSAL—GROUNDS.

An appeal regularly taken should not be dismissed on respondent's motion merely because there is no bill of exceptions embodying the evidence on which the trial court acted, as the lack of a bill of exceptions is ground rather for a judgment of affirmance.

In bank. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action by Elizabeth Howell against J. W. Howell for divorce. Plaintiff obtained judgment by default, and thereafter filed a supplemental bill for alimony. From an order granting alimony, and from orders striking out the answer, and refusing to permit defendant's counsel to cross-examine plaintiff's witnesses, defendant appeals. Plaintiff moves to dismiss the appeal. Motion denied.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle, (W. Henry Jones, of counsel,) for respondent.

BEATTY, C. J. This is an action by a wife for a divorce on the ground of desertion Defendant, being absent from the state, was not personally served with summons, but, upon substituted service and his default, judgment was given in September, 1890, dissolving the marriage, awarding to the plaintiff the custody of the minor children, and setting apart to her use all the community property in California. More than a year after the entering of this judgment,—in December, 1891,—the defendant having come within the state, the plaintiff filed a petition in the nature of a supplemental complaint, setting forth that the defendant was possessed of a large amount of property in Idaho, the proceeds and increase of community property which he took with him at the time he deserted her, and praying for an order upon him to show cause why he should not be required to pay her permanent alimony, counsel fees, etc. Such order having been made, and served upon the defendant, he appeared and demurred to the petition, and, his demurrer being overruled, afterwards filed an answer. Pending the hearing, other orders were made by the court,—one requiring the defendant to give security for the payment of any judgment that might be recovered against him, and another directing him to appear before a notary and give his deposition. For disobedience of the latter order his answer was stricken out by one order, and by another his attorneys were debarred from cross-examining the witnesses produced by the plaintiff at the hearing of her petition. After an ex parte hearing the court made an order or decree requiring the defendant to pay to the plaintiff $100 per month permanent alimony. From this order or decree, and also from the orders striking out his answer and debarring his attorneys from cross-examining the plaintiff's witnesses, the defendant has appealed, and the plaintiff now moves to dismiss the several appeals because there is no bill of exceptions embodying the papers and evidence upon which the superior court based its action.

When an appeal has been regularly taken from an order of the superior court, the lack of a bill of exceptions embodying and authenticating its proceedings is not a ground for dismissing the appeal, but rather for a judgment of affirmance, if, as is usually the case, there is, in the absence of such bill of exceptions, nothing in the record upon which the action of the superior court can be properly reviewed. It is true, this court has in such cases sometimes granted a motion to dismiss, the effect of the order being the same as a judgment of affirmance. This motion, however, presents an occasion for calling attention to the essential difference between a case in which the applicant has failed to take the proper steps for bringing his appeal before the court, when only the respondent has the right, under our rules, to make a motion to dismiss, and a case in which the appellant has, or is supposed to have, failed to make a record which, on being looked into, will disclose error in the judgment or order appealed from, when a motion to dismiss by the respondent is simply an effort to advance the hearing of the cause on its merits. In such cases the court has, as above stated, sometimes granted the motion when it was very apparent that the record before us was insufficient to enable us to review the errors assigned. But the present case is not of that sort. The principal order appealed from is in form, in substance, and effect a judgment, and it is contended by the appellant that it may be reviewed, and must be reversed, upon the judgment roll. The questions presented are not free from difficulty, and involve the whole merits of the appeal. We are, therefore, not inclined to consider them on this motion in advance of other cases entitled to precedence. Motion denied.

We concur: McFARLAND, J.; DE HAVEN, J.; PATERSON, J.; HARRISON, J.

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101 Cal. 90

BURBANK v. DENNIS. (No. 19,297.)

(Supreme Court of California. Jan. 11, 1894.)

Deceit—Corporations — Liabilities of Promoters to Stockholders — Evidence—Testimony of Stenographer.

1. Promoters of a corporation, who falsely represent that the price paid by the corporation for property conveyed by them to the corporation is the cost thereof to themselves, are liable to the stockholders for their profits in the transaction, though the property is worth the amount paid by the corporation.

2. Under Code Civil Proc. § 2047, allowing a witness to refresh his memory as to a fact by anything written by himself at the time the fact occurred, where a party examined before trial failed to sign his deposition, the stenographer who took the evidence may refresh his recollection from his transcript of the notes, and testify as to the statements made by such party.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by A. L. Burbank against L. W. Dennis and others. From a judgment for plaintiff, defendant Dennis appeals. Modified.

Wells, Monroe & Lee and W. P. Gardiner, for appellant. Wilson & Lamme, for respondent.

GAROUTTE, J. The plaintiff, as a stockholder of the San Gabriel Valley Land & Water Company, a corporation, brought this action against L. W. Dennis, John P. Sanborn, Frederick D. Sanborn, and the San Gabriel Valley Land & Water Company to recover a large sum of money, claiming such moneys to be the property of the corporation defendant, unlawfully held by defendants John P. Sanborn and L. W. Dennis. Judgment was recovered for the sum of $83,000 and interest, and this appeal is prosecuted by defendant Dennis from the judgment and order denying his motion for a new trial.

The following allegations of the complaint give a general idea of the cause of action relied upon to support the recovery: "That during or about the month of March, 1887, the defendants L. W. Dennis, John P. Sanborn, and Frederick D. Sanborn entered into an arrangement and agreement, as promoters, for the purpose of organizing the said defendant corporation, with a view of purchasing certain lands in the said county of Los Angeles, which said lands were to be, after the organization of said corporation, conveyed to the same for the purpose of selling the same, and in which corporation the said defendants Dennis and the Sanborns were to become interested as stockholders. That the said defendant Dennis and the said Sanborns proceeded to procure contracts of purchase, as aforesaid, of the said lands from the various owners of the same, and did so contract with Story, Stetson, and Hall for about 240 acres, with one Ames for about 200 acres, with one J. N. Clapp for about 70 acres, with L. L. Bradbury for about 200 acres, with one Gibbs for about 170 acres, with L. H. Titus for about 200 acres, and with James Ford for about 50 acres, and, according to the terms and conditions of the said various contracts, specified parts and portions of the purchase price of the same were to be paid in cash, and certain other parts and portions of such purchase price were to be deferred, and were to be paid with certain specified rates of interest. That, at all times while the said defendants were procuring the said contracts for the purchase of said lands, they represented to the plaintiff and other of the proposed stockholders of the proposed corporation that they were acting for and on behalf of all the parties interested, or to become interested, in the said venture, and who were to become stockholders of such proposed corporation, and at all times held themselves out as the agents of the said proposed stockholders, who were the parties furnishing the money necessary for the purchase of the said lands." The complaint further alleges that $200,000 was paid to Dennis and Sanborn by the prospective stockholders of the corporation defendant, and that contracts and deeds to these various parcels of land were taken in the name of John P. Sanborn, and partial payments made thereon from the aforesaid money. It is further alleged that, after the incorporation, the lands were conveyed to said corporation defendant, and Dennis, for himself and his associates, the Sanborns, reported to said corporation that they had paid, on account of the purchase price of said lands, $193,666.62, when in truth they had paid but $97,666.62. Plaintiff asks judgment for the difference between the amount actually paid by said Dennis and the amount which he reported to the corporation that he had paid upon the purchase price.

As a salient point in the case, it must further be borne in mind that the contract price at which the syndicate of buyers, that was subsequently merged into the defendant corporation, was to take these various pieces of realty, was the lump sum of $537,000; and the amount alleged to be retained by the defendants in no way affected the amount of the gross sum to be paid by the corporation for the lands, for the entire sum of $193,666.62 was charged to Dennis upon the purchase price of $537,000. But it is claimed that the lands actually cost but $442,000, and consequently the defendants (agents) retained of the corporation's money the overplus, amounting to $95,000. The fact that partial payments, only, were made upon the various tracts, and that the deferred payments were secured by mortgage upon the land, seems to be entirely foreign to the matter under consideration, and, as to the principles of law here involved, the case as made by the complaint stands before us exactly as though it were a cash transaction throughout, the corporation, acting through its agents, buying lands and paying $537,000 therefor, when the actual cost was only $442,000, the agents absorbing the difference. There is no question but that the foregoing facts outline a sound cause of action, and, if the findings of the court and the evidence are in line with such theory, then plaintiffs should recover.

The findings of fact are considerably broader than the allegations of the complaint; but there is no substantial variance between the theory upon which the complaint is formulated and the theory upon which the recovery is had, as evidenced by the findings of the court. Upon inspection it is readily perceived that they rest upon the same general lines. Even conceding that the complaint relies for a judgment upon false representations as to the amounts of first payments made, and that the findings tend to indicate a recovery upon the theory of false representations as to the original cost price of the property, yet it is practically the same thing. If the corporation was bound in law to pay $537,000 for the property, then it was bound in law to pay $193,666.62 when it did pay it. By both complaint and findings the fraud of Sanborn and Dennis practiced upon the prospective stockholders and the corporation is the keystone of the situation. Not alone the fraud practiced is the material element in both complaint and findings, but it is fraud practiced by the defendants as the confidential agents of the parties complaining. Both complaint and findings assert a violation of confidential relations, and a betrayal of the trust reposed in defendants by the parties dealing with them. The measure of damages relied upon in the complaint and recognized by the judgment is the same, and we think that the presence of a substantial variance, as contended for by appellant's counsel, is not apparent.

We now pass to a consideration of the evidence, the findings, and the general principles of law bearing on a question of the character here presented. Frederick D. Sanborn was not served with summons, and the only appellant in this case is L. W. Dennis, with whom alone we are called upon to deal. Some embarrassment arises from the fact that these various tracts of land, during the pendency of the negotiations which led up to the formation of the corporation, were valued in entirety at the lump sum of $537,000, and no valuation was placed upon them in severalty; and it was not until after the formation of the corporation, and at the time when Dennis made his report to the corporation showing the application of the $193,666.62, that any definite idea was had by the stockholders as to the valuation of this realty by parcels, and those valuations, it appears, were arbitrarily placed by Sanborn or Dennis, or both, in that report. From the general conduct of the original negotiations by the investors of this large sum of money, it is apparent that land speculation was rife in Los Angeles county in those days, and haste in the culmination of this transaction was exercised at the expense of future trouble and embarrassments, which a little care, and a little less haste, would readily have averted. We will summarize some of the facts which are beyond dispute: Dennis was a real-estate agent selling on commissions; Sanborn was a speculator in land, of moderate means. Upon March 11, 1887, Sanborn, for himself and various relatives and friends, purchased the Stillson and Hall tract of land for $26,000, and took the deed in the name of his nephew, Frederick D. Sanborn. Upon April 4th he entered into a contract of purchase of the Clapp tract for $20,000,—$1,000 cash; the papers being placed in escrow to await the examination of title. Upon April 5th he entered into a contract to purchase the Ames tract for $60,000, paying thereon $5,000. Upon April 9th he entered into a contract of purchase of the Gibbs tract for $51,000, and paid thereon $5,000. At about the same time he procured either written or oral options for short periods upon the Ford and Bradbury tracts; but no contracts of purchase were entered into, no moneys paid, and the lands finally passed to the corporation at cost price; hence they are not involved here. Sanborn, about this time, also procured an oral option for 30 days upon the Titus tract for $187,000, As to the Stillson and Hall tract and the Clapp tract, Dennis was a stranger, but at least as to some of the other tracts he was an agent of the owners in these negotiations, and probably was also working in the interest of Sanborn. Sanborn was securing these lands for speculative purposes, with the intention of interesting eastern capitalists therein; but about the 20th of April Dennis suggested that home capitalists would interest themselves in the venture. The suggestion was acceptable, and thereupon negotiations with various parties began, which culminated, on the 30th day of April, in a written agreement. In this agreement Dennis, Sanborn, and the other prospective stockholders of the corporation, in consideration of $1 received each from the other, agreed to purchase these lands for $537,000, and to expeditiously organize a corporation to handle them. The interest of each party in the venture was specified therein, Sanborn taking a one-fourth interest, and Dennis a one-fifth. Dennis appears to have been the moving spirit in the negotiations during these times, although Sanborn was near at hand, the agreement itself being drawn up by him. Sanborn in his testimony claims that, dating from the 20th day of April, Dennis was acting for these home capitalists, while Dennis insists that he was acting for Sanborn. The testimony seems to indicate that he was acting for all parties concerned, especially for himself. About the 5th of May it was determined that $200,000 would be required immediately to make first payments, and to keep alive Sanborn's contracts, options, etc.; and soon thereafter that amount was raised, and paid to Dennis to be applied to these purposes. The corporation was finally organized upon the 20th day of May, and, about June the 1st, Dennis reported that he had paid $193,666.62 to Sanborn upon these lands; and in this report the particular amount that had been applied upon the purchase of each tract, and also the amount of the deferred payments upon each tract, and when due, were separately stated. The disposition by Dennis of this $193,666.62 caused the present litigation.

Cook, Stock, Stockh. & Corp. Law, § 651, referring to the promoters of a corporation, says: "A promoter is one who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which looks to the formation of a corporation. A promoter is considered in law as occupying a fiduciary relationship towards the corporation." This definition is approved in Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600. As to events transpiring subsequent to April 20th, there is no question but that these defendants, Dennis and Sanborn, stood in the position of promoters of the corporation that was subsequently organized. That these defendants were promoters is well evidenced by the facts already stated, and numerous other circumstances which it is not necessary here to detail. Appellant especially fills the test demanded of a promoter in every respect, and he himself testifies that, as to all the things done and said by him looking towards the transfer of this land, he was the agent of his codefendant Sanborn; and upon this appeal we must agree with him as to such agency. It appears to be conceded by both appellant and respondent that the law bearing upon the facts of this case is well put by Mr. Justice Sharswood in Densmore Oil Co. v. Densmore, 64 Pa. St. 43; and the application of the principles of law there declared to the facts of this case furnishes the legal solution to the present litigation. In that case it is said: "There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell the property to the association at any price that may be agreed upon between them, no matter what it may have originally cost, provided there is no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. * * * The second principle is that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance, without a full disclosure of the facts."

The first interrogatory that necessarily presents itself to our consideration is, was Sanborn the owner of these various tracts of land upon April 20th?—that being the date of the inception of the negotiations which terminated in the creation of the corporation, and the date from which the defendants occupied a position of trust and confidence towards those who subsequently became the stockholders of the corporation. As to the Titus tract, Sanborn was in no sense the owner of it. He had not paid a dollar towards its purchase, and had no word of writing to indicate any interest therein. It was bought with the corporation's money, and all transactions pertaining to the sale of it occurred subsequent to the said 20th day of April. The profit of $25,000 charged to the corporation upon this tract is not justified in the law, and the corporation has been injured to that extent. It must be conceded that the Hall and Stillson tract, for the purposes of this case, was owned by Sanborn; and we also think the Clapp, Ames, and Gibbs tracts had been purchased by him, and were owned to such an extent, at least, as to establish his status as the owner thereof prior to his becoming a promoter, within the rule declared in the Densmore Oil Company Case. It may be fairly said that under his contract of purchase he was the owner of these three parcels of realty. See Howell v. Budd, 91 Cal. 342, 27 Pac. 747. Sanborn, being the owner of these tracts prior to the commencement of confidential relations with the complainants, had the right to dispose of his property to the corporation at any price he saw fit to ask and the corporation saw fit to pay. As the vice chancellor said in Foss v. Harbottle, 2 Hare, 490: "I begin the transaction at this time. I have purchased land, no matter how, or from whom, or at what price. I am willing to sell it at a certain price for a given purpose." Of course, the fraud and deceit of the vendor, practiced towards the parties contemplating the purchase, would afford grounds for relief under any circumstances, but the fixing of the amount of the purchase price by the vendor is a matter in which he is entitled to the widest latitude. The valuation upon the various tracts of land, as shown by Dennis' report to the corporation, does not appear to be questioned, and by such valuation the lands of Sanborn were transferred to the corporation at a profit to him of $48,000, less $7,500 which he paid to perfect the title to the Clapp tract. While Sanborn had the right to dispose of his land to the corporation at any figure upon which all parties concerned might agree, yet such sale must be made without any false representations upon his part. Getty v. Devlin, 54 N. Y. 403; Densmore Oil Co. v. Densmore, supra. As to false representations on the part of the defendants, the court found that, as a consideration and inducement for the prospective stockholders to enter into the venture, "defendants John P. Sanborn and L. W. Dennis represented to, and promised and agreed with, each and all of the persons above mentioned, that all of such lands as they then had, or might thereafter acquire, should be put in and conveyed to such proposed corporation at the same price and consideration as the said L. W. Dennis and John P. Sanborn had paid, or agreed to pay, therefor to the party or parties from whom they then had or might thereafter obtain the same." The evidence is entirely sufficient to support this finding. While many of the interested parties only testify generally to the understanding that all this property should pass to the corporation at cost price, and that they would not have participated in the venture if the fact had been to the contrary, yet the witnesses Sterling and Burbank testify directly to the statements of appellant, Dennis, made to them to that effect.

As to this branch of the case the conditions are these: Sanborn was the owner of several tracts of land on April 20th. At that time he and Dennis became the promoters of the defendant corporation, sold this property to the corporation, and at such sale represented that it was being sold at its original cost to them. The representation was false, and was made at a time when these parties were not dealing with each other as strangers at arm's length, but, on the contrary, at a time when they were closely allied in a joint venture, and when all the duties and responsibilities resulting from confidential relations rested upon them: and a strict performance of these duties and responsibilities is always inexorably demanded by the law. This principle is recognized in Phosphate Co. v. Erlanger, 5 Ch. Div. 73, and approved in Ewell's Evans on Agency, (page 284,*) in the following language: "A promoter is in a fiduciary relation to the company which he causes to come into existence. If he has a property which he desires to sell to the company, it is quite open for him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward, or other agent." Morawetz on Corporations (section 545) intimates that the true doctrine hardly goes to the length here stated, but still says the "promoters" are bound to exercise the highest degree of fairness in their dealings. The question of disclosure or concealment of information which should be communicated is not here involved. It is a question purely of false representations as to a substantial matter; and false representations upon the part of one party, entering into the very inception of a joint business venture, will nullify the entire transaction whenever the matter comes before a court of justice. At the time the sale was made, these parties occupied fiduciary relations, and those relations prohibited the conduct practiced by the defendants, as depicted by the finding of the court. In the eyes of the law the fact that these lands, at this time, were of the full value of the purchase price, in no way relieved appellant of the duties and responsibilities resting upon him as a fiduciary. This principle is fully illustrated in Bentley v. Craven, 18 Beav. 75.

It is now claimed that all parties had knowledge of the cost price of these various tracts of land prior to the conveyance to the corporation, by virtue of a personal inspection of the original contracts given by the owners to Sanborn; that they acted with their eyes open; and that it is now too late to rely upon these false representations as the basis of an action. It is probably true that such knowledge came to the officers of the corporation as to some of the tracts, but that event occurred long after the $193,666.62 was collected, and passed to the possession of Dennis and Sanborn. Again, such knowledge by the directors would not be knowledge to the stockholders. A fraud practiced upon the stockholders could not be ratified, or even waived, by the directors. This question was directly passed upon in Simons v. Mining Co., 61 Pa. St. 221.

Again, it is insisted that if the defendants practiced fraud in the sale of the lands, and thereby caused the corporation to pay more therefor than they in right should have paid, the remedy is not in the nature of the judgment here recovered, but the action should be for a rescission by reason of the fraud committed. We are not in harmony with such views. In the case of Getty v. Devlin, 54 N. Y. 403, a case very similar to the one at bar, in speaking as to the proper remedy, it is said: "But I think, under the complaint in this action, the four defendants may be compelled to account for the profits they made on the real estate, and which they fraudulently appropriated to the exclusion of their associates. The court can ascertain what the land actually cost the four defendants, and hold them to account for the balance. This balance equitably belongs to those who paid the money, and the plaintiffs can in this action recover their pro rata share thereof." The principles declared in Water Co. v. Flash, supra, also justify the remedy here sought and obtained. In an able and elaborate article found in 16 Amer. Law Rev., at page 671, the status, duties, and responsibilities of promoters are considered, and the true principle appertaining thereto is well stated, as follows: "The substance of the law is that promoters are corporate fiduciaries. Transactions with their companies wherein they deal honorably, with full disclosure, and without seeking to influence the action of the corporation, will be upheld; but transactions in which they suppress or misrepresent material facts, or otherwise deceive the company, or corruptly control its action, are fraudulent, and the company may elect either wholly to set aside such transactions, or to recover the promoter's secret profits." About the 5th day of May, John P. Sanborn returned to his home in Michigan, but prior to his departure he gave his nephew Frederick D. Sanborn a power of attorney to act for him in the collection of moneys, making of contracts, deeds, etc., in furtherance, probably, of the merger of the venture then on hand into the corporation about to be formed. At about this time the $193,666.62 was paid to Dennis, and portions of it passed to the original vendors through the medium of himself and Frederick D. Sanborn; and thereupon contracts of purchase were taken in the name of John P. Sanborn to the Ford, Bradley, and Titus tracts, and possibly new contracts, as to some of the others. The prospective stockholders becoming alarmed over the fact that they had expended such a large amount of money, and possessed no written evidence as to their interest in these various properties, upon May the 18th secured from Frederick D. Sanborn, as attorney in fact of John P., a statement in writing to the following effect: "Know all men by these presents, that whereas, I, John P. Sanborn, have purchased, [naming the various tracts of land here involved;] and whereas, a corporation is about to be formed, known as the San Gabriel Valley Land and Water Company; and whereas, the subscribers of stock of said corporation are the real purchasers of said lands, although the contracts thereof are made to me: Now, therefore, I agree that as soon as the organization is completed I will transfer all my right, title, and interest, etc., to the corporation." This writing was offered in evidence as the declaration or admission of John P. Sanborn that he had purchased this property for the corporation, and under objection it was admitted for such purpose. We shall not review the legal soundness of the ruling of the court in this regard, for, if error was committed, we think it harmless. If we look into the opinion of the court, as appellant suggests, this evidence appeared to have some weight, as tending to show an original purchase for the corporation; yet in the next succeeding clause of the opinion the judge says that there is ample evidence to support that allegation of the complaint aside from the writing. Neither does there appear to be any finding of fact that Sanborn actually purchased these lands for the corporation or the prospective stockholders, and for this reason the ruling of the court against appellant becomes immaterial. But, in addition, and as conclusive of the entire matter, we do not think any finding of fact that Sanborn purchased these lands for the contemplated corporation, or that he subsequently represented to the parties that he had so purchased them, is material to the recovery or necessary to support the judgment. As we have heretofore fully indicated, the acts of Sanborn and Dennis subsequent to the 20th of April justify the recovery had, and hence their conduct prior thereto is not an essential element of the case.

An attempt was made to take the deposition of the appellant, Dennis, prior to the trial; but after the examination was had, his testimony being taken down and transcribed by a phonographic reporter, he either neglected or declined to subscribe to the same. At the trial the reporter was placed on the witness stand, and, after refreshing his recollection from his transcription of the notes, under objection testified to the statements of Dennis made at that time. Dennis being an active party to the litigation, there can be no question but that his statements pertaining to the subject-matter of the action, wherever and whenever made, would be competent evidence against him. But the question here presented is whether the reporter, not having a definite and well-defined recollection of the statements so made, after he had refreshed his recollection as far as possible from the writing, will be allowed to read the contents of the memoranda to the court. There appears to be some difference of opinion among courts and law writers, as to the proper practice at common law; but under our statute (section 2047, Code Civil Proc.[1]) the course here adopted is expressly allowed. In the case of People v. Lem You, 97 Cal. 224, 32 Pac. 11, the practice was approved as justified by the foregoing provision of the Code; and in the case of People v. Gardner, 98 Cal. 127, 32 Pac. 880, the identical question was presented, and this court said: "The remaining objection to the admission of the evidence of the witness Briar does not seem to be well founded, in view of the last provision of section 2047 of the Code of Civil Procedure." Appellant's contention that the reporter's original notes are the basis from which he should have been required to refresh his recollection will not be considered, as such objection was not brought to the attention of the trial court. However, we do not intimate there is any merit in the point.

This action is brought by a dissatisfied stockholder, and a previous demand upon the corporation to commence the suit, and a refusal upon its part so to do, are made sufficiently plain from the record. There are several allegations of the complaint which have no support in the evidence, but they are immaterial, and, as a consequence, findings thereon against appellant become harmless. Appellant should be allowed a credit of $7,500, paid to perfect the title to the Clapp tract, and should only be charged with a profit of $25,000 upon the Titus tract. For those reasons we think the judgment should be for the sum of $65,500, with legal interest thereon from the 4th day of June, 1887. The cause is remanded, with directions to the trial court to modify the judgment to that effect.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 113

Ex parte GALLAGHER. (No. 21,079.)

(Supreme Court of California. Jan. 19, 1894.)

CONVICTION—REVERSAL—REHEARING—AFFIRMANCE—HABEAS CORPUS.

On application for writ of habeas corpus for failure to bring petitioner to trial after reversal of his conviction and granting of a new trial, orders recalling the remittitur and granting a rehearing, resulting in an affirmance of the conviction, cannot be impeached.

Application of B. F. Gallagher for writ of habeas corpus. Writ denied.

W. F. Aram, for petitioner. C. E. Snook, Dist. Atty., for respondent.

BEATTY, C. J. This is a petition for a writ of habeas corpus, which discloses the following facts: Petitioner was convicted in the superior court of Alameda county of a felony. On appeal to this court the judgment of the superior court was reversed and the cause remanded for a new trial. 33 Pac. 890. Our decision was filed August 16, 1893, and on the 25th of the same month the remittitur was issued, and on the 26th it was filed in the office of the county clerk, where it still remains. On the 28th an order was made by the superior court setting the cause down for a retrial on October 27, 1893, but on the 26th of October that court, of its own motion, dropped said cause from its calendar, and ever since said date has refused to retry said cause, restore it to the calendar, or dismiss it, notwithstanding the defendant has never consented to the delay, but has always been ready for trial, and has frequently demanded a trial or a dismissal of the action. During all of said time the defendant has been and still is confined in the county jail under no other authority than a commitment based on said charge of felony, upon which he was convicted as above stated. He contends that said imprisonment, in view of the facts alleged, is illegal, and that he is entitled to be discharged from custody.

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[1] The section provides that a witness may refresh his memory respecting a fact by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

If the facts disclosed by the petition were all the material facts of the case, it might be that the petitioner would be entitled to be set at liberty. But there are other material facts, of which we can take notice, because they are disclosed by our own records of the proceedings in the action of the people against the petitioner. The remittitur in that cause was issued within 10 days after the decision was filed, solely because the attorney general consented to and requested the order, and within 30 days after the decision the remittitur was recalled upon motion of the attorney general, based upon his statement made in open court that he had been induced to consent to its issuance by a message falsely purporting to come from the district attorney of Alameda county, and requesting him to make the motion. After the remittitur was so recalled, a petition for a rehearing of said cause was filed on the part of the people, and granted by the court, whereupon counsel for the defendant (this petitioner) moved the court to set aside its orders recalling the remittitur and granting a rehearing, which motion was, after argument, denied. The cause was then resubmitted, and on December 22, 1893, a decision was filed affirming the judgment and order denying a new trial. These facts are a complete answer to those set up in the petition, which appears to be a collateral attack upon the orders recalling the remittitur and granting a rehearing. We are entirely satisfied that those orders were proper, and that they cannot be impeached in this proceeding. The writ is denied.

We concur: DE HAVEN, J.; McFARLAND, J.; PATERSON, J.

101 Cal. 135

STATE INVESTMENT & INS. CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,496.)

(Supreme Court of California. Jan. 25, 1894.)

INSURANCE COMPANY—ACTION BY ATTORNEY GENERAL TO DISSOLVE — RECEIVER — POWER OF COURT TO APPOINT — INSOLVENCY ACT — CONFLICTING STATUTES.

1. Pol. Code, § 600, provides that when the insurance commissioner ascertains that a person engaged in the insurance business is insolvent he must require the person to repair the capital stock. Section 601 provides that if the deficiency in stock is not made up the commissioner shall inform the attorney general, who must commence an action in the name of the people, and apply for an order requiring cause to be shown why the business should not be closed; and if such person is insolvent, or the interests of the public so require, the court must decree a dissolution of such corporation, and the winding up of its affairs, and the distribution of its effects. *Held*, that the court, on decreeing the dissolution of a corporation in such action, has no power to appoint a receiver, or assume control of its effects.

2. Code Civil Proc. § 565, empowers the superior court to appoint receivers of a corporation on its dissolution on application of any creditor, stockholder, or member. Civil Code, § 400, provides that on the dissolution

of a corporation, "unless other persons are appointed by the court," the directors or managers at the time of its dissolution are trustees of the creditors and stockholders, and have full power to settle its affairs. *Held*, that such statutes do not authorize the court to appoint a receiver of an insurance company on dissolution thereof in an action brought by the attorney general.

3. Insolvent Act 1880, § 8, providing for an adjudication of involuntary insolvency on the petition of five or more resident creditors, is not made inapplicable to insurance corporations by Pol. Code, § 601, providing for the dissolution of such a corporation in an action brought for that purpose by the attorney general.

4. Where an insolvent insurance company is dissolved on application of the attorney general, the court has no power to appoint a receiver to take charge of its effects "during the pendency of" an appeal by the corporation.

5. On petition of creditors of an insurance company under Insolvent Act 1880, the superior court of San Francisco, department 10, adjudged such corporation to be insolvent. Afterwards the attorney general applied in department 4 of such court, under Pol. Code, § 601, to dissolve such corporation for insolvency, and the insolvency proceedings were transferred to department 4. *Held*, that such transfer did not confer on the court any greater jurisdiction in the action by the attorney general than it otherwise had.

In bank.

Application by the State Investment & Insurance Company for a writ of prohibition to the superior court of the city and county of San Francisco, state of California, Hon. J. C. B. Hebbard, judge thereof, and F. W. Van Reynegom, commanding respondents to desist from further proceeding on a certain judgment and order appointing Van Reynegom receiver of such company, and directing him to take charge of its property. Peremptory writ granted.

Sullivan & Sullivan, for petitioner. W. H. H. Hart, Atty. Gen., Lindley & Eickhoff, and Samuel Rosenheim, for respondents.

HARRISON, J. Application for writ of prohibition. The State Investment & Insurance Company was incorporated under the laws of this state December 1, 1871, with a capital stock of $400,000, for the purpose of doing a fire insurance business in the city and county of San Francisco, and very soon thereafter organized, with its capital stock fully paid, and commenced the transaction of business. June 1, 1893, certain creditors of the corporation, whose debts aggregated $49,000, filed a petition in the superior court of the city and county of San Francisco, setting forth facts constituting acts of insolvency on the part of the corporation and alleging that the said corporation was insolvent, and praying that it be adjudged an insolvent debtor. Upon filing this petition, the court made an order requiring the corporation to show cause before it, in department No. 10, on the 13th of June, why it should not be adjudged an insolvent debtor, and in its said order forbade it from transferring any of its property until the further order of the court. This order was duly served upon the corporation, and on the return day thereof it appeared in court in obedience thereto, and, the hearing having been continued until the 14th day of July, the court on that day made its order adjudging it to be an insolvent debtor, within the intent and meaning of the insolvent act of 1880. July 13, 1893, upon the information of the attorney general, an action was commenced in said superior court by the people of the state of California against the said corporation and its directors, under the provisions of section 601 of the Political Code, for its dissolution and the winding up of its affairs and distribution of its assets. In the complaint in this action it was alleged that in April, 1893, the insurance commissioner entered upon an examination of the affairs of the said corporation, and, on the 10th of May, as the result thereof, ascertained and declared that on the 1st of January, 1893, the capital stock of the corporation was impaired to the extent of $227,442.73, and thereby reduced to a sum below $200,000, viz. to the sum of $172,557.27, and that by reason thereof the said corporation was, on the 1st day of January, 1893, insolvent; that thereupon the said insurance commissioner, on the 10th of May, 1893, revoked the certificate of authority to do business as an insurance company which had been previously issued to it, and required said corporation to discontinue the issuance of new policies, or the renewal of any previously issued, and also to repair its capital stock to its original amount, within 60 days thereafter, by an assessment upon its stockholders; that said corporation failed to make up the deficiency of its capital within said 60 days; that on the 10th day of July the insurance commissioner reported these facts to the attorney general; that since the 1st day of January the business of said corporation had been so conducted that on the 10th day of July its capital had become impaired to the extent of $302,100. Upon filing this complaint the clerk of the court issued a summons directed to the defendants therein named, and upon its issuance the judge of the court, in department No. 4, made an order of injunction restraining the corporation, its directors, agents, attorneys, and creditors, and each of them, and all others acting in aid or assistance of them, from carrying on any litigation, and from interfering with or taking possession of any of the assets of said corporation, and appointed the respondent Van Reynegom temporary receiver to take possession of the assets of the corporation, and directed that the corporation show cause before said court on the 11th day of August why it should not be closed for business, and why it should not be dissolved, and its assets distributed to its respective creditors. August 10th the defendants answered the complaint, admitting the insolvency of the corporation, setting up the proceedings that had been taken against it upon the aforesaid petition in insolvency, and that it had been therein declared and adjudicated an insolvent debtor, and that such adjudication had become final, and asked that its assets be distributed under the provisions of the insolvent act of 1880. August 24, 1893, the matter having been fully heard before the court, the judge rendered his decision, in which he found the facts substantially as alleged in the complaint and answer, and also found as a fact "that the business of said corporation should be closed; that the interests of the public so require; that said corporation defendant should be dissolved, its affairs wound up, and the assets distributed; that by reason of litigation now pending, and the race between creditors for preference, the assets of said defendant corporation are being injured and wasted, and by reason thereof distribution under the provisions of section 601, Pol. Code, will be prevented, unless injunction issue out of this court, and receiver be appointed to take possession of its assets; that, unless such injunction issue and receiver be appointed, irreparable injury, which cannot be compensated in damages to the state, will result, in that it will defeat the operation and enforcement of the insurance laws of the state of California." Judgment was thereupon rendered in this proceeding "that said defendant, the State Investment & Insurance Company, which is a corporation organized and existing by virtue of the laws of the state of California, be, and the same is hereby, dissolved; that the affairs of said corporation be wound up, and that a distribution of the effects of said defendant corporation be made under the control of said court in the above-entitled action." By said judgment the court also appointed the respondent Van Reynegom as receiver of all the property, estate, and effects of the corporation, and directed every person and official having any property belonging to it to deliver the same into his possession; and provided that such receiver should have power and authority, under the control of the court, and in obedience to its orders, to hold and dispose of the property of said corporation, and to wind up its affairs and distribute its property and effects. From this judgment the defendants appealed to this court on the 26th of August, and on the 28th of August the superior court, upon the motion of the attorney general, made an ex parte order appointing Van Reynegom receiver of the property of the corporation, to keep and preserve the same during the pendency of said appeal. From this latter order the corporation also appealed, and on the 30th of August, after the taking and perfecting of said appeal, the court made another order, reciting its former one appointing the receiver, and that he had qualified as required therein, by which it "finally appointed" him receiver pending the appeal. September 15th the petitioner herein made an application to this court, setting forth that under the foregoing orders the said receiver claims to be entitled to the possession of its property, and had made demand therefor, and that the superior court had instructed said receiver to demand and take into his possession all of the estate and effects of the petitioner; and prayed for a writ of prohibition directed to the respondents herein, commanding and directing them to refrain and desist from further proceeding upon the said judgment or orders with reference to any property of said corporation, and from interfering with or disturbing the possession or control of the corporation as to any of its property or effects. Upon this application an alternative writ of prohibition was issued, and upon return thereto the respondents filed an answer, substantially in the nature of a demurrer to the petition, in which they contend that the proceedings in insolvency were superseded by and merged in the proceedings for the dissolution of the corporation, and that the court in which this latter proceeding is pending had jurisdiction to make the orders, and to wind up the affairs and distribute the effects of the corporation.

Section 8 of the insolvent act of 1880 provides that "an adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars; provided that said creditors, or either of them, have not become creditors by assignment within sixty days prior to the filing of said petition;" and section 36 of the act declares that "the provisions of this act shall apply to corporations," and "whenever any corporation is declared insolvent all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation." Upon filing the petition authorized by section 8 the court takes jurisdiction of the subject-matter of the insolvency, and upon the service of the order requiring the alleged insolvent to appear in answer thereto, provided by section 9, it acquires jurisdiction over the debtor. The order of the court forbidding the debtor to transfer any of his property, which is authorized by section 9, is in the nature of a provisional attachment or sequestration of his estate, and brings it under the control and dominion of the court. Section 12 provides that the court may, upon the default of the debtor, or after a trial upon the issues in the proceeding, make an order adjudging that he is, and was at the date of filing the petition, an insolvent debtor; hence this adjudication of insolvency has relation to the time when the petition was filed, and renders void any intervening transfer or incumbrance of his property. The superior court therefore acquired jurisdiction over the estate of the petitioner on the 1st day of June, when the petition for its insolvency was filed; and on the 13th of June, when the corporation appeared in answer to the order to show cause, the court had acquired entire jurisdiction of the subject-matter of the petition and of the insolvent. The jurisdiction thus acquired gave to the court full authority to carry out the provisions of the insolvent act, and to have the estate of the insolvent distributed to the creditors under its supervision and control; and, if the court had proceeded in the matter, and had distributed the estate without interference on the part of the court which had jurisdiction of the proceedings for the dissolution of the corporation, it would not be contended that its orders and judgment would not be conclusive. The insolvent act does not exclude any corporation from its provisions, but its declaration that "the provisions of this act shall apply to corporations" includes corporations organized for the purpose of insurance as well as others. It is contended, however, by the respondents herein that the act, so far as it was originally applicable to insurance corporations, has been superseded by the provisions of section 601 of the Political Code, in which provision is made for the dissolution of such corporations. It is not claimed that there is any express declaration in the section to that effect, or that there has been an express repeal of these provisions of the insolvent act; but it is urged that the provisions of the two statutes are inconsistent, and that, inasmuch as section 601 was amended in 1887, and is the latest legislative declaration, it must prevail over the insolvent act of 1880. The argument from the relative dates at which the several statutes were enacted is not entitled to much consideration, for the reason that the substance of section 601, and all that can be accomplished under its provisions, was on the statute books for many years prior to the enactment of the insolvent act of 1880; the only change in the section, made in 1887, being to limit the time within which the attorney general should institute proceedings thereunder. If any argument is to be drawn from the respective dates of their passage, it would be that, if there is any inconsistency between the two statutes, the insolvency act would prevail over the other. We are, however, of the opinion that there is nothing inconsistent between the two statutes, and that each is operative over the principal subject for which it was enacted; that the provisions of the insolvent act embrace insurance corporations; and that the provisions of section 601 of the Political Code are intended to secure merely the dissolution of a delinquent insurance corporation, and do not confer upon the court which decrees the dissolution the power to distribute its effects to the stockholders and creditors.

The first legislation in this state providing for a supervisory control of the business of insurance was the act of March 26, 1868, (St. 1867-68, p. 336.) By that act the office of insurance commissioner was created, whose duty it was to examine into the financial condition of all persons and corporations who might desire to transact the business of insurance within this state, and to issue to such as may be found to be in a solvent condition, within the meaning of that act, a certificate of authority to transact such business, and making it unlawful for any corporation to transact such business without first receiving such certificate of authority. This act was re-enacted in 1872, in section 594 et seq. of the Political Code, and many of these sections have since, from time to time, been amended. The "insolvency" of an insurance corporation which will authorize the commissioner to revoke his certificate of authority, or to require it to refrain from doing business until it shall have repaired its capital, is not the ordinary commercial insolvency, but is such as is defined by the statute, (Palache v. Insurance Co., 42 Cal. 418,) and, so far as applicable to the petitioner herein, is defined in section 602 of the Political Code as follows: "Whereever provision for the liabilities of any person engaged in the business of fire insurance in this state for losses reported, expenses, taxes and reinsurance of all outstanding risks, estimated at fifty per cent. of the premiums received and receivable on all fire risks, would so far impair the capital stock paid in as to reduce the same below two hundred thousand dollars, or below seventy-five per cent. of said capital stock paid in. such person is insolvent." St. 1887, p. 19. By section 600, whenever the insurance commissioner ascertains that any person engaged in the insurance business is insolvent, "within the meaning of this chapter," he must revoke the certificate granted, and require the person to repair the capital thereof within such period as he may designate; and by section 601 it is provided that in case upon such requisition the deficiency of capital is not made up as required by the provisions of the Political Code, the commissioner must communicate the fact to the attorney general, and that officer "must, within twenty days after receiving such communication commence an action in the name of the people of this state in the superior court of the county where the person in question is located, or has his principal office, against such person, and apply for an order requiring cause to be shown why the business should not be closed; and the court must thereupon hear the allegations and proofs of the respective parties, as in other cases. If it appears to the satisfaction of the court that such person is insolvent, or that the interests of the public so require, the court must decree a dissolution of such corporation, and the winding up of its affairs, and the distribution of the effects of such person; but otherwise the court must enter a decree annulling the act of the commissioner in the premises, and authorizing such person to resume business." These provisions of the Political Code are of a governmental character, and are enacted by the legislature in the discharge of its functions to provide for the welfare of the people, in affording security to them in such insurance as they may choose to effect upon their property, and to protect them against fraudulent schemes of insurance, or deception by plausible inducements which may be held out for their patronage. The legislature, in authorizing a corporation to be formed for the purposes of insurance, has attached to it as a condition of its continued existence that it shall comply with the requirements of these sections, and has fixed the forfeiture of its charter as a penalty for noncompliance. Its power to prescribe such conditions, as well as its right to revoke the charter or to dissolve the corporation, is unquestioned, and it may avail itself of such mode in the exercise of the power as it may choose. Its visitatorial power over the corporations of its creation is as extensive as its power to authorize their creation, and it may exercise this power directly by itself, or it may declare a dissolution of the corporation as the result which shall follow a judicial investigation. In whatever mode the power may be exercised, it is but the administration of the legislative power of the state. In sections 600–602 of the Political Code the legislature has conferred the initiatory step for their visitatorial power upon the insurance commissioner, and has declared that if, upon a judicial investigation thereof, it shall be ascertained that his acts have been authorized, and that the corporation has failed to comply with his requirements, a dissolution shall follow. These sections are found in the chapter of the Political Code entitled "Executive Officers," and the object of the action authorized by section 601 is to make effective the acts of the insurance commissioner in revoking the certificate of authority by dissolving the corporation for its failure to comply with such requirement. The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity, (Neall v. Hill, 16 Cal. 145; French Bank Case, 53 Cal. 495; Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121,) either at the suit of an individual (Folger v. Insurance Co., 99 Mass. 267) or at the suit of the state, (Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371;) and, as its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction, (Verplanck v. Insurance Co., 1 Edw. Ch. 84.) There is no provision in section 601 by which the court is authorized to appoint a receiver or to assume control or management of the estate of the corporation, and under that section the court has no authority to make any order affecting the corporation or its property until after it has heard the allegations and proofs of the respective parties. When the attorney general commences the action, the only order which the court is authorized to make is one requiring the corporation to show cause why its business should not be closed. Until the return day of this order the court can neither enjoin the corporation from doing business, nor can it disturb it in the possession of its estate; and if, upon the hearing at the return day, it shall not be shown to the satisfaction of the court that the corporation is insolvent, within the meaning of the statute, its only function is to annul the act of the commissioner. The provision in the section that the court must also decree a winding up of the affairs of the corporation and a distribution of its effects does not declare that such winding up and distribution shall be under the direction of the court which has decreed the dissolution, or, indeed, under the direction of any court, but merely that its affairs shall be wound up, and its effects distributed. In Attorney General v. Bank of Niagara, Hopk. Ch. 354, the chancellor held that, even though proceedings were pending at law for the dissolution of a corporation, he had no authority to aid them by an injunction, for the reason that such action would be to prejudge the question which was yet to be determined in the court of law. In Re Boynton Saw & File Co., 34 Hun, 369, it was held that proceedings for the dissolution of a corporation were purely statutory, and that the only power or authority which the court possessed was such as had been conferred by the statute, and that, as the statute gave no authority to appoint a temporary receiver, such appointment was void, saying: "The statute does not give the court control over the corporate property until the decision is made upon the return to the order to show cause." See, also, In re Waterbury, 8 Paige, 380; Ward v. Farwell, 97 Ill. 615; People v. Seneca Lake Grape & Wine Co., 52 Hun, 178, 5 N. Y. Supp. 136. Section 400 of the Civil Code provides that upon the dissolution of a corporation, "unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." The power of the court to appoint other persons, which is implied in this section, does not authorize the court to take upon itself the power to settle its affairs, or to appoint a receiver for that purpose. It was held in the Havemeyer Case that the court in which proceedings had been taken for a dissolution of the corporation did not, by virtue of its judgment for a dissolution, have jurisdiction to appoint a receiver to wind up the affairs of the dissolved corporation. It was said in that case: "When a corporation is dissolved, its property vests in its stockholders, subject only to the claims of creditors, and is thereafter held upon the same tenure, and subject to the same conditions, as similar property owned by other natural persons. What others may do, they may do. They owe no further or higher duty to the public, and are under no other restraints." Page 378, 84 Cal., and page 133, 24 Pac. The proceedings in that case were under section 803, Code Civil Proc., but it was held that the provisions of section 400, Civil Code, apply in all cases of dissolution, whether voluntary or involuntary; and the reasoning therein and the conclusions reached are applicable to the present proceeding. Each is a proceeding on the part of the state for the purpose of revoking the franchise that had been granted to exercise corporate powers, and the function of the state, as well as its interest in the disposition of the property of the corporation, is no greater in the one case than in the other. The power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in section 565, Code Civil Proc., and the authority given therein is the measure of its power. That section gives to the superior court of the county in which the corporation carries on its business authority to appoint one or more persons to be receivers or trustees of the corporation upon its dissolution, "on application of any creditor of the corporation or of any stockholder or member thereof," and, unless such application is made, the court has no authority to make the appointment. Its jurisdiction to make such appointment rests upon an application therefor by either a creditor or a stockholder, and can neither be invoked at the instance of a stranger nor assumed by the court of its own motion. Bangs v. McIntosh, 23 Barb. 600. If there should chance to be no directors in office at the time of the dissolution, or if for any reason the directors of the corporation ought not to be intrusted with the subsequent control of its affairs, the court can appoint others in their place, (Civil Code, § 2289;) but the persons so appointed become trustees in the place of the directors, and with the same powers and responsibility that are conferred by section 400 upon the directors in office at the time of its dissolution.

The only parties to the present action are the people of the state and the delinquent corporation. When the object for which the action is authorized—the revocation by the state of the franchise which it conferred—has been accomplished, there would naturally be no further action for the court to perform. The state has no interest in either the assets of the corporation or its debts, and when it has secured the dissolution of the corporation its functions in the action have ceased. See People v. Cement Co., 131 N. Y. 144, 29 N. E. 947. The statute does not authorize either the attorney general or the insurance commissioner to exercise any further direction or control in the affairs of the dissolved corporation, or in the distribution of its assets; nor has the state or any of its officers any interest in having the creditors receive from the assets of the corporation the amounts in which it may be indebted to them; and it is no concern of the state how or when the assets of the corporation shall be divided between the stockholders. Notwithstanding the decree of dissolution, the property still belongs to the stockholders, and the right to wind up the affairs of the corporation and to distribute its effects is given by the statute to the directors, and they can be deprived of this control over the property of the corporation only at the instigation of a creditor or stockholder. It must be considered that the insolvency upon which the dissolution of the corporation is authorized under section 601, Pol. Code, is a statutory, and not an actual, insolvency; and, as the liabilities of an insurance corporation are contingent upon a future event, rather than an existing indebtedness, under the watchfulness which the commissioner is required to exercise over the corporation, it would rarely happen that an insurance corporation which was in actual business would be actually insolvent, except some great conflagration had exhausted its resources. And it is also to be observed that in the complaint in the present instance there is no charge of actual insolvency, other than the impairment of the capital stock of the corporation; nor is there any reference therein to any of the creditors of the corporation, except as it may be inferred from the recital in the finding above quoted. If in fact the corporation is only technically insolvent,—that is, insolvent within the definition given by the statute,—no reason can be assigned why the court should interfere with the management of its business. The property of the corporation still belongs to the stockholders, and it would require an express statutory declaration to that effect to authorize a court, in a proceeding wherein the only parties are without any interest in this property, to assume to itself, or to take from them, the control and management thereof. They have the same right to the control of their property as has any other individual, and the court is not authorized to take under its protection the interests of those who do not seek to invoke its aid for themselves.

When the appeal from the judgment was perfected, its execution was suspended until the determination of the appeal, (Havemeyer v. Superior Court, supra,) and while that appeal is pending the court cannot carry into execution that part of its judgment authorizing the appointment of a receiver. The effect of an appeal from a judgment when the proceedings thereon are stayed is to preserve the rights of the parties to the controversy in the same condition as they were prior to the entry of the judgment. Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Dulin v. Coal Co., 98 Cal. 304, 33 Pac. 123. As the court could not take the estate of the corporation into its custody, or exercise any control over it, before the judgment of dissolution, it could have no property under its control which it was authorized to "preserve" pending the appeal from its judgment; but, if it could appoint a receiver to take the appellant's property from its custody and keep it in his possession during the pendency of the appeal, it would exercise an authority after the judgment greater than it possessed before its entry, and the effect of the appeal would thus be destroyed. For this reason the court had no jurisdiction to appoint Van Reynegom as receiver of the effects of the corporation "during the pendency of the appeal." The transfer of the proceedings in insolvency, after the order of adjudication had been made, from the department in which they had been pending to the department in which the action for dissolution was pending, did not confer upon the court any greater jurisdiction in the latter matter than it previously had had. Each of these proceedings was statutory in its character, and was to be conducted in the manner and within the limits prescribed by the statute under which it had been instituted. The application of the petitioner must be granted, and the writ of prohibition made peremptory.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

101 Cal. 152

HARRISON v. HEBBARD, Judge. (No. 15,492.)

(Supreme Court of California. Jan. 25, 1894.)

INSURANCE—DISSOLUTION OF CORPORATION — CONTEMPT—VIOLATION OF VOID ORDER.

In an action by the attorney general to dissolve an insolvent insurance company the court has no authority, on decreeing dissolution, to appoint a receiver, and restrain such corporation, its directors, agents, attorneys, creditors, etc., from carrying on any litigation, and from interfering with or taking possession of any of its assets; and disobedience to such order does not constitute contempt.

In bank.

Application by Robert Harrison for a writ of prohibition to J. B. C. Hebbard, judge of the superior court of the city and county of San Francisco, to prohibit respondent from hearing a certain order to petitioner to show cause why he should not be adjudged guilty of contempt, and punished for disregarding a certain order made by respondent. Writ granted.

Edward R. Taylor and C. W. Cross, for petitioner. A. Ruef, for respondent.

HARRISON, J. Application for writ of prohibition. The matters embraced herein are closely connected with those involved in State Inv. & Ins. Co. v. Superior Court, 35 Pac. 549, (just decided,) and the facts therein stated need not be here repeated. The petitioner herein, as attorney for certain creditors, filed in the superior court of the city and county of San Francisco their petition in involuntary insolvency against the State Investment & Insurance Company, a corporation. The hearing of the petition was set for the 10th day of June, 1893, in department 10 of that court, before Hon. W. H. Levy, J., and was continued from that date until July 14th. On the 13th of July an action was commenced in the same court by the people of the state against the State Investment & Insurance Company; and at its commencement the respondent herein, who presided over department 4 of that court, made an order "that until further order in the premises said defendant corporation, its directors, agents, attorneys, and creditors, and each of them, and their agents, attorneys, and solicitors, and all others acting in aid or assistance of them, be, and are hereby, restrained from carrying on any litigation, and from interfering with or taking possession of any of the assets of said corporation." When the hearing of the proceedings in insolvency came on before the court in department 10, on the 14th of July, the making of this order of injunction was brought to the attention of the court and of the petitioner herein, but the petitioner disregarded the order, and proceeded with the application in insolvency, and obtained from the court in the department in which those proceedings were pending an order adjudging the corporation to be an insolvent debtor. Upon an affidavit of these facts having been brought to the attention of the judge who had issued the order of injunction, he caused an order to be served upon the petitioner herein requiring him to show cause why he should not, on account of those facts, be adjudged guilty of contempt and punished therefor. The present application is to prohibit the respondent from hearing the said order to show cause, or taking any steps thereunder, upon the ground that in so doing the court is proceeding in excess of its jurisdiction. In State Inv. & Ins. Co. v. Superior Court we have held that in the action brought by the people against the corporation for its dissolution the statute has not conferred upon the court any authority to take charge or management of the effects of the said corporation; that it has no authority to appoint a receiver pendente lite, and that upon the entry of the judgment of dissolution its functions in the action are at an end; and that it has no authority to assume the distribution of the effects of the corporation and the winding up of its affairs. Under these principles it follows that the order of injunction issued by the court at the commencement of the proceedings for the dissolution of the corporation was without authority, and that the petitioner was not guilty of any contempt in disregarding the same. The subsequent order of the court requiring him to show cause why he should not be punished for violating this order is equally without authority, and it follows that his petition for a writ of prohibition must be granted; and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

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100 Cal. 525

LOS ANGELES COUNTY v. LANKERSHIM. (No. 19,235.)

(Supreme Court of California. Jan. 24, 1894.)

COUNTY TREASURER—LIABILITIES—PAYMENT OF WARRANTS.

Where the law requires all county school moneys to be apportioned, and the warrants drawn on the special funds, a finding that a payment of a school warrant was made from the general school fund is not equivalent to a finding that the warrant was not drawn on any special fund, so that the treasurer was liable for an illegal payment.

In bank. On petition for rehearing. Rehearing denied.

For main opinion, see 35 Pac. 153.

PER CURIAM. Response to petition for rehearing. The principal point decided in this case was that the county treasurer, when he has no notice of the illegality of the demand, or of the fact that no requisition has been made upon the auditor, or of any other fact to put him upon inquiry, may safely pay a warrant drawn upon the school fund, if it is in due form, and bears the genuine signature of the auditor or his deputy; and the judgment of the superior court was reversed on the findings, because, while they show that the money here in controversy was paid by the treasurer out of the school fund, on what purported to be a warrant for the amount so paid, they do not show that such warrant was not genuine and in due form, and do not show any other fact that ought to have deterred the treasurer from making the payment on presentation of the warrant. In their petition for a rehearing, counsel for respondent contend that this proposition, conceding its soundness, has no application to this case, because the findings show that the payment was made from the general school fund, whereas the law is that all county school moneys must first be apportioned to the several school districts, and all requisitions made and warrants drawn upon the special funds so created; from which they argue that the warrant in this case, having been drawn upon the general school fund, (meaning, we suppose, the unapportioned school moneys,) bears upon its face the evidence of its illegality. But the fact that the money was paid from the unapportioned school fund, while it may be evidence that the warrant was not drawn upon any special or district fund, is not conclusive evidence of such fact, and still less is it the equivalent of a finding to that effect. The finding only means that the treasurer charged the payment against the school fund without specifying the district, and it is quite consistent with this fact to suppose that the warrant may have been properly drawn against the fund of some particular district. In short, the judgment is erroneous, because not supported by findings definite and conclusive as to one point essential to the liability of the defendant. Conceding, without deciding, that the law governing the disposition of county school moneys is as respondent states it, a warrant drawn upon the general fund would be illegal on its face, and not merely illegal in a technical sense, but would carry evidence that it was not based upon any lawful demand or requisition from the county superintendent. We have not held or intended to intimate that the treasurer and his sureties would not be liable for money paid on such a warrant. But, on the other hand, if the warrant was, as we assume, regular on its face, and bore the genuine signature of the auditor, we do not think that the amount paid can be recovered in this action merely because the payment was charged to the wrong account. Upon a new trial, the facts as to the warrant may be proved, and the findings so framed as to show whether it was legal on its face or not. Rehearing denied.

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101 Cal. 197

Ex parte AH CUE. (No. 21,041.)

(Supreme Court of California. Jan. 26, 1894.)

CONSTITUTIONAL LAW—STATE CHINESE EXCLUSION ACT—VALIDITY.

Act March 20, 1891, (St. 1891, p. 185,) intended to prohibit Chinese from coming into the state, and to prescribe the terms on which those residing in the state may remain or travel between different points in the state, is in conflict with Const. U. S. art. 1, § 8, giving the general government authority to regulate commerce with foreign nations, and is void.

In bank.

Petition by Ah Cue for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and county of San Francisco. Writ granted, and petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. The petitioner was at the date of the issuance of the writ herein imprisoned by the chief of police of the city and county of San Francisco, charged with the alleged crime of "unlawfully coming in, being, and remaining within the limits of the state of California," in violation of an act of the legislature of this state approved March 20, 1891, (St. 1891, p. 185,) entitled "An act to prohibit the coming of Chinese persons into the state, whether subjects of the Chinese empire or otherwise, and to provide for registration and certificates of residence, and determine the status of all Chinese persons now resident of this state, and fixing penalties and punishments for violation of this act, and providing for deportation of criminals." The main purpose of this act, as shown by its title and by its provisions, is to prohibit Chinese persons from coming into the state, and also to prescribe terms and conditions upon which those residing within the state shall be permitted to remain or travel between different points in the state. The power thus attempted to be exercised is one which belongs exclusively to the general government by virtue of its authority to regulate commerce with foreign nations, (section 8, art. 1, of the constitution of the United States,) relating, as it does, to a subject-matter in which all the people of the United States are concerned, and not alone those of the state of California. Congress, in the exercise of its constitutional power, has prescribed the terms upon which the Chinese now here shall be permitted to remain within the United States; and it is beyond the power of the state to impose any further conditions. Ah Kow v. Nunan, 5 Sawy. 563. See, also, Chinese Exclusion Case, 130 U. S. 604, 9 Sup. Ct. 623; Fong Yue Ting v. U. S., 149 U. S. 711, 712, 13 Sup. Ct. 1016. The statute under which the petitioner is held is so plainly in excess of the power of the state, and in conflict with the constitution of the United States, that any extended discussion of its provisions is wholly unnecessary. The petitioner is discharged.

Ex parte LIPPMAN. (No. 21,045.)

(Supreme Court of California. Jan. 26, 1894.)

In bank.

Petition by one Lippman for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and county of San Francisco. Writ granted, and petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. Upon the authority of Ex parte Ah Cue, 35 Pac. 556, (No. 21,041, just decided by this court,) the petitioner is discharged.

Ex parte LIPPMAN. (No. 21,044.)

(Supreme Court of California. Jan. 26, 1894.)

In bank.

Petition by George Lippman for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and county of San Francisco. Writ granted, and petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. Upon the authority of Ex parte Ah Cue, 35 Pac. 556, (No. 21,041, the opinion in which has been this day filed,) the petitioner is discharged.

101 Cal. 200

NORTHERN COUNTIES INV. TRUST, Limited, v. CADMAN et al. (No. 19,271.)

(Supreme Court of California. Jan. 29, 1894.)

EXECUTION—SALE OF REAL ESTATE—PUBLICATION OF NOTICE—RIGHT OF SHERIFF TO SELECT NEWSPAPER.

Where, before sale of real property on execution, notice thereof must be published "in some newspaper" of the county, if there be one, (Code Civil Proc. § 692,) and an officer selling without such notice forfeits $500 to the aggrieved party, besides actual damages, (section 693,) the sheriff, and not the plaintiff, has the right to select the newspaper in which such notice shall be published.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the Northern Counties Investment Trust, Limited, against John Cadman and others, in which there was a judgment for plaintiff, and an execution issued. From an order denying plaintiff's motion for an order directing the sheriff to publish notice of sale of real estate on such execution in a newspaper designated by its attorney, plaintiff appeals. Affirmed.

Smith & Winder and Victor Montgomery, for appellant. F. O. Daniel and Chas. S. McKelvey, for respondents.

VANCLIEF, C. This appeal is from an order made after judgment denying plaintiff's motion for an order directing the sheriff to publish notice of sale of real estate on execution in a certain newspaper selected and designated by plaintiff's attorneys. The record contains no part of the judgment roll, nor anything to show the nature of the action, the substance of the judgment, or the form or substance of the execution, except that it required the sheriff to sell real property "under a decree and writ rendered and issued herein," and placed in the sheriff's hands by plaintiff's attorneys for service, with their written instructions to publish notice of the sale in the newspaper designated. The bill of exceptions shows that the motion was supported by, and heard upon, the affidavit of one of plaintiff's attorneys alone, the material substance of which is that, having contracted for the publication of the notice in a daily paper,—the Daily Evening Blade,—he gave the sheriff "written instructions, signed by affiant and his associate counsel, requesting and directing said sheriff to advertise said notice of sale of said property in the Daily Evening Blade for the length of time required by the statute;" but that the sheriff ignored and disregarded said instructions, and commenced the publication of said notice in the Weekly Gazette, a weekly paper published in the same county, (Orange,) having, as affiant is informed and believes, a circulation "of about four hundred," whereas he is informed and believes the Daily Blade has a circulation "of about seven hundred." "That the judgment in this case is for a large sum, and plaintiff will be put to heavy costs in connection with the sale of said land, and, as plaintiff is a nonresident, it wishes to avoid the necessity of bidding in said land, or any part thereof, and to secure, if possible, purchasers at said sale who will take said property at such figures as will justify the plaintiff in permitting them to buy the same." Counsel for appellant state in their brief that the action was to foreclose a mortgage, and that the decree was one of foreclosure "in the usual form," and that "a copy of said decree, with a writ for the enforcement of the same, was issued by the clerk, * * * and delivered by appellant's counsel to the sheriff," with the aforesaid written instructions, but give no further information of the contents of the decree, or of the "writ for the enforcement of the same." It may therefore be presumed or assumed, as against the appellant, that the execution conformed to that part of section 684 of the Code of Civil Procedure which provides that "when the judgment requires the sale of property the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." Newmark v. Chapman, 53 Cal. 558. Section 692, Code Civil Proc., provides: "Before the sale of the property on execution, notice thereof must be given as follows: * * * 3. In case of real property, by posting a similar (written) notice * * * in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one." And by section 693 it is enacted that "an officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages." It is admitted that these sections apply to sales on execution of foreclosure decrees; and it is clear that they enjoin upon the sheriff both the duty and the responsibility of posting and publishing the notices of sale as prescribed, which injunction necessarily implies the duty and responsibility of selecting the places where the notices are to be posted, and the newspapers in which they are to be published, since they are not specified. He is required to post the notices in three public places in the township, etc., and to publish them in some newspaper in the county once a week, under a heavy penalty, besides his responsibility for all damages. The penalty and responsibility are inconsistent with the alleged authority of the plaintiff to dictate the places or papers in which the notices are to be published, and consistent only with his duty and power to determine and select the places and newspapers in which to publish the required notices. Richardson v. Tobin, 45 Cal. 31; County of San Mateo v. Maloney, 71 Cal. 206, 12 Pac. 53; Publishing Co. v. Whitney, 97 Cal. 283, 32 Pac. 237; In re O'Sullivan, 84 Cal. 444, 24 Pac. 281. Moreover, the requirement of notice of sales on execution is quite as much for the benefit and protection of the defendant as of the plaintiff; and the defendant, if not insolvent, ultimately pays the expense of publication. Why is not he, at least, equally with the plaintiff, entitled to dictate to the sheriff how and where he shall publish notice of sale? And, if equally entitled, who is to decide when they disagree? I think the order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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101 Cal. 122

CRAIG v. SAN BERNARDINO INV. CO.

(No. 19,262.)

(Supreme Court of California. Jan. 25, 1894.)

JUDGMENT—BY DEFAULT—VACATING.

A judgment by default is properly vacated where defendant was misled by a statement by plaintiff, a lawyer, that the nonresidence of his codefendants extended his time of answering.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John W. Craig against the San Bernardino Investment Company and others for the value of certain shares of stock in the investment company. From an order vacating a judgment by default, plaintiff appeals Affirmed.

Willis & Cole and Goodall & Leonard, for appellant. Harris & Gregg, for respondents.

TEMPLE, C. This appeal is from an order vacating and setting aside a default and judgment, and permitting the defendants to answer. The application was based on many grounds, one of which was that the default was through excusable neglect, and the order was upon terms. Suit was brought to recover the value of certain shares of the corporate stock of the corporate defendant, on the ground that the said defendant refused to transfer the shares on its books, and issue a new certificate to plaintiff, who was the purchaser and assignee of the stock. Summons was served upon the secretary of the corporation, who was also a director, and it does not appear that any other officer of the corporation was aware of the controversy. The secretary, as he states in his affidavit, inquired of the plaintiff, who is a lawyer, if the fact that some of the defendants resided in another county would give all defendants 30 days within which to answer, and was informed that it would. For this reason he did not at once refer the matter to an attorney, but waited until he could see the regular attorney of the corporation, who resided at Los Angeles. But for this assurance, he would have answered in time. This is more than a mere mistake of law. The agent of the corporate defendant was misled, unintentionally no doubt, by the opposite party. Plaintiff should not be allowed to profit by this, even though it was with no design of gaining an unfair advantage. There is a sufficient showing of merits. The affidavit shows that the corporation never did refuse to transfer the stock, and that the plaintiff has obtained a judgment for $71,750 for stock, which was not then, and has not been since, of the value of more than $2,050. I think the order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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100 Cal. 514

WILSON v. SAMUELS et al. (No. 15,333.)

(Supreme Court of California. Jan. 25, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. H. Wilson against D. Samuels and another. For former report see 35 Pac. 148. Modified.

Naphtally, Freidenrich & Ackerman and A. G. Eels, for appellants. Geo. D. Collins, for respondent.

PER CURIAM. The judgment heretofore rendered in this court on December 26, 1893, is hereby modified so as to read as follows: "Judgment and order reversed, and cause remanded for a new trial."

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4 Cal. Unrep. 429

FERGUSON v. McBEAN. (No. 19,232.)

(Supreme Court of California. Jan. 22, 1894.)

PLEADING—SUFFICIENCY OF COMPLAINT—REVIEW ON APPEAL—CONFLICTING EVIDENCE—ACTION ON CONTRACT—EVIDENCE—COMPETENCY—HARMLESS ERROR.

1. A complaint alleging that plaintiff demanded payment of a specified sum, that defendant refused payment, and that the sum is due and unpaid, sufficiently alleges nonpayment of the sum alleged to be due.

2. Where the evidence is conflicting, the verdict should not be disturbed.

3. Plaintiff, having made a contract to purchase land from C., assigned it to defendant, who agreed to pay plaintiff a certain sum if he purchased the land from C. *Held*, in an action to recover such sum, that it was competent to show the circumstances attending the making of the contract of assignment; it being disputed whether C.'s sale of the land to defendant's stepson was under the contract between C. and plaintiff, and the relations between defendant and his stepson in regard to the entire transaction being a material issue raised by the pleadings.

4. It was proper to deny defendant's motion to strike out plaintiff's evidence as to conversations with a third person, not in the presence of defendant, and to retain such evidence till plaintiff's evidence was in, as other evidence might show that such third person was authorized to represent defendant.

5. Evidence that a third person agreed to pay plaintiff a part of the sum sued for was properly excluded, since defendant could not be relieved from his written obligation by such person's agreement to pay it, unless plaintiff released him.

6. Evidence that defendant's stepson told another person that he was representing defendant, and was ready to consummate the trade, was competent to show that the purchase was made under the contract assigned to defendant.

7. It was also competent to corroborate defendant's statement, after the sale, that he had purchased the property.

8. The possession and production by defendant's stepson, at the time of the transaction, of the assignment of the contract by plaintiff to defendant, were competent to show that he was defendant's agent.

9. The admission of testimony that plaintiff said defendant was represented by his stepson at the sale was not cause for reversal, when plaintiff had already testified to the circumstances connected with the assignment of the contract, and that the stepson was a party to the assignment, though it was not so stated therein.

10. Plaintiff having made the contract with C. personally, and having assigned it to defendant, evidence that plaintiff made the contract with C. at the request of one R. was properly excluded, as such fact would not alter defendant's liability.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by M. L. Ferguson against Alexander McBean on contract for the sale of lands. There was judgment for plaintiff, and defendant appeals. Affirmed.

Hendrick & Younkin and E. Crossman, for appellant. Rowell & Rowell and Hunsaker, Britt & Goodrich, for respondent.

HAYNES, C. This action was originally brought against McBean and A. V. Bills. The defendants demurred to the original complaint upon the ground that Bills was improperly joined as a defendant. The demurrer was overruled, and, upon the trial, plaintiff had judgment. Upon appeal by defendants it was held that the demurrer should have been sustained, and the judgment was reversed, with leave to the plaintiff to amend her complaint. See 91 Cal. 64, 27 Pac. 518. Respondent thereupon dismissed the action as to Bills, and amended her complaint in the matters made necessary by the dismissal of the action as to Bills, but retained, in substance, all of the allegations contained in the original complaint connecting Bills with the transaction. For a statement of facts of the case, see the opinion of Mr. Chief Justice Beatty upon the former appeal, 91 Cal. 66, 27 Pac. 518.

The only questions presented upon this appeal which were not disposed of by the former appeal arise upon a demurrer to the amended complaint, and upon certain specifications of insufficiency of the evidence to justify the findings of fact, and upon exceptions to the admission and exclusion of evidence. The demurrer to the amended complaint was properly overruled. The allegations that plaintiff demanded payment of a specific sum, that defendant refused to pay said sum, "and that the same is now due and unpaid," sufficiently allege the nonpayment of the sum alleged to be due from the defendant to the plaintiff. As to the sufficiency of the evidence to justify the findings of fact in the several particulars specified by appellant, it is sufficient to say that upon each of these findings the evidence was materially conflicting, and, under the numerous decisions of this court, cannot be disturbed.

The respondent, called as a witness in her own behalf, was asked by her counsel the following question: "State the circumstances attending the making of the contract between you and McBean, set out in the complaint, wherein you assigned to McBean your interest in the contract theretofore made by you with the Colton Land & Water Co." It was objected by appellant that the question was irrelevant and immaterial, and not in issue in the case; that the contract was in writing, was set out in the complaint, and its execution admitted by the answer; and that evidence was inadmissible under those circumstances to prove either its contents or the circumstances under which it was executed, or that any other persons were parties to the same; and that the contract is not ambiguous. The objection was properly overruled. There were other questions in issue beside the terms and execution of the contract signed by McBean, and as to which the circumstances attending the making of the contract of assignment to McBean were both relevant and material. One of these questions was whether the sale and conveyance of the property by the Colton Land & Water Company to Bills was under the contract between the Colton Land & Water Company and respondent. If the circumstances called for by the question tended to elucidate the matter above suggeested, it was material and competent. So, too, the relation between McBean and Bills in reference to the entire transaction, and each part of it, was a material matter put in issue by the pleadings, and, the issue being material, any competent evidence tending to sustain the issue on the part of the plaintiff was proper. The motion to strike out all the answer to the foregoing question, "except such portions as pertain to the identification of the contract," was also properly denied. It is not essential to the admissibility of evidence that it should prove the issue under which it is offered. It is only necessary that it should tend to prove the issue, or some part of it. We think the answer clearly tended to sustain a material issue, and was therefore properly retained.

Respondent was asked certain questions in chief as to conversations with Bills not in the presence of McBean, to which objections were made. The court overruled these objections, saying that "any conversation with Bills does not bind McBean unless he is connected with it. It is only a question of the order of proof, and it may as well come in one time as another." Defendant afterwards moved to strike out all the testimony of this witness relating to the conversations that she had with Bills, on the ground that no authority from McBean had been shown authorizing Bills to act as his agent in any manner, and that her testimony, so far as it relates to Bills, is wholly irrelevant and immaterial, which motion was denied, and defendant excepted. The motion to strike out was premature, and was properly denied. The court did not abuse its discretion in permitting the evidence to be given at that stage of the case. It involved only the power of the court to control the order of proof; and, even conceding that the testimony of this witness did not then tend to show that Bills was authorized to represent McBean, if it did not show that it was not so authorized, it was proper to retain it until all of plaintiff's evidence was in, as other evidence might, and as we think did, show that he was so authorized.

Upon cross-examination the plaintiff was asked: "Whose $1,000 was that that was paid for the first payment?" An objection on the part of the plaintiff was sustained, to which the defendant excepted. This point was settled upon the first appeal. See 91 Cal. 73, 27 Pac. 518. Besides, if the court erred in sustaining this objection, it was rendered harmless by subsequent evidence that this $1,000 was furnished to her by Raynor.

Plaintiff was asked, upon cross-examination, the following question: "Did Raynor agree to pay you some portion of the $3,000, or the whole of it?" Plaintiff's objection was properly sustained. The defendant had entered into a written obligation to pay the money demanded, and could not be relieved from that obligation by Raynor's agreement to pay it, unless, in consideration of that agreement, the plaintiff released McBean; and this was not included in the question nor proposed to be shown.

The testimony of Mr. Mintzer that the

property was sold to Bills under the contract made with plaintiff was both material and relevant. The conversation between Bills and Mintzer, testified to by the latter, in which Bills said he was there representing McBean, and was ready to consummate the trade, was competent and material for the purpose of showing that the purchase was made under the contract assigned to McBean by the plaintiff. The absence of McBean did not affect the testimony upon that point, at least. As to its bearing on the question of Bills' agency for McBean, it corroborated the statement of McBean, made to the witness after the sale, "that he had become the purchaser of the property; that he meant to put in larger pipes." So, too, the possession and production by Bills, at the time of the transaction, of the assignment of the contract by plaintiff to McBean, was a circumstance which tended to prove that he was the agent of McBean, and corroborated his statement that he represented McBean.

The subsequent conversation between Mintzer and McBean in regard to the sale of lots made by Mintzer after the contract with plaintiff, and before the conveyance to Bills, was also relevant and material. As urged by counsel, there was no issue in the case as to who was entitled to these lots, or the proceeds of them; but the fact that McBean raised a question in regard to them, and claimed the unpaid portion of the money for which they were sold, was very cogent and convincing evidence of three important facts in controversy, namely: (1) That the purchase, by whomsoever made, was made under this contract, as otherwise no possible claim could be made for lots sold after the date of the contract, and before the sale on July 13th; (2) that McBean was the real purchaser at that sale; and, if so, (3) that Bills was in fact his agent in the transaction. His interest in these lots could only have been acquired under the contract and by the sale made by the Colton Land & Water Company ostensibly to Bills. It does not affect the force of this evidence that Raynor had an interest in the purchase, and that Bills also represented him, for, so far as the Colton Land & Water Company and the plaintiff were concerned, he could serve Raynor only as the agent of McBean, who held the sole title to the contract. The objection to the testimony of the witness Mintzer that Mrs. Ferguson told him that Bills was there to represent McBean does not appear to have been sufficiently presented to the court below; but, assuming it to have been properly taken, the answer of the witness does not justify a reversal of the judgment. The plaintiff had already testified to the circumstances connected with the assignment of the contract to McBean, and that Bills was in fact a party to the assignment, though not so expressed in it. She had given evidence, as had also the witness upon the stand, tending to show the agency of Bills. Besides, if it were conceded that the court erred in overruling defendant's objection to this testimony, it is clear that the error was harmless, as the testimony abundantly shows, as we have just seen, that Bills was in fact the agent of McBean. The fact of the agency being sufficiently established by other testimony, and especially by the conduct and declarations of the defendant himself, he could not be injured by testimony erroneously admitted upon the same fact.

P. A. Raynor, called on behalf of the defendant, was asked the following question: "State at whose instance she obtained that contract." This question was asked for the purpose of showing that the contract here sued upon was obtained by Mrs. Ferguson from the Colton Land & Water Company at the instance and request of Raynor. This evidence was clearly immaterial. The plaintiff made the contract with the Colton Land & Water Company personally, and it was assigned to the defendant, who agreed in writing that, under the circumstances and conditions therein expressed, he would pay to her the sum of $3,000. The obligation of the defendant, it is clear, could not be affected by the fact that Raynor, or any one else, had instigated the plaintiff to procure the contract.

W. E. Raynor, a witness for defendant, having testified that the mortgage given by his father to Bills for $35,000 included the unpaid purchase money of McBean's water right, as well as of the remainder of the land, was asked by defendant the following question: "State what was the relative consideration for the giving of that mortgage, as between McBean's water contract and Bills' interest in the land." Plaintiff's objection thereto was properly sustained. It will be observed that the mortgage was made to Bills alone. The question concedes that it included the unpaid consideration of the water right, which belonged to McBean, and assumes that the land conveyed by Bills to Raynor was in fact owned by Bills, and that McBean had no interest in it. The question at issue was as to McBean's interest in the land purchased from the Colton Land & Water Company under the Ferguson contract. How the relative value of the land and the water could possibly tend to show who in fact owned the land is beyond comprehension. If the witness had answered that the purchase price of the water included in the mortgage was one-fourth, it would have tended neither more nor less to prove the ownership of the land than would the answer that it was three-fourths. The question as to the relative value of these interests was therefore wholly immaterial. Finding no material error in the record, the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, said judgment and order are affirmed.

101 Cal. 131

BRANDENSTEIN v. HOKE et al., (BRANDER, Intervener.) (No. 18,233.)

(Supreme Court of California. Jan. 25, 1894.)

LEVEE DISTRICTS—CONSTITUTIONAL LAW — BONDS —ESTOPPEL.

1. Act March 25, 1868, (St. 1867–68, p. 321,) which requires the county board to erect a levee district whenever a petition therefor shall be presented by persons in possession of more than half the land in the proposed district, without submitting the question of tax to a vote of the people in such district so erected, is unconstitutional, since no discretion is vested in the board to reject the petition, no notice is required to be given to landowners who do not join therein, and no opportunity for contest is allowed. Moulton v. Parks, 64 Cal. 166, 30 Pac. 613, approved.

2. A levee district organized under an unconstitutional law is not a corporation de facto, and may set up the unconstitutionality of the law to defeat the collection of bonds issued by it.

3. Such district is not estopped from denying liability on the bonds by the fact that it retained the proceeds arising from their sale, and paid interest on them for several years.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Mandamus by Joseph Brandenstein against William T. Hoke and others, defendants, and George L. Brander, intervener, to compel defendants to levy a tax to pay bonds issued by a levee district. From a judgment for defendants, plaintiff appeals. Affirmed.

Ben Morgan, for appellant. A. C. McLaughlin, Dist. Atty., F. C. Lusk, and M. E. Sanborn, for respondent. Henry Thompson, (Philip P. Galpin, of counsel,) for intervener.

GAROUTTE, J. The defendants other than George L. Brander, an intervener, are the supervisors of the county of Sutter, and, as such, are ex officio members of and constitute the board of reclamation fund commissioners of levee district No. 5. The plaintiff is the holder of certain bonds of said district, which were issued and sold for the purpose of securing funds to carry on improvements in such levee district. A writ of mandate is prayed for, requiring said board of fund commissioners to take certain steps provided in the statute looking towards the levy and collection of a tax upon the property within the limits of the district, to be applied in liquidation of the principal and interest of plaintiff's bonds. The matters here involved are purely matters of law, and the first and principal question presented involves the constitutionality of the following section of an act of the legislature, passed March 25, 1868, (St. 1867–68, p. 321:) "Sec. 21. Whenever a petition shall be received by said board of supervisors from persons in possession of more than one-half of the acres of any specified portion of said county, asking to be set apart and erected into a levee district, said board shall at once erect such territory into a levee district, and place it under the provisions of this act, to be called levee district No. 2, 3, and so on, as the case may be, provided that it shall not be required to submit the question of tax to a vote of the people of any district so erected." We cannot bring ourselves to the conclusion that it is necessary to enter into an extended discussion for the purpose of demonstrating the unconstitutionality of the foregoing provision of the statute of this state. That it is violative of fundamental principles of constitutional law is apparent upon the slightest inspection. It will be observed that one petitioner, having the possession of a majority of the acreage of the territory, which he desires to form into a levee district, has the absolute right to form such district. No notice to his neighbors is required. No opportunity for protest is allowed. No discretion is vested in the board of supervisors to reject the petition, or even change its proposed boundaries. The duty of the board is entirely perfunctory. The lands of the petitioner's neighbors may need no reclamation. They may consist of plateaus, where flood waters are never known. They, being of great value, may be placed within the lines of the proposed district for the single purpose of bearing the brunt of the taxation which is sure to follow the creation of the district. While these matters may be considered trifles in the eyes of the legislature, yet in the eyes of the law a practice of the things countenanced by this provision involves a violation of man's gravest constitutional rights. This is an attempted delegation of power to one or more unknown persons to deal with their neighbors' property with an iron hand, untrammeled by any of the requirements that are always and everywhere recognized by courts and constitutions as absolutely necessary to be observed before one man may do aught to interfere with another's property. This provision of the statute was reviewed by the court in the case of Moulton v. Parks, 64 Cal. 166, 30 Pac. 613, and it was there declared to be violative of the constitution of this state. Appellant insists that the matter was not before the court, and that the views there expressed were obiter dicta. It is not necessary for us to pass upon that contention here. If those views were dicta, they are dicta no longer, for we heartily approve of them, as containing a sound exposition of the law. We also refer to People v. Bennett, 29 Mich. 451, in support of the views we have expressed. That case contains an elaborate discussion of the principle here involved, and, both as to the facts and the law, occupies much broader ground than the case at bar.

It is claimed that this levee district is at least a corporation de facto, and that defendants will not be allowed to set up the unconstitutionality of the law under which it was organized for the purpose of defeating this proceeding; and Dean v. Davis, 51 Cal. 406, is relied upon to support this doctrine. That case does not extend to the limits insisted upon. While it is true that the regularity of the proceedings taken in the organization of a corporation cannot be questioned collaterally, still that principle does not arise in this case. This is not a question of regularity of proceedings. The matter here presented is, was there any law whatever under which a corporation similar to this so-called "levee district" could be organized at all? If there is no such law, then there is neither fund commissioners nor corporation, and a void law is no law. It is said in Norton v. Shelby Co., 118 U. S. 442, 6 Sup. Ct. 1121: "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

It is also insisted that respondents are estopped from disputing the validity of the bonds by retaining the benefit derived from the proceeds of their sale, and also by the payment of interest upon them for several years. We cannot assent to this view. It might possibly have some weight if the district was a corporation organized under a valid law, and these bonds were issued ultra vires, although the principles declared in Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7, seem to negative such contention. But here the principle cuts underneath all mere questions of irregularity of organization, or even the ultra vires issuance of bonds, for there is no organized body or person or persons against whom to urge a waiver or plead an estoppel. It is ordered that the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

100 Cal. 543

STEWART et al. v. SUPERIOR COURT.

(No. 15,482.)

(Supreme Court of California. Jan. 25, 1894.)

Department 1. Application by Julia V. Stewart and W. B. Prentice for writ of review. Modified.

For former report, see 35 Pac. 156.

Gibson & Titus and V. E. Shaw, for petitioners. E. W. Britt, for respondent.

PER CURIAM. It appearing to the court that the demurrer to the petition was submitted without answer being filed, under a misapprehension as to the effect of such submission under subdivision 3, rule 26, it is ordered that the judgment heretofore entered herein be modified to read as follows: "The demurrer to the petition is overruled, and it is ordered that the writ issue as prayed for."

4 Cal. Unrep. 440

DREW et al. v. HICKS et al. (No. 19,199.)

(Supreme Court of California. Jan. 25, 1894.)

NUISANCES—PRESCRIPTIVE RIGHT—AMENDMENT—SURFACE WATERS.

1. The rule that a right to maintain a nuisance cannot be acquired by prescription applies only to public, and not to private, nuisances.

2. Where evidence showing a prescriptive right to maintain a private nuisance has been admitted without objection that it is not within the issues made by the pleadings, it is an abuse of discretion to refuse to allow defendant to amend his answer so as to allege the right.

3. The rule that land is subject to the flow of surface water from higher land does not apply to surface water turned on the lower owners by artificial changes made by those owning land above them.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by H. L. Drew and C. W. Fairbanks against Sarah A. Hicks and William Curtis to enjoin defendants from constructing a bulkhead so as to turn water on plaintiffs' premises. From judgment for plaintiffs, defendants appeal. Reversed.

Rolfe & Freeman, Harris & Gregg, and Paris & Satterwhite, for appellants. Willis, Cole & Craig and C. W. C. Rowell, for respondents.

HAYNES, C. Appeal from the judgment, and an order denying defendants' motion for a new trial.

This case and the case of Drew v. Cole, (No. 19,143, filed Feb. 4, 1893,) 32 Pac. 229, (not reported in California Reports,) were tried together in superior court, and decided upon the same evidence. In Drew v. Cole, findings and judgment were for defendants, and upon appeal the judgment was affirmed, and a petition for rehearing denied. For a description of the premises of the respective parties, and a general statement of the facts involved, see Drew v. Cole, supra.

The complaint in Drew v. Cole was filed October 14, 1891, and in this case the complaint was filed November 9, 1891. The cases were different as to the specific relief sought, though depending largely upon the same facts, and involving in the main the same questions of law. That case was brought to enjoin the defendants from constructing a bulkhead in a wash or ravine in Colton avenue, which separates the lands of plaintiffs and defendants, whereby the water would be prevented from flowing down that avenue, and would be turned, as was alleged, upon the premises of the plaintiffs. The defendants answered, and also filed a cross complaint alleging that there was a natural water course over the lands lying to the eastward, which entered plaintiffs' premises at the southeast corner; that plaintiffs had built a dam across that water course at said corner of their land, and had excavated the ground on that portion of the avenue next plaintiffs' premises, whereby the water was turned down the avenue, and cut the ravine therein, and flooded defendants' lands, and, if the dam was allowed to remain, would cause them irreparable damage, —and prayed that it be abated as a nuisance, and for an injunction. Findings and judgment went for the defendants, dismissing the complaint, and granting the prayer of the cross complaint. In this case the complaint alleges, substantially as in the former complaint, "that the general trend of that section of the country is sloping at various grades from east to west and from southeast to northwest down to and across the premises of the defendants, and, in times of heavy storms, rain falling upon the same, or any large body of water flowing thereon, not absorbed by the soil, will, and always has, except when obstructed or diverted from its natural course as hereinafter stated, flowed in wide sheets of water down to, upon, and across the premises of said defendants," and charges that defendants, with a malicious and wrongful design to cause the water to flow down California street on the easterly side of defendants' premises, and with intent to discharge the same upon and across plaintiffs' premises, erected an embankment from two to four feet high along the east line of defendants' lands, (that being the west side line of California street,) and that, on top of said embankment on defendant Curtis' land, he attached wires to cottonwood trees, with the design to intercept brush and debris, which would constitute a barrier to the flow of water, and turn it down to and upon plaintiffs' land. The prayer is that the embankment and wire fence be abated as a nuisance.

The learned judge who tried these cases prepared a written opinion, in which he stated the material or more important facts found by him, and his conclusion thereon, and this opinion was signed and filed February 4, 1892; and afterwards, on the 15th, formal findings were signed and filed in this case, the latter following quite closely the language of the complaint. In several important and controlling particulars, the facts in the latter are wholly inconsistent with the facts stated in the opinion filed by the court, and are also irreconcilable with the findings in Drew v. Cole in respect to facts equally pertinent and material to this case as to that. It is true that in Drew v. Cole there was no issue as to the embankment and wire fence, and the right of the defendants to maintain them was not adjudicated, while here that is the sole issue, and the sole right to be adjudicated. This conflict of findings, however, does not necessarily require a reversal of this case. If, upon all controlling questions of fact, the evidence was materially conflicting, we would be obliged to affirm both judgments, because of such conflict, unless there were other grounds for a reversal.

Appellants contend, not only that the findings are not justified by the evidence, but that the court erred in denying defendants' motion for leave to amend their answer to conform to the proofs given and received without objection. In the written opinion of the learned judge, which is incorporated in the statement on motion for a new trial, it is said: "I am satisfied that the testimony discloses the fact that the Hicks embankment is to-day substantially as it existed for the past fifteen years. From the testimony and examination of the premises, I am equally well satisfied that the embankment is above the natural surface of the ground, and the only right defendant Hicks could have to maintain the same would be by reason of the fact that she had acquired a prescriptive right to do so. This contention is urged by counsel for defendant Hicks in their argument on the final submission of the cause. After a careful examination of the pleadings, however, I do not see how their position can be maintained. Under our system of practice, he who would avail himself of the privilege of the statute of limitation must do so by a demurrer or answer. No such objection having been taken in this case, it is to be deemed as waived." Counsel for defendants then gave notice of a motion to amend their answer, on the ground that the allegations of the pleadings do not conform to the facts proven at the trial, and therewith served a copy of the proposed amendment. Upon the hearing the motion was denied. Defendants excepted, and took a bill of exceptions thereto, and this refusal to permit the amendment is assigned as one of the grounds upon which their motion for new trial was based. Respondents, while controverting the fact that the embankment is in the same condition as formerly, cite authorities to the proposition that continuance of a nuisance for any length of time does not give a prescriptive right to maintain it. If that is true, as applied to the circumstances of this case, the motion to amend was properly denied, as it would not aid the defense. The first case cited to this proposition is Mills v. Hall, 9 Wend. 315. But this case does not sustain respondents' proposition. If this embankment is a nuisance, it is a private one. In the case cited it was claimed that the dam corrupted the air, by which the health of plaintiff's family was affected. The defendants moved for a nonsuit upon the ground that, the dam having been continued for 20 years, no action would lie. The court said: "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance. * * * If the defendants have for twenty years been permitted to overflow the plaintiff's land with their mill pond, so far as the injury to the land is concerned, they have by that length of possession acquired a right to use it in that manner, and are not responsible in damages to the plaintiff. So a man may overflow his own land; but, if such overflow spread disease and death through the neighborhood, it must be abated, and he must respond in damages for any special injury which any individual may have sustained from it." All the cases cited by respondents to this point are cases of public nuisance. But this question has been settled in this state, as well as elsewhere. In Learned v. Castle, 78 Cal., at page 461, 18 Pac. 872, and 21 Pac. 11, it was said: "And to thus wrongfully cause water to flow upon another's land, which would not naturally flow there, is to create a nuisance per se. It is an injury to the right, and it cannot be continued because other persons might have a low estimate of the damages which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude." See, also, Richards v. Dower, 64 Cal. 64, and other authorities cited in support of the above quotation. I think the court erred in not granting the amendment, as all the evidence in relation to the purposes for which the embankment was made, and the length of time it had been maintained, had been received without any objection, or any suggestion that it was not within the issues. Nor does it appear that it would have caused any delay in the disposition of the case, or that it would have made it necessary to take other or further testimony, while it is conceded by the learned judge that if the issue had been made the proofs already before him would have required a different judgment. If the facts had been found in relation to the embankment as indicated in the opinion of the court, it would be quite clear that a judgment for defendants, which those facts required, could not have been sustained, because not within the issues; and in such case the judgment would have been reversed, and the cause remanded, in order that the answer might be amended to correspond with the facts proved and found, as was done in Bryan v. Tormey, 84 Cal. 130, 24 Pac. 319. Justice would clearly have been promoted by the amendment, and no wrong would have been inflicted upon the plaintiff by allowing it; and under such circumstances it was an abuse of discretion to deny the motion. Or if, for any reason, the court was of the opinion that good practice required its denial, it was still sufficient ground for granting a new trial, followed by leave to amend the answer, since it clearly appeared that, such amendment being made, the facts required a different judgment.

Most of the questions likely to arise upon a new trial have been noticed in the opinion in Drew v. Cole, supra, though some of them might be made more specific, and which are especially called to our attention in respondents' brief.

So far as the embankment is concerned, a prescriptive right to maintain it would make them immaterial, though we cannot assume that there may not be different evidence upon that point; but in any event the right to maintain the wire fence does not appear to have been acquired by prescription.

We do not question the proposition laid down by respondents, that where two fields or farms adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. But this question is not always to be tested by the conditions existing at the time the suit is brought. What is meant by "the natural flow" is to be taken as of a time when its course has not been changed or affected by artificial means. As stated by the supreme court of Ohio, "The lower owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude." Butler v. Peck, 16 Ohio St. 334. See Ogburn v. Connor, 46 Cal. 352, where Butler v. Peck, and Washb. Easem. (2d Ed.) p. 427, to the same effect, are cited and approved. This principle is equally applicable to both plaintiffs and defendants. If before the surface of the lands above were changed, and natural channels or washes in which surface waters flowed were obstructed, the water did not flow over defendants' lands "in times of usual, ordinary, and expected freshets," they have a right to protect themselves against surface water turned upon them by artificial changes made by those owning the land above them, and, so far as they find it necessary for their protection, turn the water to channels where it originally flowed, provided they have not delayed until a right by prescription has been acquired against them. Nor does the flow of water over lands in case of extraordinary freshets, or such as are not expected or reasonably anticipated, affect the question. The supreme court of Pennsylvania, speaking of "usual, ordinary, and expected freshets," for the consequences of which one might be liable, said: "A flood is another thing. It may not come for years together. When it does come, it is a visitation of Providence, and the destruction it brings must be borne by those on whom it happens to fall."[1] A cloud-burst, such as the record shows occurred in 1891, could not aid materially, if at all, in determining the "natural flow" of surface water as it formerly existed, nor affect the rights of any of the parties to this case. It was one of those inevitable calamities which are to be borne without complaint, and cannot convert a fence or an embankment, otherwise lawful and proper, into a nuisance which may be abated. I think the judgment and order appealed from should be reversed, with leave to the defendants to amend their answer.

We concur: VANCLIEF, C.; BELCHER, C.

HARRISON and GAROUTTE, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to the defendants to amend their answer.

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[1] McCoy v. Danley, 20 Pa. St. 89.

PEOPLE v. CORNWELL. (No. 21,073.)

(Supreme Court of California. Jan. 25, 1894.)

CRIMINAL LAW—VERDICT—FIXING DEGREE.

Since there are two degrees of burglary, a verdict of guilty which does not fix the degree, as required by Pen. Code, § 1157, whenever a crime is distinguished into degrees, is erroneous, though the court charged that there could be no conviction of a higher offense than burglary in the second degree. People v. Bannister, (Cal.) 34 Pac. 710, followed.

In bank. Appeal from superior court, city and county of San Francisco; W. R. Dangerfield, Judge.

Thomas Cornwell was convicted of burglary, and appeals. Reversed.

W. I. Brobeck and P. A. Bergerot, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. On the authority of People v. Bannister, (No. 21,014; opinion filed Nov. 10, 1893,) 34 Pac. 710, the judgment and order of the superior court herein are reversed, and the cause remanded.

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4 Cal. Unrep. 436

DAVIS v. EAMES et al. (No. 19,284.)

(Supreme Court of California. Jan. 25, 1894.)

MINES AND MINING—AGREEMENT TO PURCHASE.

A contract giving an option to purchase a mine, wherein the vendors covenant to sink a shaft of at least 100 feet, imposes on them the absolute duty of sinking the shaft to the agreed depth, though they find no evidence that the mine contains enough valuable ore to justify them in purchasing it. Woodworth v. McLean, 11 S. W. 43, 97 Mo. 325, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. E. Davis against A. W. Eames and others for breach of contract. From a judgment for plaintiff, defendants appeal. Affirmed.

Wilson & Lamme, for appellants. Houghton, Silent & Campbell, for respondent.

BELCHER, C. This is an action to recover damages for an alleged breach of contract by the appellants. The case was tried by the court without a jury, and judgment was entered against appellants for the sum of $700 and costs, from which, and from an order denying their motion for a new trial, they appeal. The facts are substantially as follows: The respondent, being the owner of a certain mining claim, known as the "Todd Mine," entered into a written contract with the appellants, by which, in consideration of the covenants and agreements to be performed on their part, he agreed to convey to them the property within four months for the sum of $6,000; and they covenanted and agreed to at once enter upon the mine, and sink a shaft thereon to the depth of at least 100 feet, and to crosscut the ledge on the 50-foot level, and at the bottom of the shaft to crosscut again at least 10 feet, and to make such other developments thereon as they might deem proper. They were also to have all the ore taken from the mine in doing this work. In pursuance of the terms of the contract, appellants entered upon the mine and sunk a shaft to a depth of 56 feet. At the 50-foot level they ran a crosscut a distance of 47 feet, and struck a granite wall, which they penetrated about 3 feet. They then, without the plaintiff's consent, discontinued work in the shaft, and never afterwards did any more work in it, or sunk any other shaft in the mine. There were croppings on the surface of the mine, and seams leading out from the croppings, containing paying ore. The shaft was started on one of these seams, and from it defendants took some three or four tons of ore, which yielded about $20 per ton; but it gave out at a depth of about 26 feet, and below that point they found no ore in the shaft or crosscut. They afterwards prospected on the surface, and spent some $1,200 in so doing, but did not, as they thought, find evidence that the ledge contained valuable ore in sufficient quantities to justify them in paying for the mine, and thereupon they abandoned the contract. It is admitted that it would have cost at least $700 to sink the shaft the remaining 44 feet and make the 10-foot crosscut at the bottom; and, as a reason for not completing the contract in this regard, the witness James, who was an experienced miner in charge of the work, and interested with defendants therein, testified: "One of the reasons why we felt that we could not comply with the written contract, and why we wanted it modified, was because it would require steam works to sink the shaft deeper, which would have cost a good deal."

Counsel for appellants say in their brief "that the only question to be considered is whether, under the facts and circumstances disclosed by the record, the respondent is entitled to anything in excess of nominal damages;" and they insist that he was not in fact damaged in any sum or to any extent by the failure to sink the shaft to the depth agreed upon, and hence that the court erred in awarding damages in the sum of $700. In support of this position, counsel cite and rely upon the case of Woodworth v. McLean, 97 Mo. 325, 11 S. W. 43. That was an action to recover damages for breach of a written contract. Plaintiffs owned a mining claim in New Mexico, and conveyed to McLean two-thirds of it as a consideration for the contract in question. The contract provided that McLean, within two years, and at his own expense, should cause a shaft of certain dimensions to be sunk to "the depth of five hundred feet on the vein of ore cropping out on said claim." McLean sunk the shaft, as agreed, to a depth of 330 feet, but refused to carry it further. There was evidence for defendant to the effect that the work was stopped at that point because the vein of mineral had given out entirely. The plaintiffs were awarded nominal damages only, and appealed. The appellate court said: "Plaintiffs regard this contract as obliging McLean to sink the shaft five hundred feet, in any event, irrespective of all intermediate developments. Their entire argument here rests on that assumption. We think the language of the agreement does not reasonably bear that interpretation. Its intent and purpose were to secure a development of the claim in a manner to 'subserve the mutual interests of the parties,' and, on the completion of the work, two-thirds of the shaft (as part of the entire claim) was to belong to McLean. The latter stipulated to sink the shaft five hundred feet 'on the vein of ore cropping out on said claim.' If, in the progress of the work, all indications of valuable mineral ceased, and the vein of ore ran out entirely, there was no obligation on McLean to proceed further. The question whether the vein of ore had ceased is one of fact, to be tried in the usual way. As the work stopped within the five hundred feet, the burden of proof rested on him to show that the vein of ore (along which the shaft was to proceed) had terminated, for the contract itself asserts the existence of the vein at the beginning. But on establishing that fact the requirements of the contract would be met, and there would be no breach whatever. The measure of damages for failing to continue a mining excavation, such as this, to the point fixed by the contract, is the reasonable price or value of the work necessary to complete the shaft to the agreed depth. But this rule is not applicable, in view of the language and evident purpose of the contract here considered, unless the vein of mineral continued to the point where McLean ceased work." That case is plainly distinguishable from this. In that the decision was based upon the theory that as, by the terms of the contract, the shaft was to be sunk on the vein of ore cropping out on the claim, the requirements of the contract were fully met and complied with when the vein wholly gave out. In this case the contract is different. Here, the appellants were given the right to sink the shaft at such point as they might select, without reference to any vein or croppings, and to make such other and further developments as they might deem proper, and to take and appropriate to their use all ore extracted from the mine while doing the work. The obvious purpose of respondent was to have the mine opened to a depth of at least 100 feet, in case appellants declined to purchase it; and of appellants, to satisfy themselves by making the stipulated explorations of the value of the property, before completing the purchase. The obligation of appellants to sink the shaft to the agreed depth was absolute, and was the consideration for the option given them. There were no modifying terms in the contract. The claim that the supposed value of the mine would not have been increased by sinking the shaft to the agreed depth, but would probably have been lessened, is based upon theory, and not upon evidence or common knowledge. Respondent insisted that appellants should complete the shaft and crosscut in accordance with the contract, and we think he had a right to do so. The general rule as to the measure of damages in a case like this is correctly stated in Woodworth v. McLean, supra, and we think that rule applicable here, "in view of the language and evident purpose of the contract here considered." The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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101 Cal. 125

WEIR et al. v. MEAD et al. (No. 18235.)

(Supreme Court of California. Jan. 25, 1894.)

EXECUTOR'S BOND—NONEXECUTION BY PRINCIPAL—LIABILITY OF SURETIES.

An executor's bond, purporting to be the joint obligation of the principal and sureties, and the several obligation of the sureties, but signed only by the sureties, and not by the principal, as required by Code Civil Proc. § 1388, is absolutely void.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by James C. Weir and others against Michael H. Mead, Benjamin Pauly, and others, on an executor's bond. From a judgment for plaintiffs, defendants other than Mead appeal. Reversed.

Frank R. Wehe, for appellants. F. D. Soward, for respondents.

BELCHER, C. Hiram G. Weir was a resident of Sierra county, and died in August, 1883, leaving a last will, by which he devised all his property to the respondents in this action, and in which he named the defendant, Mead, as the executor thereof. The will was duly admitted to probate by the superior court of Sierra county in October following, and letters testamentary were ordered to be issued to Mead "upon giving bond required by law in the sum of six thousand and five hundred dollars." A bond was thereafter approved by the judge, and filed by the clerk of the court, which recited: "That I, Michael H. Mead, as principal, am held and firmly bound unto the state of California in the sum of six thousand and five hundred dollars, lawful money of the United States of America, in which sum I am also jointly bound with each of my sureties hereinafter named. * * * And we, Robert Forbes, [and five others,] as sureties, are severally held and firmly bound, and jointly with said Michael H. Mead are held and firmly bound, unto the said state of California, in the following sums, respectively, * * * for the payment of which, well and truly to be made, we and each of us, respectively, bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally as aforesaid, firmly by these presents." Then follow the conditions of the bond, and the signatures of the six sureties. Mead, the principal, never signed the bond, but, on the day it was filed, letters testamentary were issued to him by the clerk, and there was indorsed thereon the usual oath for the faithful performance of his duties. Thereupon, he took possession of all the property of the estate of the decedent, and thereafter continued to act as executor of the said will until June 9, 1890, when a decree was duly made and entered in the matter of the said estate, settling his final account, and distributing the residue of the estate, consisting of $1,262.69 in money, to the legatees named in the will, who are the plaintiffs and respondents here. Mead never paid to the distributees any part of the money so distributed to them; and in November, 1892, they commenced this action on the said bond, to recover the same, making Mead and four of the sureties signing it parties defendant. Mead failed to appear, and his default was duly entered. The other defendants answered, and, among other things, denied in effect that the so-called "bond" ever became a valid bond, or imposed any obligation upon them, for the reason that it was never signed or executed by Mead, the principal named therein. The case was tried by the court without a jury, and judgments in proper form were entered in favor of the plaintiffs, from which, and from an order denying their motion for a new trial, the defendants other than Mead appeal.

Our Code provides that "every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof." Code Civil Proc. § 1388. The plain meaning of this provision is that the principal and sureties must sign the bond before letters can be issued, for obviously there can be no execution without signing. It will be observed that the bond in suit here is not in form the joint and several obligation of all the parties, as it should be, but is the joint obligation of the principal and sureties, and the several obligation only of the latter. The question, then, is, was the bond, —it not having been executed by the principal,—valid for any purpose; and can the appellants, who signed it as sureties, be held liable thereunder? In City & County of Sacramento v. Dunlap, 14 Cal. 421, the action was upon a bond which purported to be the joint bond of the principal and sureties, but was signed only by the sureties; and the question for determination was whether the intended principal or the sureties were bound by it. It was held that the plaintiff could not recover upon the bond; and the court, speaking through Field, C. J., said: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete, and without binding obligation upon either;" citing Bean v. Parker, 17 Mass. 591; Wood v. Washburn, 2 Pick. 24; Sharp v. U. S., 4 Watts, 21; Fletcher v. Austin, 11 Vt. 447; Johnson v. Erskine, 9 Tex. 1. The learned justice then refers to certain decisions in other states which might seem to announce a different doctrine, and says that they were based upon bonds which were both joint and several, and he intimates that the liability might be different on the two kinds of bonds. In People v. Hartley, 21 Cal. 585, the action was upon a bond which was construed to be the joint obligation of the principal and sureties, and the several obligation of the sureties, so far as regards the amount for which each undertook to be liable. The bond was signed by the sureties, but not by the principal. The opinion in this case was also delivered by Field, C. J.; and it was held that the rule declared in City & County of Sacramento v. Dunlap was applicable, and that the bond imposed no binding obligation upon the sureties. In Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413, the action was upon a bond which was alleged to have been executed by two of the defendants as principals, and by the other defendants as sureties. The bond purported to be the bond of all the defendants, but it was in fact signed only by the sureties. It was held that the plaintiff might recover on the bond, and that the cases of City and County of Sacramento v. Dunlap and People v. Hartley, supra, were not in point, "because in those cases the bonds sued on were strictly joint, and not several, while in the case at bar the obligation is expressly joint and several." In Murfree on Official Bonds the law is thus stated: "A bond purporting to be that of a principal and his sureties, joint in form, and only several in recited limitations of the liabilities of the sureties, is absolutely void, if it is not executed by the principal. Being a joint bond, his signature was necessary to its validity, for the defects which can be cured upon their suggestion in the complaint do not embrace the absence of the signature of the principal obligor. Without his signature, the instrument is not his deed. There is no bond of his, in which defects can be suggested and cured." Section 252.

In other states the decisions are conflicting upon the question whether the sureties can be held liable on a bond which purports to be joint and several, but has not been signed by the principal. The last case to which our attention is called, bearing upon this question, and deciding in effect that sureties may be so held, is Trustees v. Sheik, 119 Ill. 579, 8 N. E. 189. The opinion in the case is an able one, and it reviews quite fully the decisions on both sides of the question. It is said: "We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts, that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri, and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality, which ought not to affect the rights of any of the parties concerned." On the other hand, the last case to which our attention is called, holding the other way, is a decision by the supreme court of South Dakota in Board v. Sweeney, 48 N. W. 302. In this case, too, the opinion is quite able and clear; and, after reviewing at length all the prior decisions on both sides of the question, it reaches a conclusion directly contrary to that reached by the supreme court of Illinois. It is said: "After a careful review of the authorities, and the reasoning upon which they are based, we think the better rule is that an official bond, in which the officer is named as principal, but which is not executed by him, is prima facie invalid, and not binding upon the sureties." It is not necessary here to cite or comment upon the numerous cases reviewed in the opinions last referred to, as this case clearly falls within the rule declared in the two California cases first cited. That rule is well supported in other states, and we think it should be followed here. There is a remark made by the supreme court of Michigan in the case of Johnston v. Kimball Tp., 39 Mich. 187, which we think applicable to this case, and we therefore quote and adopt it: "Our statutes plainly contemplate that the treasurer shall himself be a party to his own official bond; and, while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of opinion that where he purports to be obligor, and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature before they can be held responsible." Here there was no evidence that the sureties intended to be bound without requiring the principal's signature, but on the contrary the evidence introduced as to one of them tended to show that he did not so intend. It follows that the judgment and order should be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

101 Cal. 178

LEVEE DIST. NO. 9 v. FARMER et al.

(No. 18,159.)

(Supreme Court of California. Jan. 26, 1894.)

HIGHWAYS—VACATION—RIGHTS OF ABUTTING OWNERS.

1. An order of the board of supervisors laying out a new road, and vacating an old one, is not void because it fails to show on its face that there is any connection or relation between the two roads, if the surveys and descriptions of the new and the old roads show the connection.

2. The vacation of a highway established by statutory proceedings is not a taking of property from an abutting owner for a public use requiring compensation to be first made to him, since he has no interest in such highway that is not common to the public, and must be held to have acquired and improved his property in view of the statute authorizing the vacation of such highways.

Commissioners' decision. Department 2. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Levee District No. 9 against L. P. Farmer and others to enjoin defendants from vacating a road. From a judgment for defendants, plaintiff appeals. Affirmed.

M. C. Barney and W. T. Phipps, for appellant. A. C. McLaughlin, Dist. Atty., W. H. Carlin, and M. E. Sanborn, for respondents.

HAYNES, C. Appellant brought this action against the individuals composing the board of supervisors of Sutter county, two persons who were overseers of road districts, and others who were owners of lands through which a certain road ran, to enjoin them from closing up or vacating said road. Appellant is a corporation organized to maintain a levee along a portion of Feather river to prevent overflows, and the part of said road in question is contiguous, for the greater part of its distance, at least, to the levee; and the complaint alleges that it is the only inlet or outlet to the levee for the purpose of protecting or repairing the same, and charges that the defendants are preparing and threatening to, and will, unless restrained by the court, fence, plow up, and destroy the same, without any legal right or authority so to do, to plaintiff's great and irreparable damage. The prayer is for a temporary restraining order and a perpetual injunction. The answer of defendants, in addition to denials, alleged that on January 6, 1892, the board of supervisors ordered the road abandoned and discontinued, such order to take effect May 1, 1892. Upon the trial, defendants had findings and judgment in their favor, from which judgment the plaintiff appeals. The facts appear in a bill of exceptions. At the commencement of the trial, counsel for defendants suggested that, if the orders of the board of supervisors alleged in the answers were valid, that would dispose of the case, and proposed that the first proofs be directed to that issue, to which counsel for plaintiff assented. The proceedings of the board were thereupon put in evidence by defendants, and plaintiff put in no evidence whatever. The principal question, therefore, is as to the validity of the order vacating the road.

Appellant attacks the validity of the order mainly upon two grounds: (1) That the petition upon which the proceedings were based was for laying out and establishing a new road, and vacating an old one, and (2) that it did not appear from the proceedings that there was any connection or relation between the two, as that the construction of the new road rendered the old unnecessary. It requires neither discussion nor authority to sustain the proposition that two wholly disconnected objects cannot properly be joined in the same proceeding and order; and while these proceedings do not expressly, or in direct language, show that the new road is but an alteration of the old, making a portion of the old road unnecessary, the surveys and descriptions of the new road and the old, which were put in evidence, sufficiently show that fact. The portion of the old road vacated is about two miles in length, and the points where the new diverges from it at one end, and unites with it at the other, are given, while the courses of the surveys show that the divergence is at no place considerable,—perhaps not exceeding 40 rods. The petition was signed by the required umber of qualified persons; the descriptions of the road sought to be established and the one to be vacated were definite, and did not show that they were disconnected matters which ought not, or could not, be joined in the same proceeding; and as to all facts tending to show whether the power of the board ought, or ought not, to be exercised, either by granting or denying the petition in whole or in part, the board exercises judicial functions, (Damrell v. San Joaquin, 40 Cal. 158; In re Grove Street, 61 Cal. 453; Waugh v. Chauncey, 13 Cal. 11;) and its judgments are final, and cannot be attacked collaterally, but may be reviewed upon certiorari where the jurisdiction of the board has been exceeded, (Fall v. Paine, 23 Cal. 303; Murray v. Mariposa Co., 23 Cal. 495; Damrell v. San Joaquin, 40 Cal. 154; Bixler v. Board, 59 Cal. 701.)

This disposes of all the objections to the introduction of the records, except the one now to be noticed, and upon which appellant principally relies, viz.: That the provisions of the Political Code which purport to confer the power upon the board of supervisors to vacate public roads are unconstitutional, because they do not authorize the board to assess the damages caused thereby to abutting owners, nor in any manner provide for compensation to them, and that the rights of such abutting owners are property which under the constitution cannot be taken away or damaged without compensation. We are not cited to any case in this state where the question thus made has been called to the attention of the court or decided. Appellant cites Elliott, Roads & St. p. 114; but this citation has no material bearing upon the question. The author is there discussing the rights of abutting owners arising from the dedication of streets by the owner of the soil, and improvements made on the faith of such dedication, as is clearly shown by the cases cited in the footnote. One of these cases (Story v. Railroad Co., 90 N. Y. 122) was where the city owned certain lands, and surveyed and platted them into lots and streets, and sold them, the deeds therefor containing a covenant on the part of the grantor to make the streets, which "shall forever thereafter continue and be for the free and common passage, and as public streets and ways, for the inhabitants and all others," etc.; and it was held that the covenantees could not be deprived of the street without compensation. Another case cited is Le Clerq v. Gallipolis, 7 Ohio, 218. There the corporation owned the lands, and platted them, and designated a certain portion as a public square, and placed a value on the lots at which they were sold, the value of those on the public square being higher "because it was forever inalienable and to be kept open;' and it was held "that where land is dedicated to the use of the inhabitants of a town one or more, especially one whose property is affected in value, may enforce the execution of the trust." In the first of these cases the right of the abutter rested upon a covenant in his deed from the city, and in the second upon a trust created for his benefit, which the trustee could not disregard. Here, however, there was no dedication, nor any covenant on the part of the public, nor any trust in the public of the land upon which the road was laid for the use of the appellant or of the public. Whatever trust existed in the state was of an easement, not for the use or benefit of appellant, but for the use of the public, to continue for such time only as the use thereof by the public should be necessary. But it does not appear probable that the levee was built because the road was there, or on the faith that it would never be vacated, but because the river was there and likely to overflow; and therefore appellant is not within the authority he cites. Appellant, however, cites us to the statement of the same author at page 662, where the broad proposition is asserted that "the right which an abutter enjoys as one of the public, and in common with other citizens, is not property in such sense as to entitle him to compensation on the discontinuance of the road or street, but, with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property, it is radically different, for this right is a special one. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value. * * * For this reason we think the discontinuance or vacation of a street in such manner as to prevent access to the property of an adjoining owner is a 'taking' of property within the constitutional inhibition, and cannot be lawful without compensation to such owner." The cases cited by the author do not sustain the proposition. Cincinnati City v. White's Lessees, 6 Pet. 431, was where lands were dedicated and set apart "forever" as a common. Petition of Concord, 50 N. H. 530, was under a statute which provided: "On petitions for discontinuance of highways referred to the county commissioners, if they report for the discontinuance, they shall assess the damages occasioned to any person thereby." Common Council v. Croas, 7 Ind. 9, related to an alley in the city, and it was held that real estate dedicated for a street or alley could not be reclaimed by the donor without the consent of the owners of the property adjoining such street or alley. The court, in its opinion, called attention to the distinction between the modes of establishing streets in a town and of common roads,—that the former is a dedication by the owner, and the latter by appropriating private property to a public use by the state by the exercise of the right of eminent domain. Haynes v. Thomas, 7 Ind. 38, was also a case involving the dedication of land for a public street, and in no way bears upon the question now under consideration. The case cited from 50 Ind. 537 (Butterworth v. Bartlett) arose under a statute which provided that, upon the vacation of a highway, one through whose land the highway passed, who should be injured by the vacation of it, should be entitled to damages for such injury. Two other cases cited by the author related to the right of an owner, whose lot abutted on a street, to damages resulting from the use of the street by railroads, such use being an additional servitude. The only case cited by the author in which the question at bar was discussed is Pearsall v. Board, 74 Mich. 558, 42 N. W. 77; and the opinion in that case concludes as follows: "The statute of 1887, at page 185, recognizes the right of Mrs. Pearsall to her damages in this case, and has undertaken to provide a mode for obtaining them, but it is not the one authorized by the constitution." The reporter adds, in a footnote, that the act provided for a jury of six freeholders instead of twelve.

Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834, and Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, cited by appellant, were each cases of injury to abutting property resulting from a change of grade of an existing street in a city, whereby a change in the surface of the lot was made necessary to its convenient use and enjoyment, as by grading or filling, or changing approaches. In these cases, as in multitudes of others of like character, much is said about the rights and property of the abutting owner in the street; but what is said must be read in the light of the facts of each particular case. No one questions that an abutter upon a country highway has an interest in the easement created for public use; but it does not follow that such abutter is entitled to damages upon the vacation of such highway, nor that the vacation of it is a taking or damaging of private property for public use. The interest of each abutting owner is the same. Though it may be of greater use or benefit to one than to others, it is a common right, created in the same way, for the same purpose, of the same duration, and subject to be discontinued when the interests of the public, for whose benefit it was created, requires it,—that is, when it ceases to be necessary for public use. The easement is created for the public, not for an individual, though an individual may have a private way even by condemnation. Nor does the fact that a way may be necessary for a single abutter affect the conclusion that it is no longer necessary as a public road. If it were otherwise, no public road could be vacated so long as it could be shown that it was necessary for a single abutter, and thus the public could be required to maintain what is in fact a private way. That an abutter may be injured by the discontinuance or vacation of the road is conceded; but "there is no contract with surrounding property owners that a public improvement shall always exist as at present, and no damages will be allowed for its discontinuance, notwithstanding improvements have been made on the supposition that they will remain, and notwithstanding property has been thereby enhanced in value." Mills, Em. Dom. § 317. In Iowa the supreme court say: "We have held that the vacation of a highway does not take from an individual residing thereon his property, either for public or private use, and that he cannot recover damages therefor, although he may suffer inconvenience and loss therefrom." Barr v. City of Oskaloosa, 45 Iowa, 275. The supreme court of Pennsylvania said: "But by the vacation of Washington street no private property was taken or applied to public use;" and the court further held that the power of the legislature was not restrained in that regard by the provision in the constitution requiring municipal corporations to make compensation for private property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, and which also provided that private property should not be taken or applied to public use without just compensation. McGee's Appeal, 114 Pa. St. 471, 8 Atl. 237. The supreme court of Illinois said: "It is not true, in fact or in law, that defendant has either taken or damaged plaintiff's property for public use. It has taken no property for public or any other use. That of which complaint is made is the vacating of certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the constitution." City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395.

Whatever of apparent hardship there may be in particular cases where roads have been created by use when the country was new, as in this state, and for the temporary convenience of a sparsely settled country, a greater hardship would be entailed upon the public if those roads could not now be vacated or changed to meet the present changed situation without compensating those whose premises may abut thereon for the loss or inconvenience they may sustain, as, if that were the rule, none would consent to the change, and the added burden would be an embargo upon the creation of new and more desirable roads. The creation of highways by use, or under the statute, creates an easement for the benefit of the public for such time only as the public necessities and convenience may require, and creates no covenant or obligation in favor of an abutter that it shall always exist; but, on the contrary, the statutes, while providing for the establishment and maintenance of highways, also provide for vacating the same, and abutters must be held to have acquired and improved their property in view of that fact; and hence no one can acquire a legal interest in it other than that which is common to all, and this common interest the authority relied upon by appellant concedes does not entitle an abutter to damages upon the vacation of the road. The public use ceases upon such vacation, and an injury to the appellant consequent upon such ending of the use cannot be held to be a taking or damaging for a public use. The first order of the board of supervisors was valid, and the second order, passed to meet an objection made by appellant, was unnecessary, and did not affect the validity of the first. The plaintiff having introduced no evidence, the findings were proper. If the fact or extent or amount of the injury sustained by appellant had been found by the court, it would not avail to sustain a bill for an injunction, since it was damnum absque injuria. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

101 Cal. 118

LEE v. SOUTHERN PAC. R. CO. (No. 19,215.)

(Supreme Court of California. Jan. 25, 1894.)

APPEAL—GRANTING NEW TRIAL — ASSUMPTION OF RISK BY SERVANT—DEFECTIVE MACHINERY.

1. An order granting a new trial on the ground that the verdict is excessive will not be reversed merely because the supreme court differs with the trial court as to what would have been a just compensation, unless it appears that the trial court abused its discretion.

2. An employe does not assume the risk of injury from a defect in the machinery which is known to him, unless the danger arising from the defect is also known or reasonably apprehended by him.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Charles A. Lee against the Southern Pacific Railroad Company for personal injuries sustained while in defendant's employ. There was judgment for plaintiff, and from an order granting a new trial he appeals. Affirmed.

Cole & Cole and Del Valle & Munday, for appellant. John D. Bicknell, for respondent.

PER CURIAM. Action to recover damages for personal injuries. The plaintiff had judgment, and now appeals from an order granting defendant's motion for a new trial.

In the latter part of July, 1888, plaintiff was employed by defendant as a brakeman on a freight train, and continued in that service until November 13, 1888, when he sustained the injury complained of. At the time of the accident he was about 23 years of age, had from childhood been in good health, and prior to his employment by defendant had had no experience in railroad service. The additional facts disclosed by the record, so far as necessary to be stated, are that on the day of the accident the train on which plaintiff was employed had barely time to reach Honby siding in time for the south-bound passenger train to pass. The "helper" engine was in front of the train engine, and when near the siding cut loose from the train, and went ahead to couple to a flat car on the side track, and push it forward so as to let the freight train in on the siding, plaintiff going with the helper to make the coupling. After he let the engine in on the siding, he stepped upon the pilot to make the coupling, and as they were approaching the flat car he stooped to raise the coupling bar; and when it was partially raised the engine jolted in running over a defect in one of the rails, and caused his foot to slip off the bottom frame of the pilot. That the side track was only partially ballasted, which permitted his foot to catch against a tie, and prevented him from drawing it up, and that in consequence he was thrown off, and one of the wheels of the engine ran over his leg, making it necessary to amputate it about four inches below the knee. He remained in the hospital seven months. As to the condition of the track, he testified, in substance: That it was only partially ballasted, leaving a part of the tie exposed, against which his foot caught. That this side track was about in the same condition as the others along the road. That they were made of refuse iron,—"old rails that are hammered down and battered out, full of ridges and everything; * * * full of hollows and ridges and chuck holes all through, or all along, in lots of places." That the track was pretty well grown over with weeds and grass. That he never ran over a side track that was not a mass of ruts and hollows, all over it, and this was no exception to the rule. Upon cross-examination he testified: That all the side tracks were used,—this, he supposed, as much as the others. That he thought he had been on it, but could not state positively. That he looked at it from the train, lots of times, as he went along there, the same as all the rest of them; knew it was there; saw it grown over with weeds, in a neglected condition. That he did not know, of his own knowledge, that there was any such defect in that rail. That he did not see the hole there in that rail. Other testimony tended to show that at that place there was a chuck hole eight or ten inches long and an inch to an inch and a half deep. There was testimony on the part of the defendant tending to show that the side track was in proper condition; but, as the plaintiff's knowledge of the condition of the siding is principally involved, it is not necessary to state the defendant's testimony in this connection. It seems to be conceded that the mode adopted by the plaintiff to make the coupling was usual and proper. Plaintiff brought the action to recover for the injury upon the theory that, through the negligence of the defendant, its side track was imperfectly constructed, defective, out of repair, and unsafe. The jury returned a verdict for $25,000 damages. The grounds upon which defendant's motion for a new trial was granted, as appears from the opinion of the court, which is printed in the transcript, were: (1) That the damages were excessive. (2) That the injury suffered by plaintiff occurred while he was engaged in the business he was employed to perform, and that the accident which occasioned it resulted from the ordinary risks of such employment, the plaintiff being aware of the condition of the side track where the accident occurred.

1. Subdivision 5 of section 657, Code Civil Proc., permits new trials to be granted upon the ground of "excessive damages appearing to have been given under the influence of passion or prejudice." This provision has been in the statute since 1851, and has been frequently considered. Aldrich v. Palmer, 24 Cal. 516, is perhaps the leading case. See, also, Boyce v. Stage Co., 25 Cal. 473; Wheaton v. Railroad Co., 36 Cal. 591; Wilson v. Fitch, 41 Cal. 385; Harris v. Zanone, 93 Cal. 72, 28 Pac. 845. These cases hold that in actions of this character the law does not attempt to fix any precise rules for ascertaining what is a just compensation, but, from the necessity of the case, leaves the assessment of the damages to the good sense and unbiased judgment of the jury, whose province it is to make the assessment; that while the verdict in these cases, as in all others, is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice. Where this does appear, it is as much the duty of the court to grant a new trial as it is where any of the other statutory grounds exist. So the appellate court, in reviewing the action of the court below in granting a new trial upon this ground, will not reverse the order merely because it differs with the trial court as to what would have been just compensation, unless the difference of opinion is such as to justify the conclusion that the court abused its discretion; and upon this ground the order appealed from should be affirmed.

2. As to the second point discussed by the court in its opinion, to wit, the sufficiency of the evidence to support the verdict, we will pass it by without extended notice at this time. The court viewed the evidence of the case in the light of the law it gave to the jury in the following instruction: "(4) I instruct you that it is the duty of an employe of a railroad company to see that the machinery and appliances used by him are in repair, so far as this can be done by the exercise of such care and prudence as should be exercised by an ordinarily careful and prudent man engaged in such business; and if you believe that the plaintiff in this case knew, or by the exercise of ordinary prudence and care should have known, the alleged defect in the track before the happening of the accident, and continued his work without objection, then he assumed the risk, and cannot recover." This instruction is too broad. It is not only necessary that an employe should know of the defect in the machinery, in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him. Farren v. Sellers, 39 La. Ann. 1019, 3 South. 363; Cook v. Railway Co., 34 Minn. 47, 24 N. W. 311; Russell v. Railway Co., 32 Minn. 230, 20 N.

W. 147; Wuotilla v. Lumber Co., 37 Minn. 153, 33 N. W. 551; Sanborn v. Trading Co., 70 Ca. 261, 11 Pac. 710; Shear. & R. Neg. (4th Ed.) § 212. In the case of Martin v. Railway Co., 94 Cal. 326, 29 Pac. 645, this court goes to still greater lengths, and declares the doctrine that knowledge by the employe of both the defect in the machinery and the danger arising therefrom do not, in all cases, absolutely bar a recovery for personal injuries received. The order appealed from is affirmed.

(100 Cal. 672)

SCHMIDT et al. v. BRIEG et al. (No. 15,132.)

(Supreme Court of California. Dec. 30, 1893.)

TRADE-MARK—WHAT WILL BE PROTECTED—"SARSAPARILLA AND IRON"— INFRINGEMENT — DAMAGES—INJUNCTION.

1. The words "Sarsaparilla and Iron" are generic terms, and cannot be appropriated as a trade-mark, Civ. Code, § 991, providing that a trade-mark shall not include any designation "which relates only to the name, quality, or description of the thing."

2. The fact that such generic terms do not in fact indicate the character, kind, or quality of the article manufactured by persons claiming them as a trade-mark, and on which they are used as such, does not give such persons the right to their exclusive use.

3. Where a person, with intent to divert to himself the business of others, prepares and sells an article similar to that manufactured and sold by such others, and in doing so uses labels and devices so closely resembling those used by the latter as to lead purchasers, while using ordinary care, to believe that they are purchasing the imitated article, he is liable to such other manufacturers in damages, and will be enjoined from continuing the use of such labels and devices, though these do not constitute a trade-mark.

4. Plaintiffs sued defendants for infringement of a trade-mark, and manufacturing and selling an article in imitation of one sold by plaintiffs, and for an injunction, about two years after they discovered the imitation; but they had before brought suit against other infringers, and defendants had changed their label on account of a decision therein. *Held*, that plaintiffs should not be denied damages because of delay in bringing suit.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Brieg and others to recover damages for infringement of a trade-mark and for an injunction. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Judgment modified and affirmed.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. This is an action for an injunction, and to recover damages for an infringement of plaintiffs' trade-mark and labels. The facts found by the court below are substantially as follows: In the year 1887 plaintiffs commenced to manufacture and sell a new and valuable medicinal compound or beverage, and adopted and used in connection with the sale thereof the name "Sarsaparilla and Iron." By reason of the superior character of the medicinal constituents employed in the manufacture of the beverage or compound it became widely known and highly esteemed by the trade, and identified and distinguished by dealers and consumers under the designation of "Sarsaparilla and Iron." This name was not at that time in use or known as a designation of any similar article of manufacture on sale. For the purpose of identifying the beverage as being of their manufacture, and to distinguish it from other articles of a similar nature, plaintiffs have affixed to the bottles containing the same their own labels, devices, and trade-mark, specimens of which are attached to the complaint herein. The article has become widely known to the public and to buyers and consumers thereof as the beverage manufactured and sold by the plaintiffs, not only through the name "Sarsaparilla and Iron," but through said labels; and up to the time of the infringement, hereinafter referred to, large sales and great profits had been made by the plaintiffs. The defendants, since the month of December, 1888, willfully disregarding the rights of the plaintiffs, and with the intention to divert to themselves the business of the plaintiffs, and the profits and gains thereof, have fraudulently prepared, sold, and now continue to manufacture and sell, throughout the state of California, an article or beverage in imitation of the plaintiffs' beverage, having the same taste, flavor, and appearance as plaintiffs' article, with the intent to deceive and defraud the public and to injure and defraud the plaintiffs. They have put their beverage in bottles and packages similar to those used by the plaintiffs, and have labeled their bottles with labels, names, marks, and devices similar to those used by the plaintiffs. Copies of these labels are attached to the complaint. These marks and devices so closely resembled those used by the plaintiffs as to be calculated and liable to deceive purchasers and consumers of plaintiffs' article, and to lead them, although exercising ordinary care and prudence, to believe that the article contained therein is the plaintiffs' article, greatly to the diminution and damage of the business and profits of plaintiffs derived therefrom. The defendants' beverage in imitation of the plaintiffs' compound or beverage is inferior to that put up by the plaintiffs, and by reason thereof the reputation of plaintiffs' article has been greatly injured, but there is no deleterious or poisonous substance in the defendants' beverage. By reason of the wrongful acts of the defendants the plaintiffs have sustained damage in the amount of $3,539.25. Upon these findings the court concluded that the plaintiffs were entitled to an injunction perpetually restraining the defendants from "preparing, putting up, selling, or offering for sale said or any imitation of plaintiffs' article, or any article under or bearing the name of 'Sarsaparilla and Iron,' or any article under or bearing a colorable or other imitation of said name, or any article bearing said false labels, (Exhibit B,) or any imitation of the said labels of plaintiffs, or any article bearing upon or connecting therewith any of the said names, devices, or trade-marks of the plaintiffs which are shown upon said labels or exhibits. Also that plaintiffs were entitled to recover said sum of $3,539.25 and costs." A decree was entered accordingly.

1. Words which are merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trademark. Thus it has been held that the words "Iron Bitters" are so far indicative of the qualities of an article as to fall within the scope of the rule, (Chemical Co. v. Meyer, 139 U. S. 542, 11 Sup. Ct. 625,) and that name is no more generic than the name "Sarsaparilla and Iron." Our Code provides that a trademark shall not include any designation "which relates only to the name, quality, or description of the thing." Civ. Code, § 991. Words in common use are the common property of the people, and no one can acquire an exclusive right to such words by adopting them as his trade-mark, unless they be used out of their ordinary acceptation, and as a fancy name. The general rule is opposed to the use of mere words as a trade-mark; but if all of the words be used under a new combination in the way of a fancy name or designation, they may constitute a valid trademark, if they do in fact indicate origin or ownership. Lawrence Manuf'g Co. v. Tennessee Manuf'g Co., 138 U. S. 546, 11 Sup. Ct. 396. We think the words "Sarsaparilla and Iron" are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. In Canal Co. v. Clark, 13 Wall. 327, the court said: "True, it may be that the use by a second producer, in describing truthfully his product by a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the property; but if it is just as true in its application to his goods as it is to those of another, who first applied it, and who, therefore, claims an exclusive right to use it, there

is no legal or moral wrong done." We held here that a person is not entitled to the exclusive use of the words "Antiquarian Book Store" as a trade-mark. Choynski v. Cohen, 39 Cal. 501. See, also, Browne, Trade-Marks, § 164; Raggett v. Findlater, L. R. 17 Eq. 29. The words "Sarsaparilla and Iron" describe ingredients well known to the public. The word "sarsaparilla" means a root, or its extract, and iron, as used in connection with the word "sarsaparilla," must mean a solution of the metal iron. But it is claimed by respondents that the words "Sarsaparilla and Iron" do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive. But it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs'; and, this being so, as was said in Canal Co. v. Clark, supra, although the use of the name may have the effect of causing the public to mistake as to the origin or ownership of the product, "if it is just as true in its application to his goods as it is to those of another, who first applied it, * * * there is no legal or moral wrong done," the words or combination being of such a character as to designate respectively well-known articles of commerce.

2. It will be observed from our statement of the facts that the court found the defendants willfully, with intention to divert to themselves the business of the plaintiffs, and secure the profits and gains thereof, prepared and sold large quantities of an inferior imitation of the defendants' beverage, and in doing so had used labels, marks, and devices so closely resembling those used by the plaintiffs as to deceive the purchasers, and lead them, although exercising ordinary care, to believe that they were purchasing plaintiffs' beverage. Upon this finding the plaintiffs were entitled to judgment, independently of the validity of the trade-marks in question. In Lawrence Manuf'g Co. v. Tennessee Manuf'g Co., supra, Mr. Chief Justice Fuller said: "Undoubtedly an inferior and fraudulent competition against the business of the plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief;" and in the course of his opinion referred to an English case, in which Lord Justice Lindley remarked that, "although the plaintiffs had no exclusive right to the use of the words 'Stone Ale' alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, 'yet, as against a particular defendant, who is fraudulently using or going to fraudulently use the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders.'" A competing business firm is bound to deal fairly in placing its rival article upon the market; and, if it clearly appears that the defendants have closely imitated the plaintiffs' labels and style, and have done obvious damage to the latter's business through the unlawful business methods employed, the plaintiffs are entitled to relief upon the ground of fraud. Sperry v. Milling Co., 81 Cal. 258, 22 Pac. 651; Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645. Cases are not wanting of injunctions issued to restrain the use even of one's own name, where such use is made with such additions as to intentionally deceive the public, and make them believe he is selling the goods of another. McLean v. Fleming, 96 U. S. 251; Chemical Co. v. Meyer, supra. See, also, Food Co. v. Baumbach, 32 Fed. 212; California Fig Syrup Co. v. Improved Fig Syrup Co., 51 Fed. 297; Id., 4 C. C. A. 264, 54 Fed. 178; Stone Co. v. Wallace, 52 Fed. 438. There is abundant evidence in the record to support the finding of the court. The defendant's label is a palpable imitation in form and design of the plaintiffs' label. Both have the same general appearance, except in color,—one being blue, the other red. Both have crescent-shaped neck labels for the bottle, lined and lettered in similar form. Both have the word "Sarsaparilla" at the top of the label in large letters, and the word "Iron" printed in the border of the lower half of the label. Both have parallel lines running across the middle of the label with the name of the manufacturers between the same. The monogram of the defendants occupies the same position upon their label as the trade-mark of the plaintiffs upon the label of the latter. Both labels have the words, "A great blood purifier," and "Cures all skin diseases," printed in the lower half of the label. In fact the only material difference between the two labels in design and appearance exists in the colors, but this is no defense. Browne, Trade-Marks, § 236. The difference in color is a mere probative fact,—a circumstance to be considered by the court in determining the ultimate question as to whether the defendants' devices so closely resembled the plaintiffs' labels as to deceive the public. The court below has found the fact that the purchasers have been deceived by the acts of the defendants, and we cannot say that this finding is not supported by the evidence. As was said in McLean v. Fleming, supra: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resem-

bling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled." See, also, Improved Fig Syrup Co. v. California Fig Syrup Co., 4 C. C. A. 264, 54 Fed. 178. The testimony shows clearly that the size, form, design, ornamentation, and phraseology of plaintiffs' label were studiously followed by the defendants in the preparation of their own, and that the latter was used and intended to be used as a close imitation of the plaintiffs' label, and for the purpose of leading the public to believe that the beverage contained in the bottles upon which the defendants' labels were placed was the identical article manufactured by the plaintiffs.

3. The appellants insist that the plaintiffs should not be allowed to recover any damages, because of the delay in commencing this action. This claim is set up for the first time in this court, and appears to be an afterthought. There is nothing in the answer, or in the report of the proceedings at the trial below, indicating an intention to set up such a defense. The point ought to have been raised at least at the time the motion for a nonsuit was made, the facts having come out in the evidence of the plaintiffs; but conceding for the purposes of the discussion that, notwithstanding the failure of the defendants to set up the plea of laches until this time, it should still be considered, we think the contention is not supported by the admitted facts. The action was commenced about two years after the plaintiffs discovered the infringements, and the record shows that plaintiffs had, prior to the bringing of this action, brought suit against other infringers, and that the defendants not only had notice of this prior litigation, but had changed the color of their label on account of a decision in the court below. The doctrine of laches, as applied to stale claims in matters of trust, does not apply with full force to cases of infringement. Browne, Trade-Marks, § 685.

It follows from the views we have expressed that the judgment of the court is erroneous in two particulars. The plaintiffs were not entitled to a decree restraining the defendants from preparing, putting up, offering for sale, or selling the beverage in question. There is nothing in the complaint upon which a judgment awarding to plaintiffs the exclusive right to manufacture the beverage as against the defendants can be predicated. The decree is also erroneous in so far as it enjoins the defendants from making, offering for sale, or selling any beverage or article under the name of "Sarsaparilla and Iron." As we have seen, the plaintiffs have not the exclusive right to the use of those words. In other respects the decree is correct. The restraining portion of the decree should simply have enjoined the defendants from selling or offering for sale any beverage or article bearing the labels shown by Exhibit B, attached to the complaint, and from selling or offering to sell any article or beverage under any marks, signs, devices, or labels calculated or liable to deceive purchasers and consumers of plaintiffs' article, or the public generally, or to lead them, while exercising ordinary care and prudence in purchasing, to believe that the article contained in the defendants' bottles and packages is the plaintiffs' article.

The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views herein expressed. As so modified the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

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4 Cal. Unrep. 417

SCHMIDT et al. v. WELCH et al. (No. 15,136.)

(Supreme Court of California. Dec. 30, 1893.)

TRADE-MARK—INFRINGEMENT—DAMAGES—INJUNCTION.

Where labels used on bottles containing medicine manufactured by defendants in no respect resemble labels used by plaintiffs on bottles containing similar medicine put up by them, except that both labels have thereon the words "Sarsaparilla and Iron," plaintiffs are not entitled to an injunction or to damages.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawlor, Judge.

Action by Schmidt and others against Welch and others to recover damages for infringement of a trade-mark and for an injunction. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Reversed.

James G. Maguire, E. S. Solomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The facts found by the court below in this case are in all respects the same as those found by the court in Schmidt v. Brieg, (this day filed,) 35 Pac. 623, except as to the amount of damages. A decree like the decree in the Brieg Case was entered, the damages, however, being fixed in this case at $3,163.70. In the Brieg Case we held that the plaintiffs were not entitled to the exclusive use of the words "Sarsaparilla and Iron" as a trade-mark, but that they were entitled to a decree restraining the defendants from selling or offering to sell any beverage under the label, Exhibit B, attached to the complaint therein, and to an affirmance of the judgment for damages and costs. Our decision in that case is based upon the finding of the court that the defendants, with intent to divert to themselves the business of the plaintiffs and the profits and gains thereof, and to deceive the public, had fraudulently prepared and sold an inferior article in imitation of the plaintiffs' beverage, and, with intent to deceive and defraud the public and injure and defraud the plaintiffs, had caused said inferior article to be put up in bottles and packages similar to those used by the plaintiffs for their article, and sold under labels, marks, and devices similar to the names, labels, marks, and devices used by the plaintiffs. The fraudulent acts complained of and found consisted in the unlawful and studied imitation of the plaintiffs' label under which the latter's beverage had been sold and become widely known as a valuable and useful beverage, and a source of great profit to them. In the case at bar, however, the defendants' label is in no respect similar to that used by the plaintiffs. With the exception of the words "Sarsaparilla and Iron" there is nothing in defendants' label in form, design, or lettering similar to the plaintiffs' label. The larger label is diamond-shaped, with a flowery border, instead of the strong parallel lines found in the plaintiffs' border. There is no attempt to imitate the trademark in the upper portion of the plaintiffs' label, nor the peculiar and uneven letters in the crescent-shaped label. The name of the manufacturer, "Pioneer Soda Works, S. F.," appears in large letters across the widest portion of the label. Unless we are prepared to hold, therefore, that the defendants are not entitled to put any paper labels upon their bottles, the finding of the court as to the effect of the defendants' label cannot be sustained. Inasmuch as the plaintiffs have no exclusive right to the use of the words "Sarsaparilla and Iron," we think it cannot be said that the use of the defendants' label is an infringement of the plaintiffs' label, or in any manner fraudulent. Judgment and order reversed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

(101 Cal. 164)

BURNHAM et al. v. STONE et al. (No. 19,255.)

(Supreme Court of California. Jan. 26, 1894.)

APPEAL—PROTECTION OF WRIT TO OFFICER—FORCIBLE TAKING POSSESSION BY LANDOWNER—LIABILITY FOR DEATH—INSTRUCTIONS.

1. In an action against a constable and the members of his posse for killing one who resisted them while executing a writ of restitution, plaintiff cannot for the first time on appeal insist that one of defendants did not plead the writ in justification, if no objection was made to the evidence showing such justification, and no request was made that it be restricted to those defendants who pleaded the writ.

2. A description, in a judgment for the possession of land, and in the writ of restitution, by reference to certain buildings, includes the land on which they are situated, notwithstanding an error in the description by government subdivisions; and the officer executing the writ is not liable as a trespasser for the killing of one resisting him in his attempt to obtain possession of the buildings.

3. An owner of land wrongfully held by another is not civilly liable for the killing of the occupant while resisting the owner's attempt to regain possession without the use of more force than was reasonably necessary.

4. A verdict, though correct on the evidence, will be reversed for an erroneous instruction which cuts off a substantial defense on the merits.

5. The fact that a judgment is fraudulently obtained does not render the officer who executes a writ issued thereon, which is regular on its face, a trespasser.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by John H. Burnham and others against Levi P. Stone, James Stone, and others for the death of Jenny Burnham. From a judgment for plaintiffs, defendant James Stone appeals. Reversed.

Luce & McDonald, for appellant. Haines & Ward and Works & Works, for respondents.

HAYNES, C. Appeal from an order denying the motion of the defendant James Stone for a new trial. The action was brought by John H. Burnham and his two minor children to recover damages for the alleged wrongful killing of Jenny Burnham, the wife of the plaintiff John H. Burnham, and the mother of the minor plaintiffs. The third paragraph of the complaint is as follows: "That on the 18th day of January, 1888, the said defendants, Levi P. Stone, James Stone, George Morris, D. M. Breedlove, Arch Freeman, and W. H. H. Dinwiddie, maliciously, willfully, fraudulently, and unlawfully contriving, conspiring, and confederating together to attack, assault, and remove, with force and arms, one Elizabeth Goings and one Percy Goings from their prior and peaceable possession and occupation of the following described lands and the dwellings thereon, situated in said county of San Diego, state of California, to wit, the southeast quarter of the northwest quarter of section five, (5,) in township eleven (11) south, of range two (2) west, S. B. M., did then and there, in the prosecution of their said malicious, willful, fraudulent, and unlawful conspiracy and confederation, enter upon said premises with force and deadly weapons, and did there willfully and maliciously attack, assault, and shoot to death the said Jenny Burnham, then lawfully and peacefully being upon the said premises." All the defendants except Freeman answered, appellant answering separately. The only error assigned is that the court erred in its instructions to the jury given at plaintiff's request.

An outline of the facts in the case, so far as they appear to be uncontroverted, is as follows: That Levi P. Stone, one of the defendants, was the owner of the S. E. ¼ of the N. W. ¼ of section 5, in a given township and range, upon which there was a dwelling house, a honey house, and a chicken house; that, during his temporary absence, Elizabeth Goings and her son, Percy Goings, entered upon said premises and took possession, claiming that it was government land and open to settlement, and refused to deliver possession to Stone upon his demand. Afterwards Stone commenced an action in forcible entry and detainer against said Elizabeth and Percy Goings before a justice of the peace, and in his complaint described the land as the "S. W. ¼ of the N. E. ¼, and N. ½ of S. E. ¼, and S. E. ¼ of S. E. ¼, of section 5," but before the trial he amended the complaint, as to the description, so as to read: "That at the time hereinafter mentioned, and for eight years prior thereto, he was in the peaceable and actual possession and occupation, and entitled to the possession, of all that certain piece, parcel, and tract of land described as follows, to wit: S. ½ of N. E. ¼, and N. ½ of S. E. ¼, of section 5, in township 11 S., range 2 W., S. B. M., and comprising 160 acres of land, and of the dwelling house, honey house, and chicken house thereon." As a matter of fact these buildings were on the S. E. ¼ of the N. W. ¼ of the section. Upon the trial the plaintiff, Levi P. Stone, had judgment for the restitution of the premises described in the amended complaint, and a writ of restitution "in due and sufficient form" was issued thereon, and delivered to the defendant D. M. Breedlove, a constable, for service. The writ is not set out in the record, and whether it contains the added description of the buildings does not appear with certainty. The statement simply says: "The judgment and writ followed the description of the premises given in the amended complaint." The constable then went to the premises on which the buildings were, and which were occupied by the Goings, and demanded that they vacate the premises, but they refused to do so. The constable then left, saying he would be back in the afternoon. About 2 o'clock he returned with Levi P. Stone, James Stone, and another, and found Mrs. Burnham, Mrs. McConnehey, Percy Goings, and Mrs. Goings in the house, with the doors barred, and said they would not go off. The constable then told them that if he had to put them off by force he would try and get enough to do it next morning. The next day (January 17, 1888) he returned with Levi P. Stone, James Stone, Arch Freeman, George Morris, and Stockman Reed, and in the effort to execute the writ, or to obtain possession, Stockman Reed, one of the constable's posse, and Percy Goings, John McConnehey, and Mrs. Burnham were killed or mortally wounded. The jury returned a verdict against all the defendants for $30,000 actual damages, and, in addition thereto, against Levi P. Stone, $10,000, and against this appellant for $2,000 exemplary damages.

So far as the record discloses, no question seems to have been made but that the defendants would have been justified in all that they did if the judgment and writ of possession had described the subdivision of the section upon which the buildings occupied by the defendants in the writ were situated. Respondents contend, however, that as appellant did not, by his answer, justify under the writ and command of the constable, the question of the sufficiency of the writ is immaterial. It clearly appears from the instructions given to the jury at plaintiff's request that the defendants, no exception being named, did plead the writ in justification; and the record discloses no objection made by plaintiffs to the evidence tending to show justification under the writ, nor any request that it be restricted to those defendants who had pleaded the writ. Under these circumstances, appellant contends that respondents are estopped from raising the question upon appeal. Appellant testified, without objection, as follows: "The way I happened to go at that time was that Constable Breedlove required me to go help him dispossess the Goings under a writ that had been issued to him as constable of Bear Valley township, and I went in accordance with his command." We think that appellant's contention upon this point must be sustained, under the authority of Murdock v. Clarke, 90 Cal. 431, 27 Pac. 275, and, if so, that he is entitled to review the instructions of the court relating to justification under the writ and the command of the officer.

The complaint alleged, and the defendants conceded, that the premises occupied by the Goings was the S. E. ¼ of the N. W. ¼, and the record shows without qualification or contradiction that the defendant Levi P. Stone was the owner of it, and had been in possession of it for seven or eight years prior to the entry of the Goings, who entered unlawfully during his temporary absence. The instructions are too long to copy in full in this opinion, but in substance the jury were instructed, at the request of plaintiffs, that in going upon the land for the purpose of obtaining possession by force, or show of force, all the defendants were trespassers, and their entry unlawful, and because thereof each defendant was liable for the killing of Mrs. Burnham, although the killing was not intended, contemplated, aided, abetted, or advised by him; that if he aided, abetted, or encouraged the unlawful entry upon the premises, it was sufficient to fix his liability; and that such entry was unlawful unless the writ of possession covered or included the premises where the homicide occurred; but the court did not instruct the jury whether, as matter of law, the reference to the buildings thereon, in the description of the premises contained in the writ, if it did contain such description, did or did not so control the erroneous description by the subdivisions of the government survey as to include the buildings where the homicide occurred, and operate as a justification to the officer and all who acted under his authority, but, on the contrary, expressly left the jury to find whether the writ did cover the property where the shooting occurred. The jury were further instructed that if they found that Levi P. Stone testified before the justice of the peace that said buildings were on unsurveyed land, and that he knew at that time that the buildings were on the S. E. ¼ of the N. W. ¼, and if they should further find that but for such testimony he would have been unable to obtain such verdict and to recover such judgment, and that he and the other defendants entered under color of said writ, and, in the attempt to execute the same, Mrs. Burnham was killed, that not only was said writ of restitution no justification to any of the defendants engaged in such undertaking, but that they were authorized to infer express malice on the part of Levi P. Stone, and to consider such conduct on his part as one of the circumstances to be taken into account in fixing the damages as against him. These instructions were erroneous in several particulars. Assuming that the writ of restitution contained the added description of the land by reference to the "dwelling house, honey house, and chicken house thereon," the court should have instructed the jury, as matter of law, that such description included and covered the land on which they were situated, notwithstanding the erroneous description by government subdivisions. Any description which will enable the officer executing the writ to clearly identify the premises is sufficient. Freem. Ex'ns, (2d Ed.) § 471, in speaking of writs of possession, declares this to be the general rule. In Lawrence v. Davidson, 44 Cal. 177, (an action of ejectment,) the court said: "We cannot see upon the record that the description of the excepted tract is necessarily impossible or incapable of identification in the field. The bay of San Francisco is an object referred to; the 'Dows Claim' and the 'Fairbanks Claim,' which may, so far as we know, be well-ascertained objects, are mentioned too." See, also, Helm v. Wilson, 76 Cal. 476, 18 Pac. 604. No more satisfactory means of identifying the property could ordinarily be given than the description of the three buildings mentioned. It could not be expected or intended that the constable should survey the lands for the purpose of identifying them, and even if he had done so, he had a right to regard the description by survey as erroneous, and to execute the writ upon the premises identified by the buildings.

In view of a new trial, and of the possibility that the writ does not refer to the buildings as a part of the description of the land, it becomes necessary to consider the instructions upon the supposition that the writ did not cover the premises from which it was attempted to evict the defendants in the writ. In such case the instructions were also erroneous. It is conceded that Levi P. Stone was the owner of the buildings and premises where the homicide occurred, and that he had a right to the possession at that time. Mrs. Burnham made no claim that she was entitled to the possession. Her mother and brother were in possession, and the record shows that when the constable, after demanding that they vacate the premises the morning of the day before the homicide, and being met with a refusal, returned in the afternoon, he found Mrs. Burnham there with the others in the house, and with the doors barred. She was also there when the constable and owner of the premises returned the next day with the posse, and at least aided and abetted her mother and brother in retaining possession. Under these circumstances, if she had survived, she could not have maintained an action for assault and battery, or for any injury she might have sustained in an endeavor of the owner to obtain possession, even if the effort were forcible. In Canavan v. Gray, 64 Cal. 5, 27 Pac. 788, it was held that, where the owner of real property having the right of possession makes a forcible entry, the person in wrongful possession cannot maintain an action of trespass; that the remedy provided by statute for a forcible entry is exclusive. This case is amply sustained by the authorities upon that subject. Washb. Real Prop. *396, after quoting the modern English doctrine as expressed by Baron Parke, says: "And the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enters and expels the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass quare clausum, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry." The same author adds: "The uniform current of authority in the United States sustaining the same doctrine is broken only by the decisions in Vermont and Illinois." The general ground upon which these authorities are based is that, at common law, trespass would not lie against the owner if he were entitled to the possession, as in such case the person in possession, being in wrongfully, could maintain no action against the owner unless unnecessary force was used, and that, the statutes of forcible entry and detainer having provided a remedy in such cases, that remedy is exclusive, so far as the wrongful possessor is concerned; but the public, being interested in preserving the peace, may punish the owner for resorting to force. Canavan v. Gray, supra, proceeds upon this ground. In Jackson v. Farmer, 9 Wend. 201, it is said: "Statutes of forcible entry and detainer punish criminally the force, and in some cases make restitution, but so far as the civil remedy goes there is none whatever." See, also, Low v. Elwell, 121 Mass. 309; Souter v. Codman, 14 R. I. 119, and notes; Stearns v. Sampson, 59 Me. 569. In Kellam v. Janson, 17 Pa. St. 469, it is said: "An action is well founded only when a right is invaded; but the plaintiff's right ceased by the entry of defendant,—an act that completely obliterated the shadow of right cast by the plaintiff's possession. A complaint against the assumption of possession is a complaint against the assertion of a right, and a demand that the law shall give the plaintiff damages for the loss of that which it was wrong for him to have." In Sterling v. Warden, 51 N. H. 232, it is said: "It is clearly the English law, and, as we believe, the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess."

In the light of these authorities the instruction that the entry upon the premises by force, or show of force, was unlawful, and that, if appellant aided and abetted such entry, he was liable for the death of Mrs. Burnham, though he did not aid, abet, advise, or encourage the actual killing, is erroneous. No liability for damages was created against any of the defendants for the entry upon the land, nor for the expulsion, or attempted expulsion, of the occupants by force, unless more force or violence was used than was reasonably necessary; and no such qualification appears in the instructions given to the jury. It is quite true that appellant did not, in his answer, plead the ownership and right of entry of Levi P. Stone. The case was tried, however, without any apparent reference to the issues made by appellant's answer, and all the facts were given in evidence without objection or limitation. The court stated to the jury the substance of the complaint; that all the defendants except Freeman had answered denying the allegations of the complaint, and alleging that Mrs. Burnham and others acting with her first assaulted them; that they used no more force than was necessary to protect themselves from injury; and also alleged facts tending to justify themselves under the writ of restitution. The jury were expressly instructed that the question of the title to the land was not before them; that, "admitting that Stone was the owner of the land, and that Mrs. Goings was wrongfully in possession of it, this gave Stone, or any one acting with or for him, no right to enter upon the land by force or show of force, and take possession of it, or exclude or remove Mrs. Goings or any one else from the land; and, if you find that the defendants went upon the land in the manner and for the purpose mentioned, their entry was unlawful, unless justified for other reasons, and the defendants would be liable for the consequences resulting therefrom."

Counsel for respondents suggest that, the verdict being right upon the evidence, the judgment should not be reversed because of an erroneous instruction. That there are cases where the judgment should stand, notwithstanding an erroneous instruction, is not questioned; but, where the erroneous instruction is such as to cut off a substantial defense on the merits, the rule suggested can have no application. The case was not tried upon a theory which would justify this court in looking at the evidence to determine whether unnecessary force was used by the defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them.

The jury were also instructed, in substance, that, if Levi P. Stone obtained his verdict and judgment before the justice by false swearing, the writ was no protection to the defendants. But the fact that a judgment is fraudulently obtained does not render the officer a trespasser who executes a writ, regular on its face, issued on such judgment. Simms v. Slacum, 3 Cranch, 306. The question as to its effect upon the defendant Levi P. Stone is not pertinent here.

No other questions need be noticed. The order appealed from should be reversed, and a new trial granted.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and a new trial granted.

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101 Cal. 187

PALMER v. ATCHISON, T. & S. F. R. CO.

(No. 19,198.)

(Supreme Court of California. Jan. 26, 1894.)

CARRIERS OF GOODS — DELAY — ACTION FOR DAMAGES—COMPLAINT—CONNECTING LINES — PROBABLE DELAY — CONTRACT MADE IN ANOTHER STATE.

1. A complaint in an action for delay in transporting goods, which alleges the time between the receipt and delivery, and that they were not transported within a reasonable time, is good against a general demurrer, without alleging what is a reasonable time for such transportation.

2. Though two days before a carrier accepted goods for shipment over its own and connecting lines a snowstorm commenced on a connecting line a thousand miles away, it will not be presumed to have known that an unusual storm had set in, of which it was bound to speak as a fact liable to cause delay, where severe storms in that latitude were up to that time unknown, and the road might reasonably be expected to be open when the goods reached it.

3. Under Civil Code, § 2196, declaring a carrier liable for delay only when caused by want of ordinary care, and section 2201, stating that a carrier accepting freight for a place beyond

its route must, unless otherwise stipulated, deliver to a connecting line, when its liability ceases, a carrier receipting for goods to be shipped beyond its line, with the stipulation that it will not be responsible as carrier any further, is not liable for delay in delivering the goods to the connecting carrier, due to the latter's inability to receive them.

4. In an action on a contract made in another state it will be presumed, in the absence of evidence to the contrary, that the law of that state is the same as that of California.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Oscar Palmer against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Hunsaker, Britt & Goodrich and A. Brunson, for appellant. Luce & McDonald and Dodson & Ecker, for respondent.

SEARLS, C. This action was brought to recover from defendant, a corporation, and a common carrier, damages sustained by plaintiff by reason of the alleged failure of defendant to transport from Kansas City, Mo., to San Diego, Cal., and deliver to the plaintiff within a reasonable time, five car loads of furniture. Plaintiff had a verdict for $1,000, upon which judgment was entered. Defendant appeals from the judgment and from an order refusing a new trial.

Plaintiff's recovery was founded upon the second count of his complaint. To this a demurrer was interposed, which appellant contends should have been sustained, but which was overruled. The portion of the complaint to which objection is taken may be epitomized as follows: On the 24th day of December, 1887, the defendant, for a valuable consideration, undertook to receive and carry over its road from Kansas City to San Diego, and deliver to plaintiff within a reasonable time, five car loads of furniture, etc. That defendant received the same at the date mentioned for the purpose of transportation aforesaid, but did not, as it undertook to do, transport said goods to San Diego within a reasonable time, and did not deliver the same to plaintiff until on or about February 15, 1888. The objection goes to the point that the complaint should have specified what was a reasonable time for the transportation of the goods between the two points, and, failing to do so, was open to an attack upon the ground that it did not state facts sufficient to constitute a cause of action. In the absence of a special demurrer directed to this point, we think the general allegation of a failure to transport and deliver within a reasonable time was sufficient. The form used by the pleader is substantially that laid down by Chitty as sufficient in actions ex contractu, in his work on Pleading. 2 Chit. Pl. p. 103. It was admitted at the trial that the Atchison, Topeka & Sante Fe Railroad terminated at Albuquerque, N. M., and that the Atlantic & Pacific ran from Albuquerque into California, and connected at Barstow with the California Southern, which extended to San Diego; the three roads thus forming a through line from Kansas City, Mo., to San Diego, Cal., each road being operated by a different company. The five car loads of goods were delivered to defendant at Kansas City, directed to the plaintiff at San Diego as follows: Two cars December 24, 1887; one car December 27, 1887; two cars January, 1888. The company furnished to the shipper bills of lading, which, so far as important here, were as follows: "Atchison, Topeka and Santa Fe R. R. Co., K. C. Station, 12-24-1887. Will receive the under-noted property, and transport it over the road, and deliver to consignees, or the next company of carriers, (if the same is going beyond its line of road,) for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers; the company being liable as warehousemen only. Abernathy Fur. Co. Shipper, to Oscar Palmer, Consignee, San Diego, California," etc. Then follow usual description and number of car, signed, "Wm. Carroll for the Co." The bills of lading for the several cars were the same, except as to dates, numbers, etc. The evidence shows without substantial contradiction that on the 5th day of January, 1888, a snowstorm of unprecedented severity commenced over the mountain region traversed by the Atlantic & Pacific Railroad, which lasted for a period of ten days to two weeks, blocking the road, and practically stopping the transportation of freight, during which time some 683 loaded cars accumulated at Albuquerque and in its vicinity, with the result that when the road was again open it was, say, 30 days before the accumulated freight was finally passed over the road. The Atlantic & Pacific Company seems to have made every effort to open its road. It rented some 38 locomotives, in addition to 46 owned by it, most of which, for many days, were engaged in an effort to open the road, and no labor or expense was spared in the work. The yards and side tracks of the Atlantic & Pacific road became filled with cars, until they could receive no more, when they notified the defendant to hold all cars at Albuquerque until they were able to receive and forward them. This unexpected blockade on the Atlantic & Pacific is shown to have been the sole cause of the delay of plaintiff's goods. There is no showing of delay upon defendant's road, except as the cars were held by it at and near its western terminus because the Atlantic & Pacific could not receive and forward them. All the goods were shipped prior to the storm, except those in the two cars shipped January 7th; and, when the storm was over, the cars were sent forward from Albuquerque in the order received.

It must be conceded that a railroad company receiving freight for transportation over its own and connecting lines, which, by reason of some fact known to it and unknown to the shipper, is liable to detention beyond the usual time occupied in transit, should inform the shipper of such fact, in order that the latter may exercise his judgment as to the propriety of making the shipment. There is not, however, any evidence in the record tending to show that defendant had, at the date of the last shipment, on January 7th, any knowledge of the storm which then, and since the 5th, had been prevailing on the mountain division of the Atlantic & Pacific. Very slight evidence would be sufficient notice of such a fact had the storm been near at hand, or on its own road, but when we consider that it was upon another road, over 1,000 miles away, and in a region where storms of the nature and duration of the one in question were unknown up to that time, we cannot see how, in the absence of evidence, defendant can be presumed to have known that an unusual storm had set in, any more than it would be presumed to know the length of time it would continue, or the great depth to which the snow would fall. In passing judgment on this question we are not at liberty to view it in the light of present known facts, but must confine ourselves to the facts apparent when defendant received the freight. We must bear in mind that the blockade occurred in a latitude and at a point where a like storm was not to be expected, and where, if snow fell, it might be expected to be of short duration; and that freight received at Kansas City, and requiring several days to reach the point in question, might reasonably be expected to meet an open road by the time it reached the point of difficulty. Under such circumstances, had the proofs shown knowledge of the storm on the part of defendant at the date of receiving the goods, it cannot be said as a matter of law that a failure to notify the shipper was negligence, but only that it was such evidence of negligence as should be submitted to the jury to determine whether there was in fact negligence on the part of defendant.

Respondent claims that defendant was aware, when it received the goods, that there was a great blockade of freight on its different connecting lines, to haul which they were unprepared, and that this unusual press of business, coupled with inadequacy of rolling stock, was the cause of the delay; that defendant had notice of these facts, and should have notified the consignor of plaintiff, and, failing so to do, it is liable. The testimony on this point is to the effect that it was the busy season of the year for traffic and travel to southern California; that a large volume of freight was moving westward over the road. The testimony shows, however, that "the principal reason for the delay was on account of the snowstorm, for, had it not been for the snowstorm, the delay would not have occurred. The rush of freight or the rapid increase of freight over usual traffic did not cause the delay for this reason. * * * The snowstorm alone was the primary cause of the delay, of the accumulation of freight, which I have described. By primary cause I mean the line was open for business before the snowstorm, and was running regularly, and then, when the snowstorm came, that it took such a large amount of motor power to open up the line that, while we were clearing it, no freight or passenger traffic could be moved over the mountain division, and in the mean time it allowed freight to greatly accumulate at other points." The same witness, after describing the storm and the efforts to keep the Atlantic & Pacific open, says: "I do not see that the delay could have been avoided. If that snowstorm had not happened, Mr. Palmer's cars would have gone through all right. The line was running on good time previous to the storm." Thus much is quoted as a sample of the evidence on the part of defendant, which, we think, establishes the fact without substantial conflict that the delay complained of occurred upon the Atlantic & Pacific road, and was occasioned by the storm upon the mountain division of that road, and that the operators of such road used every reasonable effort to keep the line open. "A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." Civ. Code, § 2196. "Accordingly it has been held that when the carriers' canal boat was run into by a scow, which made it necessary for him to stop for repairs, the delay thereby occasioned was excusable, (Parsons v. Hardy, 14 Wend. 215;) or when he was delayed by deep snow, which made the road temporarily impassable, (Ballentine v. Railroad Co., 40 Mo. 491;) or the washing away of a bridge over a stream by a freshet, which it was necessary for the carrier to cross, (Railroad Co. v. Ragsdale, 46 Miss. 458.) * * * So a railroad company will be excusable for delay in the delivery of goods, when, having running powers upon another road, it is obstructed by the negligence of the latter." Livingston v. Railroad Co., 5 Hun, 562; Hutch. Carr. § 331. The measure of liability of a common carrier of merchandise in case of its loss or injury is very different from that imposed upon him for delay in transporting and delivering such merchandise. In the former case he is liable for its value in any event, except from some inherent weakness, defect, or vice, or from the spontaneous action of the property itself, or the act of a public enemy, or the act of the law, or "any irresistible superhuman cause," (Civ. Code, § 2194;) while for delay he is, as before quoted, only liable for a want of "ordinary care and diligence." Railroad companies may bind themselves by contract not only to convey over their own, but over connecting, lines, and may bind themselves to deliver goods within a given time, (Pereira v

Railroad Co., 66 Cal. 92, 4 Pac. 988;) but, in the absence of such contract, express or implied, they are only bound to transport them to the termini of their own lines, and to deliver them to the connecting carrier for transportation to their final destination; and that within a reasonable time, (Hutch. Carr. §§ 145, 159b, 154, 102, 103a, and cases cited.)

The English courts hold that where goods are delivered to a railway company, to be transported beyond the terminus of its line by a connecting company, the presumption is that the company receiving them is liable for loss, injury, or delay occurring beyond its own line. Muschamp v. Railway Co., 8 Mees. & W. 421, is the leading English case upon this question. The rule as enunciated in that case was that when the carrier accepts for carriage goods directed to a destination beyond its own route it assumes, by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This rule has been steadily adhered to in the English courts. On the other hand, the majority of the American courts have held that, in the absence of any other contract than that implied by an acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a delivery there to the next connecting carrier to further or complete the carriage; and that, in order to be bound, there must be a positive agreement, express or implied, extending the liability. Nutting v. Railroad Co., 1 Gray, 502; Gray v. Jackson, 51 N. H. 9, and cases cited. From the review of the cases in Gray v. Jackson it will be seen that the rule is by no means uniform in this country. Our Civil Code has, however, settled the question in this state. Section 2201 is as follows: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery." That there was no stipulation on the part of the defendant to be responsible beyond the terminus of its line, and that it expressly limited its liability to its own road, is attested by its receipt for the goods, which in such cases amounts to a bill of lading, in which, as it might do, it expressly limited its liability to transportation over its own road. Pollard v. Vinton, 105 U. S. 7; Hutch. Car. §§ 121, 122; Civil Code, § 2176. The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469; In re Missouri Steamship Co., 42 Ch. Div. 321; Hazel v. Railway Co., 82 Iowa, 477, 48 N. W. 926; Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665. There are exceptions to this rule, founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction. Ryan v. Railroad Co., 65 Tex. 13. Thus much is said to indicate that the question is not overlooked. The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. Norris v. Harris, 15 Cal. 226; Hill v. Grigsby, 32 Cal. 56; Taylor v. Shew, 39 Cal. 540; Brown v. Gas-Light Co., 58 Cal. 426; Marsters v. Lash, 61 Cal. 622; Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12. Judged by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific, connecting road, within a reasonable time, plaintiff's goods. This it is shown to have done, except as it was prevented without fault of its own by the inability of the Atlantic & Pacific to receive them when they reached the terminus of defendant's line. That the delay was caused upon the Atlantic & Pacific road by act of God, or "irresistible superhuman cause," is, we think, clearly established. The scintilla of evidence to the contrary is not sufficient to establish a substantial conflict; but, waiving this question, the negligence or want of it, on the part of the connecting road, is not one for which this defendant, under its contract and the statute, can be held liable. It follows that the evidence is insufficient to justify the verdict, and it is against law. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

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101 Cal. 160

HART v. CARNALL-HOPKINS CO. (No. 15,467.)

(Supreme Court of California. Jan. 26, 1894.)

JUSTICE'S JURISDICTION—POSSESSION OF LAND.

An action to recover money paid to defendant under a contract to locate plaintiff on vacant government land, in which the issue is whether the land on which plaintiff was located was in fact vacant, is an action involving the possession of real estate, of which, by Code Civ. Proc. § 838, a justice of the peace has no jurisdiction.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. D. Hart against the Carnall-Hopkins Company for breach of contract, originally brought in justice's court. From a judgment for plaintiff, defendant appealed to the district court, where judgment was again rendered for plaintiff. Defendant again appeals. Plaintiff moves to dismiss. Denied.

Wm. H. Chapman, for appellant. Edwin L. Forester, Fisher Ames, and S. V. Costello, for respondent.

PATERSON, J. This action was brought in the justice's court, to recover the sum of $299.99, on a contract which reads as follows: "San Francisco, July 22, 1892. Received of J. D. Hart, Esq., one hundred ($100) dollars, in full payment for ten (10) shares of the capital stock of the San Carlos Oil Company, and our services for locating the said J. D. Hart, Esq., on the limit of the number of acres allowed by the homestead law, not to exceed one hundred and sixty (160) acres. Said location to be on vacant government land in San Benito county, California. The Carnall-Hopkins Company, by Gibbs & Zimmerman, Mngs. C. A. Dep." It is alleged in the complaint that defendant failed to locate the plaintiff on certain vacant government land, or any land at all. In a verified answer, the defendant denied each and every allegation of the complaint, and alleged that a determination of the action would necessarily involve the question of title and possession of real property, that the defendant did locate plaintiff on vacant government land in San Benito county, and that no person had any valid claim thereto at the time. Judgment was entered in favor of the plaintiff for the sum of $165, $10 interest, and costs of suit. Thereupon the defendant appealed to the superior court on questions of law and fact, where judgment was again entered in favor of plaintiff, and from this judgment defendant has appealed to this court. Respondent has moved to dismiss the appeal on the ground that, as the justice's court had jurisdiction of the cause of action, the judgment of the superior court was final.

Our Code provides that "the parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property * * *; and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, * * * the justice must suspend all further proceedings in the action, and certify the pleadings * * * to the superior court of the county."[1] The constitution gives the superior court jurisdiction in "all cases at law which involve the title or possession of real property. The question is whether the issue as framed in the justice's court involved the title or possession of real property." In Holman v. Taylor, 31 Cal. 338, the court said: "The idea intended to be embodied in the phrase, 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase, 'cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense.'" In Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256, it was held that a vendee's right to recover a sum less than $300 in the justice's court, caused by a defect in the title of the vendor, depended primarily upon whether the defendants had a defective or good title, which they had contracted to sell, and that the superior court had original jurisdiction to hear and determine the controversy, although the amount claimed was less than $300. It is clear, we think, that the fact that the land was not vacant, that is to say, that it was in the possession of another, claiming the right to hold the same, "is a material fact in the case, upon which the plaintiff relies for a recovery." The court could not decide the issue without determining the question whether the land upon which the defendant attempted to locate the plaintiff was, in fact, in the possession of another. Although the nature of the evidence cannot be considered in determining the question of jurisdiction, it may not be improper to say, in illustration of the test given, that the evidence in the record shows clearly that the main question before the court below was whether or not the land was vacant, and, to show that it was not, the respondent himself introduced a decision of the register and receiver, showing that one Benvenga had made actual settlement on the land, and was a bona fide settler thereon at the time Hart attempted to make an entry. The evidence further tends to show that Benvenga was in the actual possession of the land. "The superior court had original jurisdiction of the subject-matter, and the fact that the case gained ingress to it by a way other than the front door in no manner affects its jurisdiction to hear and determine the cause." City of Santa Barbara v. Eldred, 95 Cal. 381, 30 Pac. 562.

Motion denied.

I concur: DE HAVEN, J.

HARRISON, J. I concur in denying the motion. The complaint alleges that the plaintiff paid to the defendant $100 in consideration of its agreement to "locate" him on certain vacant government land in the county of San Benito, and that the defendant had wholly failed to carry out its agreement. In its answer the defendant alleges that it did so "locate" the plaintiff, and that the property on which the location was made was "open to location," and that no other person had any "valid claim thereto," and that, in consequence thereof, the determination of the action involved the title and possession of real property. From these averments we cannot determine whether the title or possession of real property is necessarily involved. What significance must be given to the term "locate" must depend upon the sense in which it was used by the parties to the agreement, and whether the property upon which the defendant claims to have "located" the plaintiff, in purported performance of its agreement, was "open to location," or whether any person had a "valid claim" thereto, may present questions involving the title or possession of real property. Upon the present motion we are limited to the averments in the pleadings, and cannot look at the evidence introduced in support thereof. If, upon the hearing of the appeal on its merits, it shall appear that the case before the court below did not involve the title or possession of real estate, we can then dismiss the appeal; but, upon the matter as now presented, the motion should be denied.

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[1] Code Civ. Proc. § 838.

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101 Cal. 154

DOUGALL v. SCHULENBERG et al. (No. 19,238.)

(Supreme Court of California. Jan. 26, 1894.)

APPEAL—MATTERS NOT APPARENT OF RECORD—LIMITATION.

A finding by the trial court that plaintiff's cause of action is not barred by the statute of limitations will not be disturbed on appeal where the amended complaint alone appears in the record, and there is nothing to show when the original complaint was filed, or the action begun.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Duncan Dougall against A. R. Schulenberg and George Campbell on two promissory notes. From a judgment for plaintiff, defendant Schulenberg appeals. Affirmed.

M. S. Babcock, for appellant. Luce & McDonald, for respondent.

TEMPLE, C. This action is based upon two promissory notes dated upon the same day, and alike in every respect, except that one is made payable six months after date and the other twelve months after date. The following is a copy of one of them: "$500. Windsor, Ont., March 5, 1884. Six months after date, for value received, we promise to pay to the order of Duncan Dougall, at the Canadian Bank of Commerce, here, the sum of five hundred dollars. George Campbell. A. R. Schulenberg." It is averred in the complaint that at the time of the execution of the note and at the time when it became due and payable both defendants were nonresidents of the state of California, and so continued until within a period of less than two years before the commencement of the action. Only Schulenberg was served with summons. He answered, and, with other defenses, pleaded the statute of limitations, to wit, that the cause of action was barred by the first subdivision of section 339, Code Civ. Proc. The cause was tried by the court without a jury, and the fifth finding of fact is that the cause of action "was not at the commencement of this action, and is not now, barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California, or by any other statute of said state." Judgment was thereupon entered for the plaintiff, and the defendant made a motion for a new trial upon the ground of the insufficiency of the evidence to justify the decision, and specified that the evidence was insufficient to justify the finding that the two promissory notes sued on were not barred at the time of the commencement of the action by the provisions of subdivision 1 of section 339, Code Civ. Proc. The court declined to award a new trial, and defendant appeals both from the order and from the judgment.

The motion for a new trial was made upon the minutes of the court, and the statement of the case was subsequently settled. The complaint had been amended, and the original complaint is not in the record, nor is there anything showing when the suit was commenced. The amended complaint was filed September 2, 1890. Aside from proof of demand and refusal of payment, the only evidence in the statement consists of the two notes and testimony of defendant Schulenberg, who testified for plaintiff. Witness said he first came to this state on the 13th or 14th day of May, 1887. That he came for the purpose of locating, and remained from four to six weeks, during which time he bought some property for his father. He then returned to Ontario, where he remained until January 15, 1888, when he again started for California, arriving in five or six days, and has remained ever since. Since the notes were, in express terms, payable in Ontario, and both of the payors were nonresidents of this state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterwards they left the state the time they were so absent would not be a part of the time within which the suit must be commenced. Code Civ. Proc. § 351. The defense of the statute of limitations must be specially pleaded, otherwise a complaint is good although it shows on its face that the cause of action is barred. If, therefore, it was necessary for the plaintiff to allege that his case was within some exception to the statute of limitations, because it was presumably barred, it was only necessary for him to do so to prevent a demurrer on that ground. It was still necessary for the defendant to plead the statute to raise any issue upon that subject. This he did as above stated. This plea is equivalent to saying that plaintiff's action was not brought within two years after the cause of action accrued, or, perhaps, in this case, to the statement that the defendant had been in this state for more than two years after the cause of action accrued and before the action was commenced. In either case there is implied in the plea an averment of the time when the action was commenced. This might have been by demurrer, which would mean nothing except upon the supposition that the court knew without proof when the suit was commenced, for such fact would not appear by allegation. So, too, when it is pleaded in the answer, the time of the commencement of the action need not be proven.

Appellant claims that the objection was made on his motion for a new trial, in which he specified that finding 5 was not justified by the evidence, therefore the statement is presumed to contain everything upon that subject. This court has often said that in such case it will be presumed that the statement contains all the evidence upon that subject; but this was not a matter of evidence.

Again, to obtain a reversal the appellant must show error. Here, taking the record as it is, appellant has shown none. We cannot presume that the action was commenced when the amended complaint was filed. The presumption is conclusive that it was not. It was commenced some time before,—how long we have no means of determining. There is an entire absence of a fact, without which we can form no opinion upon the question presented. The appellant should have brought the original complaint here as a part of the judgment roll. It was so said in Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40. See, also, Abbott v. Douglass, 28 Cal. 296. It is true it has often been said that a pleading which has been wholly superseded by an amended pleading is no longer a pleading in the case. For most purposes this is true. It can no longer be looked to for the issues to be tried, or for admissions, yet in some respects it may still be material. In this case, for instance, it was necessary to know when the action was commenced, and the position of the defendant might have been that the amended complaint stated a new cause of action, as to which the suit was commenced only when the complaint was amended. To determine such question, the original complaint must be examined. Courts take judicial notice of those facts the existence of which they must ascertain without evidence. If we may take notice of this fact in this case, we are still not informed, and the practice has prescribed a mode in which that information should be afforded. It was the duty of the appellant to furnish this information. He not only declines to do so, but claims that we cannot now be informed, and that, therefore, upon the record as it is, the case should be reversed. I think the judgment and order should be affirmed, both on the ground that he has failed to furnish a proper record, and also on the ground that no error appears. If, however, we can assume that the suit was commenced when the respondent states it was, the result must be the same. Deducting the period during which the defendant was absent, he had not been in this state two years when the suit was commenced. Appellant contends that this time cannot be deducted, and relies upon Palmer v. Shaw, 16 Cal. 93. I find nothing in that case which tends to support the appellant. Defendant is within the very words of the statute. He was out of the state when the cause of action accrued, and after it accrued he departed from the state. Appellant says there was no allegation in the complaint of a departure from the state after the cause of action accrued, and therefore no proof on the subject was relevant. Admitting that this is a case where the plaintiff must aver and show that he is within an exception to the statute, it was but a variance. Substantially it is averred that the defendant had not been in the state two years when the action was commenced. If this is not sufficiently specific, still there was no objection to the evidence at the trial, and the defendant was not, and could not have been, injured. I think the order and judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

101 Cal. 175

JAFFE v. LILIENTHAL. (No. 15,358.)

(Supreme Court of California. Jan. 26, 1894.)

BILL OF EXCEPTIONS—DELAY IN FILING—REVIEW —CONTINUANCE—ABSENCE OF PARTY.

1. Code Civ. Proc. § 650, provides that a bill of exceptions, when settled, must be signed and certified as allowed by the judge, and shall then be filed. *Held* that, the judge having, nearly a year after the settlement and allowance, by order reciting that good cause appeared therefor, allowed a filing nunc pro tunc, his action could not be reviewed, the circumstances not being shown.

2. Under Code Civ. Proc. § 594, authorizing a continuance "for good cause" in the absence of a party, it should be granted on an affidavit of plaintiff and his physician that he is confined by illness to his room in another state, and affidavits of plaintiff and his attorney that the plaintiff's presence is necessary, and that the attorney does not know the names of the witnesses or the details of the case.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Louis Jaffe against Sol. Lilienthal, administrator of Solomon Lowenberg. Judgment for defendant. Plaintiff appeals. Reversed.

I. I. Brown, for appellant. Lamberson & Middlecoff, for respondent.

HAYNES, C. On the 21st of December, 1891, this cause was set for trial for January 6, 1892. On that day plaintiff's attorney moved for a continuance upon affidavits of the plaintiff and his physician showing, in substance, that the plaintiff, who then, and for about a year prior thereto, resided in Seattle, Wash., was confined to his room by an attack of acute rheumatism, to which he was subject, and was wholly unable to move or leave his room, and, in the opinion of his physician, would not be able to leave his room in less than two months. The affidavit of plaintiff further stated that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify. D. M. Delmas, Esq., attorney for plaintiff, also presented his own affidavit that plaintiff's presence was necessary; that he did not know the names of plaintiff's witnesses, nor the details of the case. No counter affidavits were presented. The continuance was denied, plaintiff's attorney left the court room, and a judgment was entered for nonappearance of the plaintiff, and plaintiff appeals.

Plaintiff's bill of exceptions was settled and allowed February 3, 1892, but was not then filed. On January 5, 1893, the court made an order reciting that, "good cause appearing therefor," said bill of exceptions should be filed nunc pro tunc as of February 3, 1892. Respondent contends that the bill of exceptions was not filed in time, and cites section 650, Code Civ. Proc., the last clause of which is as follows: "When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk." Whether the delay was "unreasonable," as claimed by respondent, was for the court to determine. The circumstances which the court held were sufficient to justify the order do not appear. In the absence of a bill of exceptions setting out the facts, this order cannot be reviewed. We think the court erred in not granting a continuance.

Respondent suggests that it does not appear that plaintiff was a witness, nor that his attorney used any diligence to prepare for the trial. It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of parties to be present at the trial of their cases. This right may be waived, and should be held to be waived, where the absence of the party is voluntary, and under circumstances which ought not to induce a reasonable man having a due regard for the rights and interests of others and of the public, all of whom are interested in the due and prompt administration of justice, to absent himself. So far as the want of preparation on the part of the attorney is concerned, the most laborious and painstaking preparation on his part would not have prevented the sickness and absence of his client; nor does it appear that, if the plaintiff had not been sick, the necessary preparation could not have been made after the case was set for trial.

Respondent further contends that the affidavits do not show the materiality of the evidence expected to be obtained. The application for continuance was not made under section 595, Code Civ. Proc., but under section 594, which authorizes the court, "for good cause," to postpone the trial in the absence of a party. The consequences of a dismissal of an action because of the absence of a plaintiff should always be considered, especially where any reasonable excuse is shown for his absence, as where a plea of the statute of limitations could be interposed to a new action. In such case the dismissal is the absolute destruction of the plaintiff's right, and so serious a penalty should not be imposed unless the due administration of justice clearly requires it. The judgment appealed from should be reversed.

We concur: VANCLIEF, C.; SEARLS, C.

FITZGERALD and DE HAVEN, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

McFARLAND, J. I concur in the judgment.

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4 Cal. Unrep. 446

JOHNSON v. JOHNSON. (No. 15,273.)

(Supreme Court of California. Jan. 26, 1894.)

DIVORCE—CRUELTY—AWARD OF COMMUNITY PROPERTY.

1. A complaint alleging extreme cruelty, in that "about three years ago" defendant, without cause, struck plaintiff, and since has continually, whenever they have been together, used vile language to her, is not demurrable as failing to specify the acts relied on.

2. Plaintiff's physician testified, inter alia, that her nose had been flattened by a blow that defendant admitted having struck her, but said he did not mean to, and seemed ashamed. Their son swore that he had heard his father call his mother insulting names as long as she lived with him. Since the assault, plaintiff had been generally sick in bed, and her husband's language seemed to make her worse. *Held* sufficient proof of "extreme cruelty," consisting of a blow and abusive language, to the injury of plaintiff's health.

3. Plaintiff being an invalid, and defendant more than able to make his living, it was proper for the court, while allowing no permanent

alimony, to give plaintiff, besides most of the household furniture, the whole community house and lot, which was worth only $3,000, and was subject to a mortgage of $2,500.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action for divorce by Ane Johnson against Neils Johnson. Decree for plaintiff. Defendant appeals. Affirmed.

Nagle & Nagle, for appellant. Neils Johnson and R. B. Wallace, for respondent.

VANCLIEF, C. Action for divorce on the ground of extreme cruelty, in which the plaintiff prevailed. Besides the divorce, the decree awarded to plaintiff the custody of an infant son of the parties and the greater portion of the community property, but no permanent alimony. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. Defendant demurred to the complaint on the grounds that it is ambiguous, uncertain, and unintelligible, in that it does not appear therefrom "when or where defendant was guilty of the alleged extreme cruelty," nor "what was the nature, character, or extent of the alleged acts of extreme cruelty." The allegations of the complaint charging cruelty are as follows: "That during their marriage defendant has been guilty of extreme cruelty to plaintiff, in this: That about three years ago said defendant struck plaintiff without cause, thereby rendering her insensible, and since said time said defendant has wrongfully and unjustly, and without any provocation, continually used vile and offensive language to plaintiff whenever said plaintiff and defendant have been together, thereby inflicting upon said plaintiff grievous mental suffering, by reason of which mental suffering so inflicted by defendant, as aforesaid, plaintiff has been injured in health to such a degree that, by reason of the infliction of said mental suffering as aforesaid by defendant, said plaintiff has become sick, and her health has been greatly impaired. That further cohabitation between the plaintiff and defendant will endanger the physical health and the life of this plaintiff." This seems sufficiently definite as to the times, nature, and extent or degree of the cruelty; and, from the averment that it was commenced by a beating three years before the commencement of the action, and was thence continued by abusive language "whenever said plaintiff and defendant have been together," it must be understood that the places were wherever "said plaintiff and defendant had been together" during that period of three years, which places were presumably as well known to the defendant as to plaintiff. The demurrer does not specify, as a deficiency, that the abusive language is not set out. As against the objections specified in the demurrer, I think the complaint is barely sufficient.

2. The findings as to the fact of extreme cruelty are in the language of the complaint, and therefore support the judgment in this respect; and it is not denied that they are sufficient in all other respects.

3. The evidence was sufficient to justify the findings. The plaintiff testified to all the acts of cruelty alleged, and was sufficiently corroborated by the testimony of her physician and her son. As to the beating, the physician testified, among other things, that by a forcible blow her nose was crushed down flat on her face, and that defendant admitted he struck her, but said he didn't intend to, and appeared to be ashamed of what he had done. As to his abusive language, the son testified: "I have heard my father call my mother hard names, such as 'whore,' 'bastard,' and 'son of a bitch.' My mother's testimony in this regard is true. He called her such names as long as she was home." It appeared without controversy that, during the greater portion of the time after the beating, the plaintiff was sick, and thereby confined to her bed; and the tendency of the evidence is to prove that defendant's abusive language aggravated her disease.

4. Appellant contends that his offenses were condoned by the plaintiff. But condonation was not pleaded by defendant, (Bishop, Mar. & Div. §§ 619, 645;) and, if it had been pleaded, there is no evidence tending to prove it, unless the mere fact that she continued to cohabit with him until the last of a long series of acts of cruelty had such tendency by implication. Conceding that, under some circumstances, cohabitation after having suffered acts of cruelty implies condonation, it must be remembered that "all condonation, especially the implied, is upon the condition both that the offense shall not be repeated, and likewise that continually afterwards the party forgiven shall treat the other with conjugal kindness; whereupon a breach of the condition revives the original right of divorce." 2 Bish. Mar. & Div. § 308; Civ. Code, § 117. And section 118 of the Civil Code further provides: "Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill treatment which may aggregately constitute the offense, co-habitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." There is no evidence and no pretense of any express agreement to condone.

5. The house and lot awarded to plaintiff was community property, and subject to a mortgage of $2,500 and seven months' interest thereon. In his answer, defendant alleged this property to be worth only $3,000, and admitted the mortgage as above stated. The greater portion of the household furniture was also given to plaintiff. Appellant contends that the court erred in awarding the whole lot and house to plain-

tiff; but I think the allowance was proper and just. It appeared that plaintiff was in bad health, and that defendant was able to earn more than was necessary for his support. I think the order and judgment should be affirmed.

We concur: SEARLS, C; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(100 Cal. 609)

In re LUX'S ESTATE. (No. 15,146.)

(Supreme Court of California. Jan. 29, 1894.)

In bank. On rehearing. Denied.
For opinion on appeal, see 35 Pac. 345.

PER CURIAM. The order of May 13, 1892, directing the executors to pay to the widow an allowance of $1,000 per month for her support during the period named therein, has been reversed, and there is nothing said in the opinion filed in this case which can be properly construed as a direction to the superior court in settling the accounts of the executors to only credit them on account of the payments made by them for the support of the widow with the amount named in the reversed order. In settling the accounts the court will credit the executors with such sum as it finds was reasonably and properly advanced by them for the purpose named. In declaring this general principle, the court in its opinion simply explained how the account should have been stated upon the findings appearing in the record of the case; but, as these findings fell with the order reversed, the court will necessarily make new findings, and upon them will state the account in accordance with the general rule announced in the opinion. If the court shall, upon the new hearing, find $1,000 per month, or any greater or less amount, a reasonable sum to be applied for the support of the widow, then the executors should be credited with the amount so found to be reasonable and proper. Rehearing denied.

(101 Cal. 222)

BROWN v. FRESNO RAISIN CO. (No. 18,206.)

(Supreme Court of California. Jan. 31, 1894.)

PARTNERSHIP—INDIVIDUAL LIABILITY OF PARTNER—COUNTERCLAIM.

Defendant may counterclaim for goods sold and delivered to a partnership on the individual credit of plaintiff, one of the partners.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Brown against the Fresno Raisin Company. From a judgment for defendant on a counterclaim, plaintiff appeals. Affirmed.

L. L. Cory, for appellant. Geo. E. Church, for respondent.

DE HAVEN, J. The defendant recovered a judgment for $104.45, balance due upon a counterclaim, and the plaintiff appeals. The plaintiff was a member of the firm of Brown & May, and there was evidence from which the court was justified in finding that the raisins delivered by the defendant to that firm were sold and delivered upon the individual credit of the plaintiff, and, this being so, the finding of the court that such goods were sold and delivered by defendant to the plaintiff, and that the counterclaim of defendant was established, cannot be disturbed; for it is well settled that a partner may contract on his own account, and make himself alone liable for the property bought for the copartnership, if the vendor choose to accept such individual liability. 1 Lindl. Partn. (2d Amer. Ed.) pp. *179–192; Sylvester v. Smith, 9 Mass. 119. We discover no error in the rulings of the court in relation to the admission of evidence. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 403

FIRST NAT. BANK OF CHICAGO v. CALIFORNIA NAT. BANK OF SAN DIEGO. (No. 19,261.)

(Supreme Court of California. Dec. 29, 1893.)

ASSUMPSIT—MONEY LENT—EVIDENCE.

1. G., plaintiff's vice president, being at the C. Hotel in defendant's town, was asked by the latter's president for a loan on collateral, $25,000 to $40,000, and agreed to make it on proper security. N., who was present, writing G. about a note which said president proposed to send, "to obtain this loan, as I understand it," gave his opinion about certain notes, defendant's stock, etc. A note for $25,000 was made to G., vice president, by four of defendant's directors and its cashier. The president, in sending the collaterals, wrote G. that he believed they were, in substance, "about what was spoken of at the C. Hotel when Mr. N. was with us." On receipt of the collaterals, plaintiff credited defendant with $25,000, less discount, and paid it on defendant's orders. *Held*, that a finding that plaintiff lent defendant $25,000 was justified.

2. In an action by one bank against another on a note, and for money loaned, where defendant asserts that plaintiff bought the note, proof of the negotiations for the loan, and that defendant received its proceeds, is not incompetent as varying the written instrument.

3. In an action by one bank against another for money loaned, and on a note representing the balance due, the loan and balance being established, it is immaterial whether the note was authorized by the directors.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the First National Bank of Chicago against the California National Bank of San Diego on a promissory note, and for money loaned. Judgment for plaintiff. Defendant appeals. Affirmed.

Luel & McDonald, for appellant. Tippet, Boone & Neale, for respondent.

SEARLS, C. This appeal is prosecuted from a final judgment in favor of plaintiff, and from an order denying motion for a new trial. There are three counts in the complaint, as follows: (1) Upon a promissory note for $12,500, dated October 19, 1881, made by "California National Bank, per J. W. Collins, Pres.," upon which a payment of $2,500 was admitted; (2) a cause of action upon an overdraft for $9,862.95, which was admitted, except that defendant claimed that the $2,500 credited in the first cause of action should be applied to the second; (3) a cause of action for the recovery of $25,000, loaned by plaintiff to defendant May 18, 1891, with a credit thereon of $15,000.

The findings are in favor of plaintiff, and are sufficient to support the judgment. By the second finding it appears that "the first and third counts of plaintiff's complaint relate to the same indebtedness." According to these findings, the plaintiff on the 18th day of May, 1891, loaned to the defendant $25,000 at defendant's request; that defendant paid the interest thereon up to the 19th day of October, 1891, and $12,500 on account of the principal, and that on said last-named date the defendant made its promissory note to the plaintiff for $12,500, being for the balance due on account of said loan, payable thirty days after date, with interest at 7 per cent. per annum; that defendant received the consideration for said note; that the same is due and unpaid, except the sum of $2,500, paid thereon December 22, 1891. The court further finds, as to the $2,500, that it was not collected for the use of the defendant, as averred in the answer, but was collected by the plaintiff on a promissory note deposited with it by defendant as collateral security for the $12,500 note of plaintiff, etc.

The contention of appellant is that the finding of the court that plaintiff loaned to the defendant $25,000 on the 28th day of May, 1891, is not supported by the evidence. It is in proof that a promissory note for $25,000, made by five individuals, payable to "L. J. Gage, Vice President," was sent to the plaintiff in Chicago; and the theory of appellant is that plaintiff discounted the note, and there is certainly some evidence in support of the theory. On the other hand, it appears that Gage, the vice president of the plaintiff bank, located in Chicago, was in San Diego; that the president of the defendant bank negotiated with him for a loan of $25,000 to $40,000, offering to put up, as collateral, notes, bank stock, etc.,—anything, in short, that plaintiff wished; and it was finally arranged that, with proper security, plaintiff would make the loan to defendant. H. F. Norcross, who was present at the negotiations, was afterwards requested to write to Gage, vice president of plaintiff, and did on or about May 21, 1891, write in reference to some note which defendant's president proposed sending "to obtain this loan, as I understood it." In this letter he gave his opinion of certain notes, and the value of defendant's stock, etc. The $25,000 note was made by four of the directors of defendant, and its cashier. In sending on the collaterals to Chicago, Collins, the president of defendant, wrote to Gage that he believed they were, "in substance, about what was spoken of at the Coronado Hotel [where the negotiations had occurred] when Mr. Norcross was with us." Upon the receipt of these collaterals, of which there seems to have been a considerable number, plaintiff placed the $25,000, less interest, to the credit of defendant, and paid it out on its drafts and orders. This is not all of the evidence going to show a loan of the $25,000 by plaintiff to defendant, but is sufficient to show a substantial conflict in the evidence, and to uphold the finding of the court in favor of such loan.

Defendant at the trial objected to the testimony in reference to negotiations on the part of plaintiff and defendant for a loan of money by the former to defendant, and that the latter received the funds, upon the ground that it was immaterial, irrelevant, and incompetent, and that it tended to vary and contradict the written instrument, to wit, the promissory note for $25,000 already in evidence. We do not see that it did anything of the kind. The third cause of action was for money loaned by plaintiff to defendant. This evidence tended to support that cause of action; and the fact that defendant contended that it was not a loan by plaintiff, but a purchase of the promissory note in question, did not militate against the admissibility of the evidence.

On the 19th day of October, 1891, the defendant, having paid the interest on the loan and $12,500 of the principal, made its promissory note for the remaining $12,500, payable 30 days after date, with interest, etc. This note was signed as follows: "California National Bank of San Diego, per J. W. Collins, Pres." Appellant contends that this note is not shown to have been authorized by the board of directors of the defendant, and that the president of the defendant, not having been specially empowered so to do, could not bind the defendant by making this note. Respondents meet this contention: (1) By reference to the record, which shows that a meeting of the board of directors of defendant "held in February, 1891, a resolution was passed by the board of directors to authorize Mr. Collins, the president, to borrow $100,000 from some eastern national bank." The record also shows that in January, 1891, J. W. Collins was elected president, and that section 19 of the by-laws of defendant requires "all contracts, checks, drafts, etc., shall be signed by the president, vice president, or cashier." (2) Authorization implied from course of conduct of business of defendant. (3) That defendant, having received and retained the consideration for which the note was given, with notice, is estopped from denying the validity of the note. We need not notice all of these propositions in detail. Under the first of them, which authorized the president to borrow from some eastern national bank $100,000, we think it clear that authority was conferred to borrow a less sum from plaintiff, a national bank of Chicago. Ordinarily, the power of a bank to borrow money on time implies the power to give its negotiable note on time. Morse, Banking, § 63. We may waive all this, however, and the case stands thus: In May, 1891, defendant borrowed from plaintiff $25,000. Of this sum it paid $12,500, and in October following gave its promissory note for the balance due. The complaint contains two counts for this cause of action. In the third it seeks to recover the balance due on account of the loan. In the first count plaintiff seeks a recovery on account of the note. Being for the same subject-matter, it cannot recover upon both counts; but, if the note was unauthorized, it may still recover upon the count for money loaned. The very object of different causes of action upon the same transaction is to meet just such contingencies as the present; hence, the loan having been established, and plaintiff's right to a recovery therefor fixed, the question of the right of the president of the defendant to bind it by the execution of a promissory note in evidence of the indebtedness becomes of no moment in a case where, like the present, plaintiff has counted upon its claim in each form. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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101 Cal. 9

BARKER et al. v. MASKELL et al. (No. 19,206.)

(Supreme Court of California. Jan. 3, 1894.)

CHATTEL MORTGAGES—FURNITURE IN LODGING HOUSE—FORECLOSURE.

Civil Code, § 2955, provides that mortgages may be made on furniture used in lodging or boarding houses, "when mortgaged to recover the purchase money of the articles mortgaged." *Held*, that a petition in an action by mortgagees to foreclose a mortgage on furniture used in a lodging house need not show that the mortgage was given to secure the purchase money of such furniture, since it is valid, as between the parties to it, though not given for such purpose.

Department 2. Appeal from superior court, Los Angeles, County; Walter Van Dyke, Judge.

Action by O. J. Barker and others against John Maskell and E. A. Rhodes to foreclose a chattel mortgage. From a judgment for plaintiffs, defendant Maskell appeals. Affirmed.

The petition alleged that on the 5th day of November, 1890, defendants executed to plaintiffs a certain note, which is set out, and dated October 23, 1890. It also alleged that at the same time, to secure the payment of such note, defendant Maskell executed to plaintiffs a chattel mortgage dated October 23, 1890, which is also set out. The mortgage describes the property as furniture used in a certain lodging house belonging to the mortgagees. It contains a copy of such note, and recites that such note is given as the purchase price of the furniture "above described, and for no other consideration." The petition then alleged that, at the time of the execution of the mortgage, all the property described therein belonged to plaintiffs; that it was sold to be used in such lodging house, and the "mortgage was given to secure the purchase price thereof, to wit, the amount of said note, to the plaintiffs, and for no other consideration, and the said promissory note was given as an evidence of said indebtedness," etc.; and that the note was due and unpaid.

Hugh J. & Wm. Crawford, for appellant. A. M. Stephens, for respondents.

DE HAVEN, J. The action is for the foreclosure of a mortgage upon certain furniture and upholstery used in a lodging house in the city of Los Angeles. The mortgage was executed to the plaintiffs by one of the defendants, for the purpose of securing a promissory note made by himself and the other defendant. We think it sufficiently appears from the complaint that the note was given for the purchase price of the property mortgaged; and therefore the mortgage is one to secure the purchase money of the articles mortgaged, and valid under section 2955 of the Civil Code.[1] But even if it should be conceded that the complaint is ambiguous, and fails to show that the mortgage was given for the purpose of securing the purchase price of the property therein described, still the mortgage is valid as between the parties to it, and the complaint states a good cause of action from either point of view. There was no error in overruling the demurrer. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

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[1] Civ. Code, § 2955, provides as follows: "Mortgages may be made upon * * * upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged. * * *"

(101 Cal. 198)

GRANGERS' BANK OF CALIFORNIA v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,323.)

(Supreme Court of California. Jan. 26, 1894.)

SUPREME COURT—REHEARING—CASES OF ORIGINAL JURISDICTION.

The power to order a rehearing in bank, after a decision in one of the departments, conferred on the supreme court by the constitution, applies, not only to cases of appellate jurisdiction, but also to cases of original jurisdiction; and hence, in such cases, a motion for rehearing, and not for a new trial, is the proper practice.

On motion to set aside an order granting a rehearing. Denied.

For former report, see 33 Pac. 1095.

McFARLAND, J. This proceeding is on original petition in this court for a writ of prohibition. There was a decision here in favor of petitioner, August 19, 1893, but within 30 days thereafter, an order of this court was made, granting a rehearing. Petitioner now moves to set aside said order granting said rehearing upon the ground that the court had no power to make it, contending that a motion for a new trial was the proper remedy. The point was substantially determined against petitioner's contention in Re Tyler, 71 Cal. 374, 12 Pac. 289. It may be further said that the present constitution provides that the judgment of a department of this court shall be final in 30 days, unless before that time ordered into bank; and that there has been a rule of this court, ever since its origin, that a judgment of the court in bank shall be final in 30 days, unless before that time a rehearing shall have been granted. Neither the constitution nor the rule makes any distinction between cases of appellate jurisdiction and cases of original jurisdiction; and, indeed, most of the cases here which are in form original are, like the case at bar, in their nature appellate. Therefore, to apply to this court those parts of the Code of Civil Procedure about new trials, etc., which are evidently intended to regulate procedure in the superior courts, would be to overturn the constitutional provision above mentioned, as well as the ancient rule and uniform practice of the court. A motion for a new trial, with its attendant consequences and delays, would suspend a judgment rendered here beyond the time fixed by the constitution and the rule. Many of the provisions of the Code about procedure have reference to appeals, and were intended as means for the perfection of records in the superior courts upon which cases might be reviewed in the appellate court; but in an original proceeding here this court has its own record. The general powers of this court to grant rehearings is fully discussed and declared in the opinion delivered by Beatty, C. J., in the Jessup Case, 81 Cal. 459, 21 Pac. 976, and 22 Pac. 742, 1028. The motion to set aside the order granting a rehearing is denied.

We concur: BEATTY, C. J.; DE HAVEN, J; HARRISON, J.; PATERSON, J.

(4 Cal. Unrep. 463)

OGDEN v. PACKARD. (No. 19,306.)

(Supreme Court of California. Jan. 31, 1894.)

FORECLOSURE OF MORTGAGE—ATTORNEY'S FEES—DISCRETION OF COURT.

On appeal from a judgment foreclosing a mortgage which provides for the allowance of reasonable attorney's fees on foreclosure, the allowance will not be disturbed if the appeal is brought up on the judgment roll alone, without exceptions, and there is nothing in the record to show that the court abused its discretion in making the allowance.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by Matthew B. Ogden against C. E. Packard. From a judgment for plaintiff, defendant appeals. Affirmed.

W. J. McIntyre, for appellant. Irvington & Adair, for respondent.

VANCLIEF, C. Action to foreclose a mortgage which provided that, "in the event of the foreclosure of said mortgage, reasonable attorney's fees shall be taxed by the court, and included and paid in the bill of costs." It is alleged in the complaint that $500 is a reasonable attorney's fee to be allowed under said provision of the mortgage. The answer simply "denies that $500 is a reasonable attorney's fee," without stating whether such fee is unreasonably large or unreasonably small, or what sum would be a reasonable fee. The court found the amount due on the mortgage notes to be $16,571.65, and fixed and allowed as plaintiff's attorney's fees the sum of $500, and for the payment of these sums ordered a sale of the mortgaged property in the usual mode. Findings of fact were waived, but the amount due on the notes and the sum allowed for attorney's fees are recited in the decree. The defendant brings this appeal from the final decree, upon the judgment roll, and without any exceptions; and the only point made is that the court exceeded its discretionary power in fixing and allowing plaintiff's attorney's fees, and asks that the judgment be modified by deducting from the attorney's fees $350. There is nothing in the record tending to show any abuse of the discretionary power of the court; and, indeed, for aught that appears, the appellant may have expressly acquiesced in the order fixing the attorney's fees. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

4 Cal. Unrep. 462

RUSS LUMBER & MILL CO. v. ROGGENKAMP et al. (No. 19,242.)

(Supreme Court of California. Jan. 30, 1894.)

MECHANICS' LIENS—NOTICE TO OWNER.

Under Code Civ. Proc. § 1184, requiring the owner of a building to retain sufficient funds to pay a claim for materials, furnished by a material man who has given notice of his claim to such owner, a material man who serves the required notice acquires a prior right to the fund in the hands of the owner, due the contractor, though the contractor subsequently abandons the contract.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Russ Lumber & Mill Company against William Roggenkamp, W. H. Pierce, J. Lee Burton, and the Union Bank of Redlands to enforce a mechanic's lien. From a judgment for plaintiff against defendant Roggenkamp, personally, said defendant appeals. Affirmed.

Goodcell & Leonard, for appellant. Curtis, Oster & Curtis, for respondent.

PER CURIAM. This action was brought to foreclose a mechanic's lien upon a dwelling house constructed for defendant Roggenkamp, and owned by him. All the defendants made default, except the defendant Roggenkamp; and he alone prosecutes this appeal upon the judgment roll. Defendant Roggenkamp entered into a written contract with the defendant Pierce for the construction by the latter of the building in question, for the price of $2,750, and this contract was made and filed as required by law. The plaintiff furnished material to the contractor, Pierce, for which there is still due the plaintiff the sum of $977.23. On June 26, 1891, the plaintiff served upon defendant Roggenkamp written notice that he had furnished material to the contractor to the amount of $963.87. At that time there was due the contractor $687.50, and to become due the further sum of $2,062.50. On July 3, 1891, the contractor ceased work, and abandoned the contract. The work was continued by Roggenkamp, under the supervision of his architect, defendant J. Lee Burton, and the building completed on October 23, 1891. Plaintiff filed its claim of lien on December 18, 1891, which was 56 days after the completion of the building. The lien was disallowed, and judgment rendered against defendant Roggenkamp, personally, for the sum of $687.50, with interest and costs. The sole question involved in the case was passed upon in Bates v. Santa Barbara Co., 90 Cal. 543, 27 Pac. 438. A careful perusal of the brief of appellant fails to convince us either that this case can, in principle, be distinguished from that, or that the question here was not necessarily involved there. The judgment appealed from is affirmed, upon the authority of Bates v. Santa Barbara Co., supra.

101 Cal. 20

McDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,308.)

(Supreme Court of California. Jan. 31, 1894.)

PLEADING—VERIFIED DEFENSES—EVIDENCE—CONVEYANCE OF RIGHT OF WAY — CONSTRUCTION AND EFFECT.

1. Statements made in the special defenses in a verified pleading are not evidence against defendant on issues in other defenses contained in the same answer.

2. A conveyance to a railroad company of a right of way over the grantor's land, for its road, as already constructed and operated, to enable the company to use it as it was then using it, bars the grantor's right to damages for injury to his land, caused by the maintenance and operation of a defective bridge thereon, constructed before the execution of the conveyance.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county, John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Elmer E. Rowell and W. J. Hunsaker, for appellant. A. Brunson, Paris & Allison, and Goodcell & Leonard, for respondent.

TEMPLE, C. This is an appeal by the defendant from the judgment, and order refusing a new trial. Practically, the complaint and the amendments thereto contain four counts. The first charges that defendant is a corporation, owning and operating a railroad in this state, and, for the use of its railroad, in December, 1889, erected a trestle bridge over Lytle creek in the county of San Bernardino, and, in constructing the same, failed to use due and ordinary care in providing for the passage of water, debris, and flood wood under the same in time of flood; that on the 23d day of December, 1889, during a heavy flood, owing to the said negligent construction of the bridge, debris, flood wood, sand, and gravel accumulated under the bridge, choking up the channel, and causing the water to overflow, and damage plaintiff's land, to his injury in the sum of $4,000. The second count contains the same facts, with the addition that defendant did not use proper care and diligence in removing wood, debris, etc., from the bridge, but negligently permitted its accumulation, thereby causing the water to run against and wash away plaintiff's land, to his damage, etc. The third count charges that defendant constructed across the creek a modern pile and stringer bridge, which was an unlawful construction, and caused accumulations, obstructing the flow of water; that its construction was due to negligence and want of ordinary care, etc. The last count charges that the spaces between the piles or trestles were not wide enough, or high enough, to permit the free passage of water; that, as constructed, the bridge would inevitably cause an accumulation of drift, etc., choking up the stream, and that defendant, well knowing its defective nature, nevertheless carelessly continued its use, and failed and neglected to remedy the defects, whereby damage resulted. Each count, or statement of a cause of action, is specifically answered by the defendant, and to each cause of action several defenses were set up. The different answers, however, are very similar. First, there are specific denials of the material allegations of the complaint. The answer denies that defendant was a corporation prior to November 7, 1889, or that it owned or operated a railroad prior to that date, that it built the bridge in question, or that it was negligently constructed. The specific charges of negligence and damage are denied. As a separate defense, charges contributory negligence on the part of plaintiff. As another separate defense, that the injury was by accident, or caused by the elements, and was the act of God. As another separate defense, that on the 7th day of November, 1889, this defendant was formed by the consolidation of three named corporations, one of which was the California Central Railway Company, which last-named company built the bridge in question, and there was, therefore, a misjoinder of parties, in that the California Central is not made a party herein. Still another separate defense avers that, on the 17th of September, 1889, the plaintiff executed and delivered to the California Central Railway Company a deed, which is fully set out, and which purports to convey a right of way, over described land, "for the main track of said railroad, as the same is now located, constructed, and operated," and which contains the following language: "And I do hereby grant to said grantee the right to exercise the right to use the said street for railroad purposes, as it is now doing for its main track, and I do hereby acknowledge full and entire satisfaction or payment of any and all damages sustained by me, by reason of the construction of said railroad upon said street, and by reason of the operation thereof, and, particularly, do I acknowledge payment for damages for any injury caused by the construction of said railroad in front of my property hereinbefore described." It is then averred that, at the date of the deed, the California Central Railway Company owned and operated a line of railroad, which was constructed upon and over said bridge, which was then, and at all times, necessary to the said company in the use of its railroad; that the bridge is constructed upon the property and right of way so conveyed. The consolidation of the three corporations is again set out, to show that defendant has succeeded to the rights of the California Central Railway Company, and it is claimed that the deed is a bar to plaintiff's right to recover.

On the trial, and at the commencement thereof, it was stipulated in open court as follows: "For all purposes of this trial, it is admitted and conceded by both plaintiff and defendant: First. That the bridge and road mentioned in plaintiff's complaint were built and constructed in the year 1886 by the California Central Railway Company, and not by this defendant, and that, at the commencement of this action, and the commencement of action No. 4,033, this defendant was using said bridge and road, and operating its road thereon, and over such bridge, as grantee and successor of said California Central Railway Company. It is admitted that, at the time of the commencement of this action, and that at the time of the commencement of action No. 4,033, plaintiff in this case was the owner of the property, described as belonging to him in the complaints in both actions herein, and that this present defendant had no corporate existence until on or about the 7th day of November, 1889."

One of the findings of fact reads as follows: "The defendant did not construct the bridge mentioned in the complaint. Said bridge was constructed, prior to November 7, 1889, by the California Central Railway Company, a corporation; and after the construction of said bridge, to wit, on November 7, 1889, the defendant was formed by the consolidation af three certain railway corporations, to wit, said California Central Railway Company, the California Southern Railway Company, and the Redondo Beach Railway Company, and, upon such consolidation being effected, the defendant, on November 7, 1889, became the owner of said bridge and of said railroad crossing, and the same commenced the operation of said railroad, and thereafter continuously, until the commencement of this action, the defendant was the owner of said bridge, and in the possession, use, and operation thereof."

The difference between this finding and the admission is obvious. The admission is to the effect that the defendant is the grantee of the California Central Railway, while the finding is to the effect that the defendant is a consolidated company, of which the California Central Railway is a constituent. Under one hypothesis, defendant could only be held responsible for knowingly using a structure which was a nuisance, while on the other it is liable for negligence in its construction. Defendant, in its motion for a new trial, based partly upon the ground of the insufficiency of the evidence, objects to this finding, and charges that there was no evidence whatever tending to show the consolidation, and the fact is against the express admission. Respondent does not claim that there was evidence to support the finding, but contends that appellant cannot complain, for it is so expressly averred in defendant's verified answer. So it is, many times over, but only in so many separate and distinct defenses. To each cause of action, however, there is a defense which consists of denials only, and which contains no such allegation.

Are the statements made in the special defenses in a verified pleading evidence against the party upon issues tendered in other defenses contained in the same answer? Respondent claims that it was so held in Bell v. Brown, 22 Cal. 678. In that case, in a somewhat elaborate opinion, the court held that a defendant may set up as many defenses as he has, and cannot be deprived of any because they are inconsistent. The learned justice, however, says: "There is this difference, however, between verified and unverified pleadings, that, if the truth of the fact is directly averred in any part of the former, whether in a complaint or answer, and then in any other part of the same pleading, whether in the statement of several causes of action in the complaint, or in separate defenses in the answer, the same fact is directly contradicted or denied, the person verifying it is guilty of perjury, for both cannot be true; and the averment which bears most strongly against the party so pleading will be taken as true upon the trial." In the opinion it is shown that one may verify certain inconsistent defenses, and yet not commit perjury. For instance, one may deny the execution of a note sued upon, and yet, in another defense, plead payment, or the statute of limitations. In legal theory, the second defense would admit the execution of the note, and the third admits its execution, and that it has not been paid. Yet one may claim that it is forged, and yet that he has paid it; and, also, in case that he fails in his proofs as to either point, that it is barred. But could not the defendant, in such a case, also plead as a defense that the note was procured by fraud? Of course, this involves a statement that he did, in fact, execute the note. If this statement may be used as conclusively settling the issue raised by the denial, then the defendant is practically, not allowed to interpose all the defenses he has. The matter is again discussed in Buhne v. Corbett, 43 Cal. 264. There it is said there is no distinction between verified and unverified pleadings, in this respect. Billings v. Drew, 52 Cal. 565, presents the question as suggested in the foregoing illustration, and holds that the statement in one defense cannot be used as evidence upon another issue, because to so hold would deprive the defendant of the benefit of his denials. This I understand to be the universal rule. Pom. Code Rem. § 724; Botto v. Vandament, 67 Cal. 333, 7 Pac. 753.

Respondent contends that, if this finding in regard to the consolidation of the corporations be stricken out, still the findings left are sufficient to support the judgment. One count in the complaint, as we have seen, is based upon the proposition that the defendant continued to maintain the bridge, knowing that it was a dangerous nuisance. Upon this issue the court finds: "From November 7, 1889, until the time of the commencement of this action, the defendant, well knowing all the facts hereinbefore found, willfully and negligently kept, used, and maintained said bridge, so constructed, and willfully and negligently failed to take any means or precautions to remedy the obstruction of said bridge, or to provide for the free or safe passage of the flood water thereunder, when charged with brush, trees, or other debris, or to protect the plaintiff's said land from injury thereby." This finding is also attacked in the motion for a new trial, but I think this court would not be justified in saying it is unsupported by the evidence. There was much testimony to the effect that the bridge was an improper one for use at that place. Of course, defendant was constantly using it, and it was its duty to have it constantly inspected, and kept in repair. The character of the stream was quite obvious, and, although the defendant was but a few months old, its managers were not without experience. All the evidence tending to show the nature of the structure, and of the stream, may be said to have a bearing upon the question of defendant's knowledge of the defects in the structure, and its inadequacy for emergencies which were likely to arise. We are, therefore, driven to consider the defense based upon the deed given by plaintiff to the California Central Railway Company, the grantor of defendant. The execution of the deed is admitted, and it is averred and found that "said bridge and all approaches thereto are located within the right of way in said deed described, and constitute part of the premises thereby granted to the California Central Railway Company." Respondent attempts to avoid this point by claiming that there is no evidence to sustain this finding, and it is declared in the statement that it contains all the evidence given at the trial. But this finding is not attacked, and cannot be, by the respondent, in this way. It is, no doubt, an embarrassing position to be placed in, when there is a favorable judgment, based upon findings which may be held to show that the judgment ought to have been the other way. The only safety for a party in that position is to attack the erroneous finding himself, unless the consequence of the defect could only be to necessitate a new trial.

Upon the main question, appellant cites us to three cases, which apparently fully sustain its proposition: McCarty v. Railway Co., 31 Minn. 278, 17 N. W. 616. The defendant entered upon plaintiff's land, and built an embankment, upon which it constructed its road. Thereafter it compromised with the owner, and took a deed conveying the land used as a right of way. Held, that the deed licensed the maintenance of the road and embankment as already constructed, and that defendant was not liable because it continued to maintain the embankment with insufficient culverts, thereby obstructing the natural flow of water from plaintiff's meadow. Radke v. Railway Co., 41 Minn. 350, 43 N. W. 6, is, in all respects, like the last. Referring to the other case, it is said: "The decision must be deemed to rest upon the ground that, from the sale and unqualified conveyance to the railroad company of the premises upon which its road and embankment had already been permanently constructed, and where it was to be expected to remain, it was to be presumed that the grantor consented to the continued existence of such permanent improvements, for the enjoyment and use of which the purchase and conveyance of the land was obviously made. * * * It cannot affect the case that he may not then have apprehended the full extent of the injury which could result from this in the future." To the same effect is Hoffeditz v. Mining Co., 129 Pa. St. 264, 18 Atl. 125. This decision was affirmed in Updegrove v. Railroad Co., 132 Pa. St. 541, 19 Atl. 283; and in McMinn v. Railroad Co., 147 Pa. St. 5, 23 Atl. 325. The principle of these cases seems to be that one, having conveyed the land with the structure, for the purpose of enabling the purchaser to continue to use it as it was then using it, cannot deprive the purchaser of the benefit by claiming that it constitutes a private nuisance. Respondent has cited us to no case which holds a contrary doctrine. I feel constrained, therefore, to sustain this position of the appellant. Respondent, in his brief, claims that the finding is not only entirely unsupported by the evidence, but is untrue. The plaintiff did not claim to own the land across the river, or attempt to convey it, but only up to the river on one side of it. Since the appellant is here asking for a new trial, I think a new trial should be awarded, even if the findings would justify a judgment for the defendant. I therefore recommend that the judgment and order be reversed, and a new trial granted.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

(101 Cal. xviii)

McDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,309.)

(Supreme Court of California. Jan. 31, 1894.)

Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Elmer E. Rowell and W. J. Hunsaker, for appellant. A. Brunson, Paris & Allison, and Goodcell & Leonard, for respondent.

PER CURIAM. This case is, in all essential respects, like the case with the same title, (No. 19,308,) 35 Pac. 643, and on the authority of that case the judgment and order are reversed, and a new trial ordered.

(4 Cal. Unrep. 450)

WATKINS v. WILHOIT et al. (No. 18,167.)[1]

(Supreme Court of California. Jan. 26, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RECORD—LIMITATION.

1. Under Civ. Code, § 3465, which declares an assignment for the benefit of creditors "void" as against nonassenting creditors, unless recorded as required by sections 3463, 3464, no preliminary suit is necessary by a nonassenting creditor to set aside an unrecorded assignment before he can maintain a creditors' bill to apply the assignor's property in the assignee's hands on a judgment against the assignor.

2. The fact that an unrecorded assignment may be valid as between the parties does not render it merely voidable as against nonassenting creditors, since Civ. Code, § 3465, expressly declares it "void" as against them.

3. The right to bring a creditors' bill to set aside an assignment for the benefit of creditors as in fraud of plaintiff's rights accrues when the execution on plaintiff's judgment against the assignor is returned unsatisfied, and not when the assignment was made.

4. Civ. Code, § 1170, which provides that an instrument is deemed to be recorded when deposited in the recorder's office for record, must be read in connection with section 1213, which requires the instrument to be "recorded as prescribed by law" before subsequent purchasers are charged with constructive notice of its contents; and hence no notice is imparted until the instrument is actually placed on record in the proper book, and then it relates back to the date of deposit for record.

5. The negligence of the recorder in recording a conveyance in the wrong book cannot affect third persons, but the injury must fall on the parties to the conveyance, since they are the "parties aggrieved," within the meaning of the county government act, (section 133,) making the recorder liable to the parties aggrieved in three times the amount of damages occasioned by his negligence.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action in the nature of a creditors' bill by C. G. Watkins against R. E. Wilhoit, B. F. Langford, and M. E. Bryant. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

John B. Hall, for appellant. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

VANCLIEF, C. This action is of the nature of a creditors' bill in equity to subject property in the hands or under the control of the defendants Wilhoit and Langford to the payment of a judgment at law against defendant Bryant in favor of the plaintiff. A demurrer to the complaint having been sustained, and plaintiff having declined to amend his complaint, judgment passed for

[1] Rehearing granted.

defendants. The plaintiff has appealed from the judgment upon the judgment roll containing a bill of exceptions showing that the demurrer was sustained on the grounds "that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by the statute of limitations."

The complaint shows that on June 2, 1890, the plaintiff recovered a judgment against Bryant for the sum of $2,342.60 on a promissory note made by the latter to the former on January 17, 1885, and that no part of the judgment has been paid. That before, and on February 16, 1886, said Bryant was indebted to others besides the plaintiff, and was then, and ever since has been, insolvent, though he was then the owner of considerable real and personal property in the county of San Joaquin, where he resided. That on said 16th day of February, 1886, he executed to defendants Wilhoit and Langford and one Charles Bamert a deed purporting to convey to them all his real and personal property, except such as was exempt from execution, in trust for the benefit of all his creditors, without preference to any, except as provided by law, "to sell and dispose of said real estate and personal property, and to collect the said book accounts and choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract or sale, with the right to compound for the said book accounts and choses in action, taking a part for the whole where and when the trustees deem and decree it expedient so to do." Then, after applying the proceeds to the payment of his debts according to law, to pay the surplus, if any, to him, Bryant. This instrument, with an inventory of the property thereby assigned attached thereto and made a part thereof, and the written acceptance of the trust by Wilhoit and Bamert, are fully set out in the complaint. It is next alleged that said instrument has never been recorded in the office of county recorder of said county in any book of records therein of grants, deeds, or transfers of real estate, or in any book kept in said office for the recordation of conveyances or mortgages of either real or personal property, or otherwise or elsewhere recorded in said office, save and except that the instrument was, on the 16th day of February, 1886, transcribed into a book kept in said office, labeled "Book G, Miscellaneous." That within 30 days after the date of said instrument, pursuant to an order of a judge of the superior court, Wilhoit, Langford, and Bamert executed a bond, with sureties, for the faithful discharge of the trust, as required by section 3467 of the Civil Code, and thereupon took possession of all the property described in said instrument, claiming title thereto as assignees. "That said plaintiff at no time, either before or at the time of or since the execution of said instrument, assented to the execution thereof, or to any matter or thing therein contained, and has never assented to any act of said Wilhoit, Langford, and Bamert, or any or either of them, done or claimed to be done in the execution of the trust in said instrument mentioned." That at different times between February 16, 1886, and the commencement of this suit, said Wilhoit, Langford, and Bamert have sold and disposed of all said property, real and personal, and have received from the sales of said lands $4,000, from the sale of said personal property, $4,000, and from rents, issues, and profits of said real property a sum not less than $10,000; and that the said Wilhoit and Langford "now have in their hands or under their control the full sum of eighteen thousand dollars,—proceeds of the property of said Bryant, so as aforesaid coming into their hands, to which they assert no right or claim other than a right or claim under said pretended assignment of February, 1886;" said Bamert having died in January, 1891. That on January 29, 1892, plaintiff caused to be issued and placed in the hands of the sheriff an execution on his said judgment against Bryant upon which on March 29, 1892, the sheriff indorsed his return that he had "levied upon all moneys, goods, credits, effects, debts due or owing or any personal property of any kind belonging to M. E. Bryant, the judgment debtor named in the annexed writ, and in the custody or under the control of R. E. Wilhoit and B. F. Langford, or either of them;" and proceeds to state the acts constituting a garnishment as required by law, to which Wilhoit and Langford orally answered that they did not owe Bryant anything, but declined to make any written answer; and further returned that he had "made diligent search and inquiry, and had not been able to find any property of any kind in San Joaquin county belonging to M. E. Bryant out of which he could make the sums due on the annexed execution," and the same is returned unsatisfied. It is next alleged that Wilhoit, Langford, and Bamert have not, nor has either of them, accounted for or paid to any creditor of Bryant said funds in their hands, and have refused to deliver the same, or any part thereof, to the sheriff for the satisfaction of said execution, and claim that they rightfully hold the same for the uses and purposes of said pretended assignment. It is further alleged that said pretended assignment is, and ever has been, null and void as against the plaintiff, and that plaintiff has a lien on said money in the hands of Wilhoit and Langford for the payment of his said judgment. The prayer of the complaint is that it be adjudged that the instrument of February 16, 1886, is null and void as against the plaintiff; that plaintiff has acquired a valid lien upon the funds in the hands of Wilhoit and Langford for the payment of his judgment against Bryant; that they pay said judgment, with interest and costs, from said funds; and that plaintiff have such other and further relief as the court may deem equitable.

The foregoing is the substance of the complaint so far as pertinent to the issues of law raised by the demurrer. It should be observed that the assignment was made under title 3, pt. 2, of division 4 of the Civil Code, before the amendment thereof in March, 1889. The grounds of the demurrer are: (1) That the complaint does not state a cause of action; (2) that the action appears to be barred by section 338, and also by section 343, of the Code of Civil Procedure; and (3) that the complaint is uncertain, and also ambiguous in certain specified particulars. The theory of the complaint is that, as between the defendants and the plaintiff, the assignment of Bryant to the other defendants is void, and that plaintiff is entitled to pursue the $18,000 in their hands or under their control for the satisfaction of his judgment, as though that assignment had not been attempted. If, upon the facts alleged, this position can be sustained, I think the complaint states a cause of action not barred by the statute of limitations, with sufficient certainty, and without ambiguity.

1. It is claimed by appellant that the assignment is void for the reason that it was not recorded. Section 3458 of the Civil Code provides that an assignment for the benefit of creditors "must be in writing * * * and recorded as required by sections 3463 and 3464." Section 3459 provides: "Unless the provisions of the last section (3458) are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto." Sections 3463 and 3464 provide that the assignment "must be recorded" and the inventory "filed with the recorder," etc., in the county or counties as therein stated. Section 3465 provides: "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded * * * pursuant to section 3463 within twenty days after the date of the assignment." Section 3466 requires that "where the assignment embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers as well as to those of this title." Article 4 of the chapter on recording transfers (sections 1213 and 1215) shows that assignments for benefit of creditors embracing real property must be recorded as conveyances of real property. Section 3473 enacts that "an assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be canceled or modified by the parties thereto without the consent of every creditor affected thereby." In view of these provisions, I think the assignment was void as to plaintiff, who was a creditor at the time of the assignment, and did not assent thereto; and therefore that it interposes no obstacle to the relief sought by this action, which is to have Bryant's property, in the hands of Wilhoit and Langford, applied to the satisfaction of plaintiff's judgment against Bryant. The assignment being void "against the creditors of the assignor who did not assent thereto, and against purchasers and incumbrancers in good faith and for value," (section 3465,) no preliminary suit by the plaintiff against the parties to it, to set it aside, was necessary. As against the parties to the assignment, at least, nothing more than plaintiff's election to disregard it was necessary.

Yet it is contended by counsel for respondents that the assignment has so far operated upon and affected the plaintiff as to prevent him from pursuing Bryant's property in the hands or under the control of Wilhoit and Langford, otherwise than by suit in equity to set it aside, on the ground that it is merely voidable, and that he is not at liberty to disregard it as being void as against him, although the statute declares it to be so; that the word "void" is often used in the sense of "voidable merely," and must have been used in that sense in the sections of the Civil Code above quoted, for the reason that an assignment for the benefit of creditors is valid as between the parties to it, though not recorded. The theory which seems to have led counsel for respondents to this conclusion is that an instrument or contract cannot, at the same time, be valid as between the parties to it and void as against third persons whose rights it purports or was intended to affect; and that it must have the intended effect upon such third persons, until they avoid it by procuring a decree of a court of equity setting the instrument aside so far as it affects them. Yet upon this theory the instrument would still be valid as between the parties to it, after having been nullified as to third persons, and would have its intended effect upon the parties, and also upon the subject-matter not taken to satisfy the decree in favor of third persons; and therefore would at the same time be valid between the parties, and void as to third persons whom it was intended to affect. It follows that the theory propounded is not sound, and that a contract may, at the same time, be binding upon one or all of the parties to it, and wholly void as others whom it was intended to bind or affect; and surely the legislature has the power to make it so. While it is true that the word "void" has been inappropriately used by lawyers and judges, it nevertheless has a determinate meaning in law when applied, as an adjective, to contracts, statutes, and other acts intended to effect some purpose or purposes; which meaning is that such contracts, statutes, or acts are totally ineffectual for the purposes, or for a part of the purposes, intended. If totally ineffectual for any purpose intended, they are simply void. If totally ineffectual as to only a part of such purposes, they are only relatively void. This distinction is not identical with that between void and voidable, since a voidable act or contract takes effect as intended, and continues to be effectual to all intents and purposes until it is set aside or nullified as to all or some part of the persons or things which were before affected by it. For example: The contracts of infants and contracts procured by fraud, if not otherwise against law or the policy of law, are not void, but only voidable, because they take effect when made, and remain effectual until avoided; whereas void acts, though in the form of contracts or statutes, never take any effect as such; and acts which are only relatively void are denied any effect, even temporary, against a part or class of the persons or things that they purport or were intended to bind or affect. As bearing directly and indirectly upon these distinctions, see Whart. Cont. § 28, and notes; and Pearsoll v. Chapin, 44 Pa. St. 13. Therefore, when the legislature has declared an act or instrument void, or relatively void, it must be understood to have used the word "void" in its primary and ordinary sense as above defined, unless it be made apparent by the context, or by some other statute in pari materia, that it was used in a different sense. But, as applied to assignments for the benefit of creditors in the Civil Code, I perceive nothing in the context, and find nothing in either of the Codes, indicating that the word was used by the legislature in any other than its ordinary sense.

But conceding, for the sake of argument merely, that the assignment in question is only voidable, and that the object of this action is to set it aside, as contended by respondents' counsel, still the action is not barred by either of the sections of the statute pleaded, unless the cause of action accrued more than three years before the commencement of the action. It is properly conceded that the action is a creditors' bill in equity to enforce the application of Bryant's property in the hands of and claimed by Wilhoit and Langford to the satisfaction of plaintiff's judgment against Bryant. That such an action is allowable in this state, notwithstanding the provisions of the Code of Civil Procedure for proceedings supplementary to execution, there never has been any question since the decision in the case of Swift v. Arents, 4 Cal. 390. And see Swinford v. Rogers, 23 Cal. 234; Reed v. Goldstein, 53 Cal. 296; Harmon v. Page, 62 Cal. 448. But it is essential to the cause of such an action that the plaintiff should have exhausted his remedy at law, otherwise a court of equity has no jurisdiction of the creditor's bill, (3 Pom. Eq. Jur. § 1415;) and the fact that an execution has been returned nulla bona is conclusive that the legal remedy has been exhausted, (Baines v. Babcock, 95 Cal. 591, 27 Pac. 674, and 30 Pac. 776; Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397.) In the last-cited case the court, by Mr. Justice Harlan, said: "We are of opinon that the complainant's cause of action should not be deemed to have accrued until the return of the execution." Page 117, 111 U. S., and page 400, 4 Sup. Ct. Plaintiff obtained judgment against Bryant June 2, 1890, on which execution was issued January 29, 1892, and returned nulla bona March 29, 1892. This action was commenced May 7, 1892, less than two months after the return of the execution, and less than two years after the rendition of the judgment. Since the judgment was a necessary condition precedent to the creditor's bill, it follows that the action was not barred by any statute of limitation.

It is further claimed by respondents that the depositing of the assignment with the recorder on the day of its date was a recordation thereof as required by law, though it has never been transcribed in any book of records in which the law requires deeds, grants, or transfers of real estate to be recorded, and only in a book in which miscellaneous instruments are recorded in supposed accordance with the twelfth subdivision of section 124 of the county government act, which book, however, is not expressly authorized, and for it no index is required to be kept. In support of this point, section 1170 of the Civil Code is cited, and solely relied upon, which reads as follows: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." Literally interpreted, without regard to other provisions of the Codes in pari materia, and without considering the various objects of recording different instruments, or the differing legal consequences of failing to record, this section would seem to make the depositing of any instrument with the recorder equivalent in effect to the actual recording of it in the appropriate book, though it should never be so recorded; and without such an interpretation it will not answer the purpose for which it is cited by respondent. Yet no case has been cited, and I have been able to find none, in which it has been held that the transcribing of an instrument in a different book from that in which the law requires it to be recorded effects the object of the law, or answers any lawful purpose; but there are many cases to the contrary. In the first place, it is to be observed that section 1170 does not state the effect of recording, nor of a failure to record, any kind of an instrument; such effect generally being declared in each distinct provision of the statute requiring a specific class of instruments to be recorded; but the effect is not uniform in all the classes. For instance, sections 1213 and 1214, Civ. Code, declare the effect of recording, and also of a failure to record, conveyances of real property, but the effect of a failure to record such conveyances is not commensurate with that of a failure to record an assignment of real property for the benefit of creditors; since the latter, without being recorded, is void, not only against subsequent purchasers and mortgagees without notice and for value, but also against nonconsenting creditors of the assignor, without regard to actual notice. Section 1213 declares that the effect of recording a conveyance of real property is as follows: "Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." By this section no effect is given to the mere filing of the deed for record until it is actually "recorded as prescribed by law," when the actual record is made to relate back to the date of filing with the recorder; and, since section 1213 is the only provision declaring the effect of recording a conveyance of real property, it cannot be said to be inconsistent with section 1170, which says nothing about the effect, but should be read as an addition to and qualification of section 1170; and a fair construction of the two sections, thus read, is that a conveyance is deemed to have been recorded when filed for record only by relation from the time when it was actually recorded. A statute of Missouri provided that every instrument "certified and recorded in the manner prescribed shall, from the time of filing the same with the recorder, impart notice," etc., and it was held under this statute that no notice was imparted until the instrument was actually placed on record, and then it related back to the date of filing for record; and that the statute must be so understood. Terrell v. Andrew Co., 44 Mo. 309. Mr. Webb, commenting on this case, says: "The greater weight of reason, if not of authority, seems to be in favor of this view of the law." Webb, Record Titles, §§ 16–18, and cases there cited. In Sawyer v. Adams, 8 Vt. 175, it was said: "There is but little doubt that 'recording' means the copying of the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor. This recording may and does take effect from the time the deed or instrument is delivered to the officer, if it is in due time placed upon the records. The delivery of the deed to the town clerk, or his minute on the same that he has received the same for record, is not recording; but the record, if completed, is considered as taking effect from that time." In that case the deed was recorded in an improper book, and the court further said: "The act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record." See, also, 2 Pom. Eq. Jur. §§ 653, 654; Flanagin v. Wetherill, 5 Whart. 280; Reigart's Appeal, 4 Pa. St. 477; Watson v. Bagaley, 12 Pa. St. 164; Wallace v. Wainwright, 87 Pa. St. 264; Rennie v. Bean, 24 Hun, 123; Dewey v. Littlejohn, 2 Ired. Eq. 495.

The precise point under consideration as to the effect of depositing an instrument for record seems not to have been directly decided in this state; but in Lawton v. Gordon, 37 Cal. 202, it was expressly assumed that the withdrawal of a deed from the recorder's office after filing suspends the effect of recording (constructive notice) during the time it is withdrawn, although it is afterwards returned and copied into the appropriate book without being refiled. Section 130 of the county government act requires the recorder to indorse upon an instrument the date of its reception, to record the same without delay in the order in which it was received, "and must note at the foot of the record the exact time of its reception." In Donald v. Beals, 57 Cal. 399, the facts were that a mortgage to plaintiff was deposited for record on April 15th, and properly indorsed as received for record on that day, but when he recorded it the recorder noted at the foot of the record that it was received for record on April 18th. Held, that the latter date, though inconsistent with the filing, and proved to be erroneous, must prevail over the true date indorsed on the mortgage. This decision, though indubitably correct, is inconsistent with the literal interpretation of section 1170, Civ. Code, contended for by respondents, since it shows that an instrument cannot be deemed to be recorded when deposited with the recorder until it is properly recorded "as prescribed by law." In other words, sections 1170 and 1213, Civ. Code, must be read and construed together. So, in Chamberlain v. Bell, 7 Cal. 293, a prior defective record of a prior deed was held to have imparted no notice to a subsequent purchaser. The defect in the record was the omission of the numbers by which the lots conveyed were described by mistake of the recorder. In the opinion the court cite as authorities, Frost v. Beekman, 1 Johns. Ch. 288, and Sanger v. Craigue, 10 Vt. 555. In Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47, cited by respondents, the instrument defectively recorded was a personal mortgage, of which it was said the defendant had actual notice, and the decision cannot properly be supported on any other ground than such actual notice; but, since actual notice to a nonconsenting creditor of an assignment for the benefit of creditors is immaterial, that case is not in point.

It is suggested that the defendants should not suffer for the negligence of the recorder without their fault. The recorder is "liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby," (County Government Act, § 133,) and the question is, which is the aggrieved party, whose sole remedy is by action against the recorder? Upon this question the cases are divided, but I think the weight of authority, including California cases, is opposed to the view of respondents, (Webb, Record Titles, § 18, and notes,) though Mr. Devlin, in his work on Deeds, (sections 683–696,) expresses a contrary opinion. Whether the party who deposits a deed for record is the aggrieved party whose remedy is against the recorder in case it is not properly recorded depends upon a solution of the question above considered and answered. If the mere deposit of his deed with the recorder by the grantee or assignee is to be deemed a recording, and to have the full legal effect of a record, though not afterwards actually recorded as required by law, then such grantee or assignee is not aggrieved by the negligence or fraud of the recorder; otherwise he is. As against subsequent purchasers and mortgagees, and as to nonconsenting creditors in cases of assignment for benefit of creditors, it is the duty of the grantee, not only to deposit his deed with the recorder, but to see that it is actually recorded in the proper book, as prescribed by law; and, if not so recorded, it has no effect whatever upon creditors of the assignor, nor upon subsequent purchasers or mortgagees in good faith, (Civ. Code, § 3465;) and, therefore, the non-consenting creditors are not aggrieved by the failure to record. As against them, an unrecorded grant or assignment for the benefit of creditors is void, and raises no equities even though they had actual notice of it. Dewey v. Littlejohn, 2 Ired. Eq. 495. And this is admitted by Mr. Devlin, as I understand him, to be a legitimate deduction from the authorities which hold that constructive notice of an instrument does not date from its deposit for record, unless afterwards duly recorded. Sections 683, 684. I think the judgment should be reversed, and the court below directed to overrule the demurrer.

We concur: **HAYNES, C.; SEARLS, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the lower court is directed to overrule the demurrer.

DUFFY v. WILHOIT. (No. 18,170.)[1] LITTLEHAL v. SAME. (No. 18,168.)[1] TULLY v. SAME. (No. 18,169.)[1]

(Supreme Court of California. Jan. 26, 1894.)

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Three separate actions in the nature of creditors' bills by Duffy, Littlehal, and Tully against R. E. Wilhoit, B. F. Langford, and M. E. Bryant. From judgments sustaining demurrers to the complaint, plaintiffs appeal. Reversed.

John B. Hall, for appellants. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

PER CURIAM. Upon the authority of Watkins v. Wilhoit, (No. 18,167; this day decided,) 35 Pac. 646, the judgments herein are reversed, and the court below is directed to overrule the demurrers.

(101 Cal. 216)

SAN DIEGO WATER CO. v. PACIFIC COAST STEAMSHIP CO. et al. (No. 19,200.)

(Supreme Court of California. Jan. 31, 1894.)

PRELIMINARY INJUNCTION—ACTION ON BOND—RECOVERY OF ATTORNEY'S FEES.

Where defendant recovered final judgment in an injunction suit, and thus dissolved a preliminary injunction which plaintiff had obtained by giving bond, defendant could not recover his attorney's fees in an action on the bond, since they were incurred in the suit, and not in an attempt to dissolve the preliminary injunction.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the San Diego Water Company against the Pacific Coast Steamship Company, principal, and A. R. Schulenberg and C. T. Chadwick, sureties, on a preliminary injunction bond. From a judgment for defendants, plaintiff appeals. Affirmed.

Works & Works, for appellant. Luce & McDonald, for respondents.

TEMPLE, C. This is an action upon an undertaking alleged to have been given in consideration of an injunction, in an action by the steamship company against the plaintiff, and upon which the individual defendants were sureties. It is denied that any injunction was ever issued in the suit alluded to, and the finding of the court sustains the denial. It appears, however, in the statement that an action was brought to obtain an injunction, and that, before the complaint was filed, the plaintiff obtained an order to show cause why an injunction pendente lite should not be issued. This order contained no restraining clause, but did require the plaintiff to give a bond to the defendant in the sum of $500. In pursuance of this order, the undertaking sued on was given, and recites that the plaintiff is about to commence an action, and to apply for an injunction, "as in the complaint filed in the said action is more particularly set forth and described." The order was made November 10th, and the undertaking approved on the same day. The next day another order to show cause was made, returnable at the same time that the first order was made returnable. This order contained a clause restraining the defendant "pending this order to show cause, and until the further order of this court." There was no appearance by either party at the time the order to show cause was returnable, nor was the motion for an injunction continued or kept alive in any mode. The restraining order, therefore, which is only authorized to be made pending the motion, fell with the motion. Code Civ. Proc. § 530; Hicks v. Michael, 15 Cal. 107. In the last case Judge Field says that an order dissolving such a restraining order is not necessary. It ends naturally with the motion. To that effect, also, is the reasoning in Webber v. Wilcox, 45 Cal. 302, and Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327, although this precise question was not involved in these cases. If the phrase, "and until the further order of this court," could have the effect to prolong the restraining order beyond the pendency of the motion for an injunction, then it would convert the order into a preliminary injunction, which could not be operative until a bond was given. But this order required no bond, and, by making the order to show cause, the court adjudged that a preliminary injunction should not be made until the defendant had been heard. The restraining order is a restraint, of the same nature as an injunction, but the statute not only does not designate it as an injunction, but discriminates between it and an injunction. It is a restraint, pending the conclusion of the court as to whether the party is entitled to a preliminary injunction. The statute does not expressly require an undertaking as a condition for a restraining order, although this court has said one ought to be required. Such undertaking is expressly required as a condition for a preliminary injunction, which does not become operative until the bond is given. But, in this case, there is no specific denial of the allegation in the complaint that the undertaking was given to secure the issuance of the injunction. It may be doubted, therefore, whether the questions above suggested can be raised. I proceed, therefore, to the main question discussed by counsel, which is whether, conceding that a preliminary injunction was issued, and the undertaking sued on was given in consideration of the injunction, plaintiff can recover his attorney's fees. It is admitted that no effort was ever made to dissolve the injunction, except that the case was tried on its merits, and the court, having found against the right of the plaintiff in the injunction suit, dissolved the preliminary injunction. Counsel were simply employed to try the case, and were paid for that service, and for no other. The cost was no greater than it would have been had no preliminary injunction been issued.

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[1] Rehearing granted.

Appellant's counsel concedes that, ordinarily, such damages cannot be recovered under such circumstances, but he contends that the rule is different where, as here, injunction is the only relief sought in the action, and where it appears that the same questions would arise on a motion to dissolve which are determined by the final judgment. He cites many very respectable authorities, which seem to sustain his contention, and it is, furthermore, indorsed by High, in his work on Injunctions, § 1686. High seems to think the weight of the authorities is to the effect that, if the counsel fees were necessarily incurred in procuring the removal of the illegal restraint, they may be recovered, although the dissolution of the injunction was by the final judgment. In Buford v. Packet Co., 3 Mo. App. 159, it is said: "The principle upon which counsel fees are allowed, upon dissolution of an injunction, does not rest upon a supposed increase of the trial expenses, created by the injunction. It is based upon the fact that defendant has been compelled to employ aid in getting rid of an unjust restriction, forced upon him by the act of the plaintiff." If the sureties could be held responsible, without reference to the terms of their contract, for a conspiracy to aid the plaintiff in the imposition of an illegal restraint upon the defendant, there would be some show of reason in such a rule, but, if the sureties are to be held only on their contract, the admission that the expenditures were not caused by the injunction is fatal to the argument. The sureties did not agree to pay the expense of getting rid of the restraint. Ordinarily, such expense would be caused by the injunction; but it is not always so, and is not when a preliminary injunction is ended by a final judgment for defendant. Here the expenditure was caused by the suit, and not by the injunction. The sureties are liable for expenditures caused by the injunction, and not for those caused by the suit. This whole matter was elaborately discussed in Thurston v. Haskell, 81 Me. 303, 17 Atl. 73, which was a case in all respects like the present. It was there held that counsel fees could not be recovered in such a case. But it is not true that, in any sense, the counsel fees were expended to get rid of the restraint imposed by the preliminary injunction. The fee was, of course, paid to prevent the permanent injunction. But, in such case, the defendant has not been relieved of the restraint imposed by the preliminary injunction. It was a restraint, in terms, during the pendency of the suit only. It continued unchanged during the whole of that period. Its purpose was to hold the defendant until the rights of the plaintiff could be determined. It did so, and then ceased by original limitation. The attorneys were not employed to get rid of it, and never attempted to do so. The defendant acquiesced, and submitted to all the restraint it assumed to impose. It is true we sometimes speak of making the preliminary injunction perpetual. But while the injunction, by the judgment, may be the same in scope and effect, it is a restraint imposed by a new and distinct command. It is a new injunction, which may be, and often is, different in its effect and terms. This was determined in Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327. But I think the question was practically decided by this court in Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833. Counsel distinguishes that case from the one in hand, on the ground that there injunction was not the sole relief sought. If the foregoing reasoning be correct, that is not a circumstance of any importance. But that case was upon a bond, given in an action brought to enjoin the defendant from violating an alleged patent right, claimed by the plaintiff, and to recover damage for infringing the right. The issue was as to the validity of the claim. Upon that depended the right to the injunction, and to the damage. Nothing else was tried. The claim having been adjudged invalid, the bill was dismissed, and the injunction fell with the claim. The issue would have been the same on a motion to dissolve. This court refused to allow counsel fees, and remarked that the allowance of counsel fees on injunction bonds is exceptional, "and should not be carried beyond the point to which former decisions have taken it." Former decisions have carried the doctrine to the extent that reasonable counsel fees, paid for the sole purpose of procuring a dissolution of an injunction, may be recovered. Unless this rule is to be extended, the contention of appellant on this point cannot be sustained. If this petition be correct, it is not necessary to consider other points raised. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

101 Cal. 224

GODFREY v. MONROE et al. (No. 19,217.)

(Supreme Court of California. Feb. 6, 1894.)

ATTACHMENT—MORTGAGED PROPERTY.

E. conveyed land to H., in trust to sell, and from the proceeds pay E.'s debt to L. Thereafter H. conveyed it to L. by deed absolute, an agreement between E., H., and L. being executed at the same time, reciting that the property was conveyed to secure payment of an indebtedness of E. to L., and providing that, when it was paid by a sale of the land, L. should deed to E. the balance of the land. While the title was in this condition, the land was attached in an action against E. Before judgment was recovered in the action, E. deeded the land to plaintiff and L. quitclaimed it to E. *Held*, that title under execution sale in the attachment suit related back to the time of the attachment, E.'s interest as mortgagor being subject to attachment.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Godfrey against Monroe and others. Judgment for defendants. Plaintiff appeals. Affirmed.

P. W. Dooner and E. H. Bentley, for appellant. Wells, Monroe & Lee, for respondents.

PATERSON, J. Action to quiet title. In September, 1886, Ellis, the owner of the land in controversy, by deed of trust conveyed the land to Edward A. Hall, authorizing the latter to sell the property in said deed described, and out of the proceeds pay the indebtedness due from Ellis to the Los Angeles Improvement Company. On December 30, 1886, Hall executed and delivered to said improvement company a deed, grant, bargain, and sale in form, but, as a part of the same transaction, an agreement was entered into between Ellis, party of the first part, Hall, party of the second part, and the Los Angeles Improvement Company, party of the third part, the terms of which state that the party of the first part, by and with the consent of his trustee, to secure payment of an indebtedness amounting to the sum of $11,865.55, evidenced by notes and orders, had caused to be conveyed to the third party the property described in the deed of trust of September 24, 1886. It was provided therein that as soon as said improvement company "shall have received their pay in full, as above stated, and shall be fully reimbursed for such payments as the said J. W. Ellis shall cause them to expend under his orders during the continuance of this contract, which sums shall be payable out of the receipts of the sale of said lands, then the Los Angeles Improvement Company shall deed to said J. W. Ellis the balance of the property remaining unsold." On April 25, 1887, the defendant J. P. Monroe, in an action against Ellis, caused an attachment to be levied upon the property in controversy. On September 29, 1887, Ellis conveyed the land to the plaintiff's grantor, and, on the day following, the Los Angeles Improvement Company executed and delivered to Ellis a quitclaim deed of the property. On October 12, 1887, the defendant Monroe recovered judgment against Ellis in the attachment suit, and a sale of the property upon execution followed in February, 1888.

It is claimed by appellant that the sale under the judgment recovered by the defendant against Ellis did not relate back to the time of the attachment, because, at the time said attachment was levied, the legal and equitable title of the property was in a trustee of Ellis; that an attachment can operate only upon the interest of a defendant at the time the attachment is levied, and not upon any interest he subsequently acquires in the property affected by it. Inasmuch, as under our Codes, any interest, legal or equitable, which a defendant has in lands is subject to attachment, (sections 688, 542, Code Civ. Proc.,) and notwithstanding the fact that every express trust in real property vests the whole estate in the trustees, subject only to the execution of the trust, the author thereof may prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust, it would seem that the contention of the appellant is unsound; but we do not deem it necessary to consider the question discussed in the briefs, as to whether, after the execution and delivery of a deed of trust, the grantor retains any attachable interest. The deed from Hall to the Los Angeles Improvement Company and the agreement accompanying the same, constituted a mortgage with a power of sale; the transaction was consummated by a deed with a separate defeasance, authorizing the improvement company to sell so much of the land as might be necessary to pay the amount of the loan, interest, and charges, and to reconvey to Ellis the property remaining unsold. This form of security is no longer looked upon with disfavor, and our statutes expressly authorize mortgages conferring the power of sale upon the mortgagee or other person. Civ. Code, § 2932. The power given is merely a cumulative remedy, and does not in any way affect the right to foreclosure in chancery. Cormerais v. Genella, 22 Cal. 116. If there be any doubt as to whether an instrument was intended as a mortgage or a deed of trust, such doubt should be resolved in favor of a mortgage with the power of sale. The intervention of a trustee is not always, but is generally, a serious inconvenience and expense. "The mortgagor is apt to suppose that in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee whose disinterestedness is no more than that of the creditor himself. * * * This form of security has come into very general use in several states, and in Virginia and West Virginia, in particular, has come into universal use in securing debts upon real estate." 2 Jones, Mortg. §§ 1725, 1764, 1769, 1770. The defendant's title under the sheriff's deed, we conclude, relates back to the time of the levy of the attachment.

We see no merit in the claim that the property attached on the 25th of April is not the same property that was conveyed to plaintiff on the 29th of September. The only variance between the descriptions in the attachment proceedings and in the deed is in the evidence as to the number or name of the block. The lots should have been described in the attachment proceedings as being in block D, instead of block 9; but upon reference to the map of Ellis' subdivision, which map was referred to in the conveyances, it appeared to the court that nobody could have been misled. All the lots referred to in the sheriff's description are on the map. There is no block on the map which is known as "Block 9." There are but two blocks on the map, namely, block T and block D. All the lots on the map in block T were levied on by the sheriff, and his return shows it. All that was left of the property, outside of block T, on the map, was in block D. All of the lots in controversy fronted on Belmont avenue. The court did not err, therefore, in holding that the description in the return was sufficient to notify a purchaser of the lots, and to enable the sheriff to identify the same. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

GOULD v. MONROE et al. (No. 19,218.)

(Supreme Court of California. Feb. 6, 1894.)

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Gould against Monroe and others. Judgment for defendants. Plaintiff appeals. Affirmed.

P. W. Dooner and E. H. Bentley, for appellant. Wells, Monroe & Lee, for respondents.

PER CURIAM. On the authority of Godfrey v. Monroe, (this day filed,) 35 Pac. 761, the judgment and order are affirmed.

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4 Cal. Unrep. 465

RASKIN v. ROBARTS et al. (No. 19,263.)

(Supreme Court of California. Jan. 31, 1894.)

EXECUTORS—ACCOUNTING—APPEAL—REVIEW OF FINDINGS.

1. An appeal from a decree, not taken within a year from its entry, will be dismissed.

2. Where an executor stated in his petition for the probate of the will that a part of the estate consisted of a sum of money in his hands, and he died without rendering an account, a finding that such sum came into his hands while acting as executor is justified.

3. Where there is no specification in the statement on motion for a new trial that a finding of fact is not justified by the evidence, and counsel do not make that point, the question whether it is justified cannot be considered on appeal from an order denying a new trial.

4. The question whether a conclusion of law is supported by the findings of facts cannot be considered on appeal from an order denying a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Charles Raskin, administrator with the will annexed of Jean Leonis, deceased, against John Robarts and another, executors of Miguel Leonis, deceased. From an interlocutory decree for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from decree dismissed. Affirmed on appeal from order denying new trial.

S. M. White, Brosseau & Thomas, and John Robarts, for appellants. Reymert & Orfila and Wells, Munroe & Lee, for respondent.

VANCLIEF, C. Jean Leonis, plaintiff's testator, died March 6, 1888, leaving his last will, by which he gave and bequeathed to his brother, Miguel Leonis, (defendant's testator,) all and singular, his property, "real, personal, and mixed, of whatsoever nature, and wheresoever the same may be, of which I may be the owner, or of which I may be possessed, or of which I may be entitled to perfect the title thereto, at my death," and nominated said Miguel as the executor of said will, to act as such without bond. On April 16, 1888, the will was admitted to probate in the superior court of Los Angeles county, and said Miguel duly appointed executor thereof, and thereupon Miguel qualified as executor, and continued to act as such until September 20, 1889, when he died testate; and the defendants were appointed executors of his will on October 11, 1889, and on October 24, 1889, first published notice to the creditors of the estate of Miguel, and the term of 10 months within which claims against the estate should have been presented expired on August 24, 1890. On September 3, 1890, the plaintiff, Charles Raskin, was appointed administrator with the will annexed of the estate of Jean Leonis, to fill the vacancy caused by the death of Miguel Leonis, which vacancy had continued from the death of Miguel (September 20, 1889) until September 3, 1890. On September 23, 1890, the plaintiff presented to the executors of Miguel's estate the claim upon which this action is based, which is as follows:

"March 19, 1888. Estate of Miguel Leonis, deceased, to Charles Raskin, Adm'r of the estate of Jean Leonis, deceased, debtor:

To recover the sum of two thousand dollars, United States gold coin, with interest, from March 19, 1888, to date, at the rate of 7 per cent. per annum......................	$2,350 00
Fifty head of cattle..............	1,000 00
	$3,350 00

"Said property having been intrusted to Miguel Leonis, deceased, by his brother, Jean Leonis, in his lifetime, and being part and parcel of the estate of Miguel Leonis, deceased."

This claim was rejected by the executors of Miguel on the day of its presentation, and thereafter this action was commenced.

The substance of the complaint, in addition to the facts above stated, is that the money and cattle described in the above claim came to the possession of Miguel Leonis, as executor of Jean Leonis, while he was acting as such, it being then the property of the estate of said Jean Leonis, and that he continued to hold the same in his possession, as such executor, in trust for the benefit of the estate of Jean Leonis, until his (Miguel's) death, and that neither Miguel nor his executors have accounted for or delivered said money and property, or any part thereof, to plaintiff, or to the probate court. The prayer of the complaint is that defendants be required to render an account of said money and cattle, and all other property of the estate of Jean Leonis which came into the possession of their testator, Miguel Leonis, and that plaintiff have judgment against them for the recovery of all such money and property as, upon such accounting, may be found to belong to the estate of Jean Leonis, deceased. The defendants, by their answer, deny all allegations of the complaint relating to the property of the estate of Jean Leonis, and, as a further and separate defense, aver that plaintiff's alleged cause of action is barred by section 1493 of the Code of Civil Procedure. On August 27, 1891, the cause was brought to trial, and the respective parties introduced evidence touching the issues; and the court made written findings in favor of plaintiff, upon which it based the following interlocutory decree: "Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that the said defendants, John Robarts and George L. Mesnager, executors of the last will and testament of Miguel Leonis, deceased, do, within twenty (20) days after the filing of this decree, render to this court in this action a full, just, and true account of the property received by the said Miguel Leonis in his lifetime, as executor of the estate of Jean Leonis, deceased, and particularly of the sum of two thousand dollars, ($2,000,) with interest thereon from the 19th day of March, 1888, at the rate of 7 per cent. per annum, received by the said Miguel Leonis as such executor of the estate of Jean Leonis, deceased, and that said defendants do, in said account, justly, fully, and truly account for all the dealings of the said Miguel Leonis, deceased, with the estate and property of the said Jean Leonis, deceased, including such items as may be claimed by the said defendants to have been paid out by the said Miguel Leonis, as such executor aforesaid, as expenses of administration, and for claims allowed and proven by creditors against the estate of the said Jean Leonis, deceased. It is further ordered, adjudged, and decreed that, when said account is filed as herein ordered and adjudged, that a day shall thereupon be set in this court for the hearing of the same, and that thereupon the said defendants shall fully, justly, and truly account to the said plaintiff for all of said property and matters aforesaid, and a settlement of said account be then had in this court, and that thereupon and thereafter a final decree shall be entered herein." The defendants have appealed from this interlocutory decree, and also from an order denying their motion for a new trial.

The appeal from the interlocutory decree should be dismissed; for, conceding that the decree was appealable, (which is, at least, questionable,) the appeal was not taken within a year after entry of the decree.

The appeal from the order denying a new trial was taken in time, but the only point made by appellants on this appeal is that the evidence is insufficient to justify that part of the sixth finding, "that there came to the possession of the said Miguel Leonis, as such executor aforesaid, and while he was acting as such," $2,000 in money, "bearing interest," which was then and there "the property of the estate of said Jean Leonis," and that said Miguel never rendered any account thereof to the probate court. But, waiving the question whether a motion for new trial was proper before final judgment, which has not been raised, (Harris v. Railroad Co., 41 Cal. 394,) I think this finding is justified by the evidence. In his petition for probate of the will, Miguel stated that a part of the estate left by Jean was $2,000, at interest, "in the hands of Miguel Leonis," and it appears that Miguel died without having rendered any account to the probate court.

The court found, as a conclusion of law, that the action "is not barred by the provisions of section 1493 of the Code of Civil Procedure." Conceding this to be a sufficient finding of the fact or facts constituting the alleged bar, notwithstanding it purports to be a conclusion of law, yet there is no specification in the statement on motion for new trial that it is not justified by the evidence, nor do counsel for appellant make the point that it is not sustained by the evidence. Therefore, the question whether it is justified as a finding of fact cannot be considered. Nor can the question whether it is supported, as a conclusion of law, by the findings of fact, be considered on the appeal from the order. Jenkins v. Frink, 30 Cal. 595; Mason v. Austin, 46 Cal. 386; Thompson v. Patterson, 54 Cal. 542; Roberts v. Eldred, 73 Cal. 398, 15 Pac. 16. And it has been held, even, that the error of rendering a judgment on an insufficient complaint cannot be corrected on appeal from an order denying a new trial. Heilbron v. Ditch Co., 76 Cal. 8, 17 Pac. 932; Shepard v. McNeil, 38 Cal. 74. I think the appeal from the interlocutory order should be dismissed, and that the order denying a new trial should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the appeal from the interlocutory order be dismissed, and the order denying a new trial be affirmed.

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4 Cal. Unrep. 469

SMITH v. ELLIS et al. (No. 19,294.)[1]

(Supreme Court of California. Feb. 6, 1894.)

FRAUDULENT CONVEYANCES—CONTRADICTORY EVIDENCE—APPEAL.

The mere fact that the parties to a conveyance contradict each other in some particulars, will not warrant a reversal of the trial court's finding that the conveyance was not fraudulent.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by W. A. Smith against M. E. Ellis and J. N. Ellis, Sr., to subject certain land to the payment of judgments. Judgment for defendants. Plaintiff appeals. Affirmed.

[1] Reversed in banc. See 37 Pac. 400, 103 Cal. 294.

J. T. Houx, for appellant. J. W. Ballard, for respondents.

SEARLS, C. This is an action on the part of a judgment creditor of J. N. Ellis, Sr., to set aside as fraudulent a deed of conveyance of certain land in the county of Orange, executed by said J. N. Ellis, Sr., May 22, 1890, to his daughter M. E. Ellis, and to satisfy plaintiff's judgments out of said land. The defendants had judgment, from which, and from an order denying a new trial, as well as from an order denying a motion of plaintiff to amend his statement on motion for a new trial by inserting therein specifications as to insufficiency of evidence, etc., plaintiff appeals. For the purpose of disposing of the appeal, I shall assume the motion to amend the specifications of the insufficiency of the evidence as having been in fact allowed by the court. The testimony in the case was mainly that of the two defendants, father and daughter, and the two brothers of the latter, and the only question of any importance is, was it sufficient to support the findings? This question can be answered in this wise: If true, it was amply sufficient. There is sufficient contradiction in the testimony of the two defendants to awaken some suspicion as to their truthfulness in my mind. These contradictions may, however, arise largely from ignorance on the part of the witnesses, from a failure to comprehend questions, from forgetfulness, etc., and a judgment formed from an examination of the record cannot, in the very nature of things, be as satisfactory as one based upon a hearing of the witnesses in open court with ample opportunity to not only hear what they say, but to observe their manner, intelligence, apparent honesty, etc. With all these superior opportunities the court below evidently placed faith in their integrity, and by its findings negatived all the charges of fraud. The findings are amply sufficient to support the judgment. I recommend that the judgment and orders appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

101 Cal. 250

CALIFORNIA LOAN & TRUST CO. v. HAMMELL. (No. 19,280.)

(Supreme Court of California. Feb. 6, 1894.)

MORTGAGES—PAYMENT—ASSIGNMENT.

When an agent holding for collection a note and mortgage to be delivered up when paid, with a release signed by his principal, assumes instead, on receiving payment, to assign them without recourse, no title in the mortgage passes to one with notice, who has agreed with the mortgagor to pay the debt, and taken other security for it.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by California Loan & Trust Company against James Hammell to foreclose a mortgage. Judgment for plaintiff. Defendant appeals. Reversed.

Guthrie & Guthrie, for appellant. Walter Bordwell, for respondent.

FITZGERALD, J. Action to foreclose a mortgage. Plaintiff had judgment, and defendant appeals. It appears that Cockens, who assumed to act as the agent of Robbins, the owner and holder of the note secured by the mortgage sought to be foreclosed in this action, in making the assignment thereof to plaintiff had no authority whatever to do so. The evidence shows that the note in question was delivered to him by Robbins for collection only, with directions that the mortgage, the release of which he had previously signed and acknowledged, should be delivered upon the payment of the note; that the note was thereafter presented by Cockens, after maturity, for payment, at the request of the maker, to one Avery, who thereupon paid the same for and at the request of plaintiff, in pursuance of an understanding to that effect between all parties. Cockens, however, instead of delivering the note and mortgage upon payment to him of the amount due thereon, as he had been directed by Robbins to do, and which was the limit of his authority, executed, as the pretended agent of Robbins, at the request of Avery, an assignment of the note without recourse to plaintiff. It further appears that Avery stated to Cockens at the time of the making of the assignment that they preferred taking an assignment of the note to paying it off and discharging the mortgage, as they wished to use it in a trade in which they were interested. Upon these facts, of which the plaintiff had due notice at and prior to the alleged assignment, it is clear that no title passed to it thereby. In addition to this, it is equally clear that the note was paid and the debt extinguished by the payment of the amount thereof as stated, which payment had theretofore been provided for and secured to plaintiff by the assignment to it for that purpose of the joint note and mortgage on other land executed by the maker of the note in question and his wife. Judgment and order reversed.

We concur: McFARLAND, J.; DE HAVEN, J.

101 Cal. 246

LA FETRA v. GLEASON et al. (No. 19,204.)

(Supreme Court of California. Feb. 6, 1894.)

ACTION TO FORECLOSE MORTGAGE—SUMMONS AND COMPLAINT—SERVICE ON NONRESIDENT SUBSEQUENT LIENOR.

In an action to foreclose a mortgage as to a nonresident, whose interest in the mortgaged property is subject to the mortgage, personal service out of the state on such nonresi dent is sufficient, under Code Civ. Proc. § 413, which provides for service by publication on such a nonresident defendant, and that "personal service of a copy of the summons and complaint out of the state is equivalent to publication."

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Tylee W. La Fetra against Nellie H. Gleason, Charles Ingles, and others to foreclose a mortgage. From a judgment for plaintiff, and an order refusing to set aside a default and allow him to answer, defendant Ingles appeals. Affirmed.

R. Dunnigan and E. H. Bentley, for appellant. S. C. Hubbell, for respondent.

McFARLAND, J. This action was brought to foreclose a mortgage executed by defendant Gleason to plaintiff upon certain land in California. The defendant Charles Ingles and a number of other persons were made parties defendant upon the general averment that they claim to have some interest in the mortgaged premises, which interest is averred to be subsequent and subject to the lien of said mortgage. Judgment by default was rendered against all of the defendants, and a decree of foreclosure entered in favor of plaintiff. Defendant Ingles appeals from the judgment. He also appeals from an order denying his motion to set aside his default, and to be allowed to answer.

The appeal from the judgment is based entirely upon the judgment roll, no facts aliunde the record being shown. Practically therefore, appellant is in the same position as one attacking a judgment collaterally; that is, he contends that the judgment roll does not show jurisdiction. The default of appellant was regularly entered, and the court found specially in the decree that he was duly served and made default. This finding (no facts appearing aliunde) is conclusive, unless there is something in some other part of the judgment roll which overcomes or contradicts it. Now, the only other thing in the record on the subject of service is an affidavit annexed to the returned summons, made by one J. L. Dawson, in which he swears that he is over 21 years old, not a party to the action, etc., and that he served the summons personally on appellant by giving him a copy thereof, together with a copy of the complaint, etc., on a certain day, in Clinton county, in the state of Missouri. Appellant contends that this affidavit shows a want of jurisdiction, but we do not think so. It must be borne in mind that the action, as against appellant, is not in personam, but a direct proceeding to reach and affect an interest of appellant in property within this state; in other words, the action is in the nature of a proceeding in rem. In the leading case of Pennoyer v. Neff, 95 U. S. 714, the supreme court of the United States holds that while the courts of a state cannot acquire jurisdiction to render a judgment in personam against a nonresident without personal service of process within the state, still they may, without such service, subject property of the nonresident found within the state to the satisfaction of claims of her citizens, and may enforce liens thereon in a direct proceeding instituted for that purpose, as by attachment, or by an action to enforce the lien of a mortgage. In such a case the procedure is against the property, and is, in its nature, in rem. In a proceeding strictly in rem personal service is not necessary; but a state may require that, in such a proceeding, notice or warning must be given, in a prescribed method, to persons claiming interests in the property; and in such event the method must be followed. In this state the statute provides that, in such a case, summons may be served on a nonresident by publication, in pursuance of an order of court based upon an affidavit; and it also provides that, "when publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication," etc. Code Civ. Proc. § 413. But the affidavit and order for publication are no part of the judgment roll (Estate of Newman, 75 Cal. 220, 16 Pac. 887;) and of course they would not appear in the record which appellant chose to bring here, and over which respondent had no control. Therefore, as there is nothing in the judgment roll inconsistent with the finding by the court of due service of summons, and as appellant shows nothing further on the subject, we will presume, in support of the judgment, that the finding was based upon service made in pursuance of the statute. The judgment must therefore be affirmed.

With respect to the appeal from the order refusing to grant the motion to set aside the default and allow appellant to answer, it would be sufficient to say that the bill of exceptions on the subject merely shows that such a motion was made and denied. There are some affidavits and other documentary matter printed in the latter part of the transcript, but they are not in the bill of exceptions, nor are they in any way identified or made part of the record. If, however, they could be considered, they show no reason for holding that the court abused its discretion in denying the motion. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

101 Cal. 252

McCARTNEY v. DENNISON et al. (No. 19,304.)

(Supreme Court of California. Feb. 6, 1894.)

DEED—DESCRIPTION—FORECLOSURE DECREE.

1. There is no objection in a deed to the phrase, "the south one-fourth," or "the south 10 acres," of a government subdivision.

2. A description in a foreclosure decree need not follow that of the complaint in terms, so it show the same land.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Nora McCartney against Lucius Dennison and others to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

E. C. Bower, for appellants. D. K. Trask, for respondent.

McFARLAND, J. This was an action to foreclose a mortgage, and defendants appeal from a judgment in favor of plaintiff. The appeal is taken upon the judgment roll alone, which shows merely the complaint, demurrer thereto, and the judgment. The only point made is that the description of the mortgaged premises in the decree is different from that set forth in the complaint. The description in the complaint, after giving the county and state, is as follows: "The south one-fourth (¼) of the east one-half (½) of the north one-half (½) of the northeast one-fourth (¼) of section 18" of a certain township and range, "containing ten (10) acres of land; also the six (6) acres of land having the same length east and west, being of uniform width north and south, and lying immediately south of and adjoining said first above described parcel; the whole parcel contained in both said descriptions being eighty rods in length from east to west, and thirty-two rods in width from north to south." The description in the decree is as follows: "The south 10 acres of the northeast quarter of the northeast quarter, and the north 6 acres of the southeast quarter of the northeast quarter, of section eighteen (18)" of the same township and range as stated in the complaint. These two descriptions describe exactly the same piece of land. The only plausible objection that can be made to the descriptions is that such terms as "south one-fourth" and "south 10 acres" are not usually applied, in United States government surveys, to legal subdivisions. Under that system, "quarter" is used to designate a square piece of land, as the "southeast" or the "northeast" quarter. But, while the description in question is not ordinarily used by the government in patents of land, there is no reason why it is not sufficient in conveyances between private persons. The south quarter of a piece of land bounded by parallel lines running north and south and east and west may be ascertained as well as the south half, which is used as a government subdivision. If the land, the south quarter of which is covered by the mortgage, had been a city lot, or some other tract of land that had never been known as a government legal subdivision, we apprehend that no one would have questioned the sufficiency of the description; but the fact that the whole piece of which the south quarter is conveyed happens to have been a government subdivision can make no difference. The description is clearly not void for uncertainty. Appellant's assertion that "the description in the decree should follow the complaint" means only that the land described in the decree should be the same as that described in the complaint. Judgment affirmed.

We concur: DE HAVEN, J; FITZGERALD, J.

101 Cal. 254

FREEMAN v. KIEFER.

KIEFER v. FREEMAN et al. (No. 19,259.)

(Supreme Court of California. Feb. 6, 1894.)

EQUITY — RESCISSION OF CONTRACT — FRAUD OF AGENT — LIABILITY OF PRINCIPAL — PARTIES — COSTS.

1. A land company, as plaintiff's agent, induced defendant by fraud to contract to purchase land, and then assigned the contract to plaintiff, who accepted the benefit thereof. *Held*, that plaintiff was, on rescission, liable to refund all money which he had received from defendant under the contract.

2. Defendant, in rescinding such contract, properly offered to convey all his title in the land under the contract to plaintiff, who was the legal holder of the contract, and for whose benefit it was made.

3. The land company was a proper, though not a necessary, party to defendant's action to rescind the contract.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Freeman against Kiefer on a contract for the sale of land, and cross action by Kiefer against Freeman and the Centinela-Inglewood Land Company to rescind the contract. From a judgment for Kiefer, the company and Freeman appeal. Affirmed.

Geo. I. Cochran, Henry Bleeker, and A. M. Stephens, for appellants. J. L. Murphey, for respondent.

PER CURIAM. The pleadings and findings in this case are voluminous, and we do not deem it necessary to make any particular statement of the matters alleged and found. In our opinion the findings are sufficient to sustain the judgment. While there was some delay on the part of the defendant in rescinding the contract made by her with the Centinela-Inglewood Land Company, we cannot say the delay was unreasonable, and such as to deprive her of the right of rescission under the circumstances shown by the findings; nor can the efforts or willingness on her part to effect a settlement of the controversy between her and the plaintiff growing out of the contract be considered as a waiver of her right to now insist upon its rescission. The Centinela-Inglewood Land Company was simply the agent of the plaintiff in making the contract with defendant for the sale of the land; and the plaintiff, having accepted the benefit of the contract, as well as an assignment thereof from his agent, is equally responsible with the agent for any fraudulent representations which induced it, and is liable to refund to defendant the money which she has paid under the contract, and which has come into the hands of the plaintiff. The plaintiff being the legal holder of the contract made by defendant with the Centinela-Inglewood Land Company, as well as the party for whose benefit it was made, the defendant properly offered to convey to him all her right, title, and interest in the land described, and vesting in her by that contract. The Centinela-Inglewood Land Company was a proper, although not a necessary, party to this action, and the court did not err in giving judgment against it for costs. Judgment and order affirmed.

(103 Cal. 287)

MERRILL v. MERRILL. (No. 19,223.)[1]

(Supreme Court of California. Jan. 26, 1894.)

Vendor and Purchaser — Rescission by Vendor—Lien of Vendee for Purchase Money.

The vendor of land placed the deed in escrow under a condition that, in case of the vendee's default in making payments, the sums paid should be forfeited, and the deed delivered to the vendor. The vendee defaulted, and the vendor obtained the deed. *Held* that, where the vendee recovered judgment in an action for the purchase money paid, she was not entitled to a lien on the land, under Civ. Code, § 3050, which provides that one who pays to the owner any part of the price of land, under a contract of sale, has a special lien on it, independent of possession, for such part as he may be entitled to recover back "in case of failure of consideration."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Mattie H. Merrill against F. H. Merrill to recover money paid under a contract for the purchase of land, in which there was a judgment for plaintiff. From a refusal of the court to allow her a lien on the land, plaintiff appeals. Affirmed.

John D. Pope, for appellant. R. Duningan, J. M. Voss, and W. H. Henning, for respondent.

TEMPLE, C. This is an appeal upon the judgment roll, in which the plaintiff contends that she was not awarded all the relief to which she is entitled upon the pleadings and findings. It is the second appeal in the case. The first appeal was from a judgment on demurrer, and is reported 95 Cal. 334, 30 Pac. 542, where the nature of the contract upon which action is based is fully shown. Plaintiff recovered judgment for the money she had paid upon the contract of purchase, but was not allowed a vendor's lien upon the land. She now insists that the pleadings and findings, taken together, show that she is entitled to such lien, and she asks that the judgment be corrected or modified in accordance with her claim. In pursuance of the contract of purchase, the defendant, who is the vendor, executed a deed, which was placed in escrow, under the condition that, "in case of default in the payment of the sums of money as herein named, * * * then said sums of money are to be considered forfeited," and the deed was to be delivered to the vendor. After paying $3,000, plaintiff made default in the payment of an installment, and thereupon the vendor demanded and obtained the deed, and denied the right of plaintiff to purchase. Apparently the court denied the lien on the ground that the rescission was claimed by defendant because of the default of plaintiff.

Plaintiff relies upon section 3050, Civ. Code, which reads as follows: "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration." She claims that when defendant withdrew the escrow deed, and denied her right to a conveyance, he thereby rescinded the contract, and that such rescission was a failure of the consideration; therefore she is entitled to the lien under the statute. For the proposition that it is a failure of consideration she relies upon the case of Glassell v. Coleman, 94 Cal. 261, 29 Pac. 508. In that case the court said: "Upon the election by the plaintiff to rescind the contract by claiming a forfeiture by Wilson of all his rights under the contract, the contract itself, and each of its provisions or terms ceased to be a subsisting or enforceable obligation against Wilson. The only right of action against him then remaining to the plaintiff was for damages for his breach of the contract. The plaintiff could not have a right of action on the contract and at the same time one for its breach. An action for damages for the breach of a contract necessarily implies that the contract has been terminated, * * * and the forfeiture of his right to the land wrought an entire failure of the consideration for his promise to pay for the land." This language must be taken in connection with the facts of the case under consideration. In that case the vendor had notified the vendee that he had forfeited all rights under the contract. The vendor had also brought an action to recover $50,000 damages for the breach of the contract on the part of Wilson. Practically, the case before the court was one to compel Wilson to pay further installments of the purchase money after this forfeiture. It was said that plaintiff could not recover his damage and the purchase money also. When he availed himself of his privilege of forfeiting the rights of the purchaser under the contract there was no consideration to support the promise to pay, and it could not be enforced. It is true, when one sues to recover damages for a complete failure to perform a covenant, he thereby waives performance of that covenant; for he has elected to take damages in lieu of performance, but I doubt whether it be correct to say that by bringing such action he rescinds the contract. Certainly it is not such a rescission as extinguishes the obligation. On the contrary, as said in Wainwright v. Weske, 82 Cal. 193, 23 Pac. 12, by such action he affirms the contract, and bases his right upon it. His recovery may be quite another thing from what he would be entitled to if he elected to rescind; and then he is not compelled to place the other party in statu quo, and his suit does not authorize the adverse party to recover everything of value paid by him. Often a party cannot rescind, but is remitted to his action for damages, because he cannot restore the other party to the condition he would have been in but for the contract. And, again, damages are often stipulated for in a contract, and may be recovered according to its terms. Bishop on Contracts states this doctrine very briefly: "Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, the party, either in words or by their equivalent in acts, declines to take it, or is unable, while the other is ready and willing to do his part, the latter may rescind the contract; or, if he chooses, he can sue for the breach. He cannot do both." Bish. Cont. § 827. And again, section 842: "After a contract has been broken, whether by an inability to perform it, by a rescinding against right, or otherwise, the party not in fault may sue the other for the damages suffered; or, if the parties can be placed in statu quo, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The pursuing of the latter alternative is called 'rescission.'" It will be seen that, when a breach of the contract has occurred, the party is often put to his election whether he will rescind or sue for damages; and sometimes he cannot rescind, but must sue for damages, because he cannot place the other party in statu quo. Now, both of these courses would so far end the contract that the party suing can no longer insist upon a performance of that covenant for the breach of which he has claimed damages. Both cannot properly be called "rescission;" or, if they can, it must follow that rescission, effected by suing to recover damages for a breach, does not require that the parties shall be placed in statu quo, or authorize a recovery, by the party in the wrong, of money paid.

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[1] Rehearing granted.

Plaintiff (appellant here) contends that when defendant withdrew the escrow deed, and denied the rights of plaintiff under the contract, he, by his own act, rescinded the contract, and caused a failure of consideration. I do not understand this to be the effect of a rescission of a contract when the rescission extinguishes the obligation. The consideration of the contract has not failed; the contract has simply ceased to exist. Conceding a subsisting contract, and the consideration is ample. Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. In some of the cases the contract provided that the vendor might rescind upon default of the vendee. In such cases the rescission is by consent of the parties. In others it seems to be held that when the vendor refuses further performance, and claims the damages according to the contract, he abandons the contract, and thereupon the vendee may also abandon it, and reclaim his money. Whether the conclusion be correct or not is not a question here. Unless the rescission is by consent, it is difficult to understand how it has been brought about; for, as respondent justly says, it is, in effect, enacted in section 1691, Civ. Code, that rescission cannot be otherwise effected without a compliance with that section. The idea must be that the abandonment of the contract by the vendor is equivalent to a claim of rescission on his part which may be acquiesced in by the vendee. In Cleary v. Folger, 24 Pac. 280, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not here held that when a vendor refuses to complete performance because of a breach on the part of the vendor, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission. It has been said in several cases that this doctrine was announced in Drew v. Pedlar, 87 Cal. 449, 25 Pac. 749. Perhaps it does so hold, but such conclusion seems to be based in that case partly upon the pleadings, in which both parties recognized the fact of a rescission. In other words, it was a rescission by mutual consent. Phelps v. Brown, 95 Cal. 572, 30 Pac. 774, was a suit against a broker who held money deposited by a vendee as a forfeit. It was held that, the parties having rescinded the contract, the broker could not hold the money. There was an actual rescission in that case, and no question was raised which required a discussion showing how a rescission was brought about.

Appellant's judgment is based upon the proposition that the contract had been extinguished by rescission. That could only have been accomplished with her consent, or because of her wrongful act. There was no claim that the consideration had failed, or that a rescission had been had or was sought upon that ground. This cannot be the failure of consideration contemplated in Civ. Code, § 3050. That was intended to secure a party from injury through the wrong or inability to perform of the other party. If the vendee did do himself the injury, he is not injured in the eye of the law. He cannot acquire an equity based upon his own wrong. The Civil Code, in general, was intended to announce rules of law already declared by the courts. This presumption is not of such force as to control the language of the statute, but in all cases of doubt that construction should be preferred which accords with known rules. In equity a vendee had a lien when in possession under a contract if the consideration failed. It was the counterpart of the lien given to the vendor, and the rule in equity is that no such lien exists in favor of one who is in default. One who has himself abandoned the contract, or has refused to perform it according to its terms, is not afforded a lien to secure him from loss because of his own breach of the contract. 3 Pom. Eq. Jur. § 1260, and note. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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101 Cal. 223

SYMONS v. BUNNELL et al. (No. 18,178.)

(Supreme Court of California. Jan. 31, 1894.)

APPEAL—ORDERS.

1. An order striking a statement on motion for new trial is a special order after judgment, within the provision requiring appeals therefrom within 60 days from date.

2. No appeal lies from an order refusing to vacate an appealable order.

Department 2. Appeal from superior court, Tuolumne county; Joseph H. Budd, Judge.

Action by William Symons against E. F. Bunnell and others. From three orders, defendants appeal. Two appeals dismissed. One order affirmed.

Moses G. Cobb and J. B. Curtain, for appellants. F. D. Nicol, for respondent.

DE HAVEN, J. The order of September 16, 1891, striking the appellants' statement on motion for a new trial from the files, is a special order made after judgment, and the appeal therefrom, not having been taken within 60 days from its date, must be dismissed. Sutton v. Symons, 97 Cal. 475, 32 Pac. 588. The order referred to being itself an appealable order, (Calderwood v. Peyser, 42 Cal. 113; Clark v. Crane, 57 Cal. 633,) no appeal lies from the order refusing to vacate it, and the appeal from this latter order must also be dismissed. In the absence of the statement, the motion for a new trial was properly denied. Sutton v. Symons, 32 Pac. 588. Order denying the motion for a new trial affirmed. The appeals from the order of September 16, 1891, striking the statement from the files, and from the order refusing to vacate the same, are dismissed.

We concur: McFARLAND, J.; FITZGERALD, J.

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101 Cal. 242

GALLAGHER v. MONTECITO VAL. WATER CO. (No. 19,311.)

(Supreme Court of California. Feb. 6, 1894.)

WATERS AND WATER COURSES—RIGHT TO DIVERT WATER—TITLE BY PRESCRIPTION—CHANGING USE.

1. Where defendant and its predecessors in title diverted the waters of a stream on which plaintiff's land bordered, at a point thereon above plaintiff's land, and for more than five years prior to plaintiff's action to restrain its diversion used the same openly, and adversely to plaintiff and all others, it must be deemed to have acquired a prescriptive right to continue the diversion complained of.

2. The fact that defendant changed the point of diversion, and applied the waters to a use different from that for which they were diverted by its predecessor, furnishes no ground for complaint to plaintiff, if his rights are not injured thereby.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Gallagher against the Montecito Valley Water Company. There was judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Stratton, for appellant. R. B. Canfield and Richards & Carrier, for respondent.

DE HAVEN, J. The plaintiff is an owner of land bordering on the Cold Spring branch of Montecito creek, and this action was brought for the purpose of restraining the defendant from diverting the waters of said stream. The defendant is a corporation organized under the laws of this state for the purpose of supplying water to the inhabitants of a portion of Santa Barbara county, and in its answer alleged that prior to January 14, 1888, John Coe and John W. Coe had acquired a prescriptive right to divert the waters of the Cold Spring branch of Montecito creek to the extent of defendant's diversion, and were then in the enjoyment of that right, and that on that day the defendant recovered a judgment against said John and John W. Coe, condemning their rights in said water; and for a separate defense the defendant alleged that plaintiff's right of action was barred by section 318 of the Code of Civil Procedure. The case was tried by the court, and judgment rendered for the defendant; and from this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

The superior court found that the defendant, on January 14, 1888, recovered against John and John W. Coe the judgment of condemnation alleged in the answer, and "that for a period of more than five years before said 14th day of January, 1888, the said John Coe diverted to his own use, for beneficial purposes, from said stream, and used and enjoyed for beneficial purposes the waters thereof, to an amount greater than the quantity diverted by defendant as aforesaid, under claim of right and title, continuously, openly, notoriously, peaceably, uninterruptedly, and adversely to the plaintiff and to all other persons, and with the knowledge and acquiescence of plaintiff and his predecessors in interest; that a portion of the water so diverted and used by said John Coe was diverted and used upon land bordering on said Cold Spring branch." The court further found that such diversion was continued by the defendant after the judgment condemning the right of the Coes in and to the waters diverted, and that "the defendant and its predecessors in title aforesaid have diverted to their own use from said stream, for beneficial purposes, the water so condemned, as aforesaid, to the extent of the capacity of the box and pipes alleged in the complaint to have been used by defendant for diverting said water, and have used and enjoyed the same for beneficial purposes, continuously, openly, notoriously, uninterruptedly, peaceably, and adversely to the plaintiff and to all other persons, for the period of more than five years next before the commencement of this action." The court also found "that the plaintiff's cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of this state."

It is claimed by plaintiff that these findings are not sufficient to show that defendant has acquired a prescriptive right to continue the diversion complained of. It seems to us, however, that the particular findings above quoted, to say nothing of the general finding to the effect that plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure, are alone sufficient to show a good prescriptive title in defendant to the water in controversy, under the law as declared by this court in Davis v. Gale, 32 Cal. 27; Water Co. v. Crary, 25 Cal. 504; Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. It is urged by plaintiff that as Coe was a riparian owner, and the diversion was made upon riparian land, and the water diverted used upon such land, and the court having also found "that a portion of the waters of said Cold Spring branch of Montecito creek was used by plaintiff and his predecessors in title, for lawful purposes, for a period of more than ten years next before the time of the diversion mentioned in the amended complaint, and also since said diversions were made," the findings, when taken together, do not show such an invasion of the rights of plaintiff as would have entitled him to maintain an action therefor because of such diversion and use of the water by Coe, as plaintiff may at all times have had sufficient water flowing by his land for the proper use and enjoyment thereof; and the cases of Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 186,—are cited to sustain this contention. These cases are not in point. In the first one cited, the defendant's ditch was above that of plaintiff, and the court held that a finding to the effect that plaintiff had diverted the water from the stream for more than five years prior to the commencement of the action, adversely to the whole world, the water so diverted being sufficient to fill the ditch of plaintiff "whenever there was water in the stream to fill it," could not, in the nature of things, show a diversion adversely to the defendant, as no right of his could possibly have been affected by such acts of the plaintiff, while in the case at bar defendant's diversion was at a point on the stream above the land of plaintiff. In the case of Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, the court simply held that the diversion of water by one riparian owner for use upon riparian land could not be adverse to the rights of a lower proprietor along the stream, so long as there was left flowing in the stream an abundance of water to supply the present and prospective riparian wants and uses of the lower proprietor; but the facts as found by the court here do not bring this case within the rule there declared. The special finding above quoted, and upon which plaintiff relies, is not inconsistent with an adverse user of the water of the stream by defendant and its predecessors, and certainly is not so when it is read in connection with the special findings that Coe, the predecessor of defendant, had become entitled "by prescriptive use and enjoyment of a portion of the waters of the Cold Spring branch of Montecito creek, exceeding in quantity and amount the quantity of said waters diverted by defendant," "and that defendant has not at any time taken or diverted any of the waters of said stream in excess of the quantity so condemned to its use." The special findings do not show that defendant's present diversion and user of the waters in controversy are any more injurious to the riparian rights of plaintiff and other lower proprietors than when the diversion was commenced. On the contrary, it is clear that, as no more water is diverted now than at the commencement, if the present diversion is an infringement upon the equal right of plaintiff to the enjoyment of the water naturally flowing in the stream, it has always been so; and as the diversion was exercised under a claim of right, and in open hostility to the plaintiff, it has ripened into a prescriptive title.

The further point is made that the evidence does not support the findings, but we think the evidence is such that we would not be warranted in reversing the judgment upon this ground. It is shown that defendant has changed the point of diversion, and applied the waters to a use different from that for which they were diverted by its predecessor; but, as the rights of plaintiff do not seem to be injuriously affected by such change, he has no cause for complaint. It seems to be settled that one entitled to the use of water "may change the place of diversion, or the place where it is used, or the use to which it was first applied, if others are not injured by such change." Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41, and cases there cited. We discover no error for which the judgment should be reversed. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

101 Cal. 238

BANNING v. MARLEAU. (No. 19,207.)

(Supreme Court of California. Feb. 6, 1894.)

REPLEVIN—ANSWER—FINDINGS—VALIDITY OF SALE.

1. Under Code Civ. Proc. §§ 627, 667, providing for a judgment for the return of the property or its value if it be in plaintiff's possession, and defendant, in his answer, claim a return thereof, such judgment cannot stand where the answer fails to make the appropriate demand.

2. Plaintiff showed a written bill of sale (such as, under Civ. Code, §§ 1053–1057, vests title on delivery) of the property from H. to her, of date long before defendant's seizure. The court found that, at the date of such seizure, plaintiff was not the owner and entitled to possession; that defendant did not wrongfully come into possession of and detain the property; that H. was the owner and in possession of it, and defendant, a constable, seized it under certain attachments against H. *Held* bad, as not determining whether plaintiff was in no sense the owner, or whether H.'s sale to her, for want of change of possession, (Id. § 3340,) was void as against his creditors, or, if the latter, that the attachment plaintiffs were his creditors, within the protection of said section.

3. On the question whether a change of possession of an interest in cattle is good as against the seller's creditors, (Civ. Code, § 3340,) the fact must be considered that the buyer was the owner and in possession of the land where the cattle always grazed, and where some of them had been bred.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Replevin by Mary H. Banning against W. F. Marleau. Judgment for defendant. Plaintiff appeals. Reversed.

W. S. Wright, for appellant. Dupuy & Dunnigan, for respondent.

McFARLAND, J. This is an action to recover certain personal property, or its value. Judgment went for defendant, and plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions. The court found that "the plaintiff is now in possession of said above-described property;" and the entire judgment is that "the defendant, W. F. Marleau, to have and recover of and from Mary H. Banning, the plaintiff herein, the following personal property, viz. [describing it,] and that said property be returned by plaintiff to defendant, or the value thereof, being the sum of six hundred dollars, in case a return cannot be had, be paid by plaintiff to defendant, together with costs and disbursements." But there is no prayer, claim, or demand of any kind in the answer for a return of the property or its value; and, this being so, the judgment for its return cannot stand. Code Civ. Proc. §§ 627, 667; Gould v. Scannell, 13 Cal. 431; Pico v. Pico, 56 Cal. 459. It cannot be reasonably expected that, for the purposes of this case, we should ignore the statute, and overrule former decisions. We might, no doubt, remand the cause, with directions to change the judgment into one which would simply give costs to defendant; but, as we are not entirely satisfied with the case in other respects, we think that the ends of justice require a new trial.

Plaintiff claims ownership of the property sued for, consisting mostly of certain live stock on a ranch; and defendant, a constable, took it as the property of one Hannon, under two writs of attachment issued by a justice of the peace. The findings on the main issues are merely "that on the 30th of November, 1891, in Los Angeles county, Cal., the plaintiff was not, nor has she at any time since said date been, the owner of and entitled to the possession of the property described in the complaint; that the defendant herein, on said date, in Los Angeles county, did not wrongfully come into possession of said property," and does not wrongfully detain the same; and "that on the 30th day of November, 1891, Joseph Hannon was the owner and in possession of the property above described, and on said date the defendant, a constable in said county, seized said property by virtue of two writs of attachment against said Hannon, one in favor of W. H. Harbell, the other in favor of P. J. Hardy, aggregating the sum of $579, which writs were duly issued by W. A. Gaines, a justice of the peace of said county." These findings are not specific enough to show upon what theory the case was decided; that is, whether it was upon the theory that plaintiff was not the owner of the property in any sense, or upon the theory that a sale of said property by Hannon to plaintiff was void as against creditors, for want of delivery and an immediate and continued change of possession, under section 3440, Civ. Code. If the findings mean that, as between plaintiff and Hannon, the latter was, and the former was not, the owner of the property at the time of the attachment, then they are not supported by the evidence; for it clearly appears that Hannon before that time had sold whatever interest he had in the property to plaintiff, and had given her a written transfer of the same, which passed the title. Civ. Code, §§ 1053-1057. If, on the other hand, it was meant that the sale was not followed by such possession as would make it valid as against creditors of Hannon, then it should have been found that the parties attaching were such creditors; and it was not sufficient to merely find that the property was seized under certain writs of attachment. Sexey v. Adkinson, 34 Cal. 346. On another trial the findings on these points can be made fuller and clearer.

The main question in the case seems to be whether there was a sufficient change of possession of the property from Hannon to plaintiff. The property consisted mostly of live stock on a ranch owned at one time by plaintiff and Hannon jointly, but owned exclusively by plaintiff for some years prior to the attachments. As to some of this property there is a conflict of evidence as to whether Hannon ever owned any interest in it, and as to the balance there is a conflict as to whether he ever owned anything more than an undivided interest therein. Whatever interest he had in any or all of it he had sold and transferred to plaintiff, by a written instrument, long before the attachment. He had acted for plaintiff at various times as a sort of general superintendent of the ranch; and, at the time of the attachment, had a cropping contract, which included part of the land. Plaintiff had other stock on the ranch belonging to her alone. In determining, therefore, whether there was a sufficient delivery and change of possession from Hannon to plaintiff of whatever interest he had in the property attached, due importance should be given to the fact that plaintiff was the owner and in possession (if such was the fact) of the land on which the stock always grazed, and on which some of it was bred and raised. Morgan v. Miller, 62 Cal. 492; Hogan v. Cowell, 73 Cal. 211, 14 Pac. 780. Defendant should be allowed to amend his answer so as to ask therein for a return of the property. The judgment is reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

YOUNG v. TRIERWEILER. (No. 19,373.)

(Supreme Court of California. Jan. 31, 1894.)

Department 2. Appeal from superior court, Los Angeles county.

Action by Peter Young against Adam Trierweiler. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

J. Marion Brooks and Moyle G. Norton, for appellant. Hughes & Garrison, for respondent.

PER CURIAM. Respondent moves the court to dismiss the appeal, and also to impose damages for delay, etc. The appeal is dismissed, but without damages.

SCHMIDT et al. v. McEWEN et al. (No. 15,131.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against McEwen and others to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The larger label used by the defendants in this case is very much like the one used by the defendants in the Brieg Case, (Cal.) 35 Pac. 623. It is oval in form, and in that respect more closely resembles the plaintiff's label. The neck label is crescent in form, with letters of unequal length, but bears no marginal lines like those found in the plaintiff's neck label. Taken as a whole, it is at least as close an imitation of the plaintiff's label as the Brieg label is; and, the evidence in other respects being the same, the order should be affirmed. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. STEINKE et al. (No. 15,133.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Steinke and others to recover damages for infringement of a trade-mark, and to obtain an injunction, from a decree for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The labels used by the defendants in this case are precisely the same in shape and size as those used by the plaintiffs. The word "Sarsaparilla" covers the same space in the margin of the upper portion of the label, and in the same type as in the plaintiffs' label. In the margin of the lower portion of the label are the words "and Iron Phosphates," the same space in the plaintiffs' being occupied by the words "and Iron Water." In place of the trademark in the upper portion of the label, defendants inserted in their label a monogram occupying about the same space, with the letter "s" in the center, making the monogram resemble somewhat the trade-mark of the plaintiffs, the chief feature of which is the letter "s." Two parallel lines cross the center of the label, with the words "Steinke Bros." where the plaintiffs' label shows the words "Schmidt & Co." In the lower portion of the large label, and above the inner marginal line, are the words: "San Francisco. A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases." In the same place on the plaintiffs' label are the words "Stockton, Cal. A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases." Beneath the words in each label is a fancy flourish, almost identical in form. The two labels are practically the same, except in color. The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (No. 15,132, this day filed,) 35 Pac. 623. As so modified, the judgment will stand affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. CRYSTAL SODA-WATER CO. (No. 15,134.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against the Crystal Soda-Water Co. to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellant. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The labels of the defendant are the same in size, form, and design as those used by the plaintiffs. The neck label is somewhat different from those noticed in the other cases. It bears the words "Trade Mark," in letters of unequal length, according to the position they occupy on the crescent-shaped label, with a triangle in the center of the label between the two words, inclosing a scroll and the letters "C. S. W. Co." The plaintiffs' neck label has upon it the word "Universal," in letters of unequal length, according to their position on the paper; and the trade-mark occupies about the same space as the triangle of the defendant in the center of the label, between the letters "e" and "r" in the word "Universal." The case is in all material respects like the Brieg Case, (this day filed,) 35 Pac. 623. In all of these cases the complaint is the same. Appellant contends that the demurrers ought to have been sustained, because it is not alleged that the plaintiffs ever acquired any trade-mark or exclusive right to the use of the wards "Sarsaparilla and Iron," or that defendant ever adopted or used any imitation of plaintiffs' alleged trade-mark. It is claimed, also, that the complaint is ambiguous in certain respects. We deem it sufficient to say, upon this question, that the facts stated in the complaint are substantially those we have set forth in our opinion in the Brieg Case, and, upon the views therein expressed, the demurrer was properly overruled. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (No. 15,132; this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. HAAKE et al. (No. 15,135.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Haake and others to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. This action is in its nature and the facts found similar to the Brieg Case, (No. 15,132, this day filed,) 35 Pac. 623. The defendants' label in this case differs from the label in the Brieg Case, chiefly in the matter of color. Like the plaintiffs' label, the larger label is oval in form, and the smaller or neck label a crescent, with letters of unequal length. There are the same parallel and prominent lines in the border. Instead of a monogram like those in the other cases, there is a small picture, occupying about the same space as the plaintiffs' trade-mark, and upon the inside of the label are written the usual words, "A great blood purifier and pleasant tonic." The findings of the court are supported by the evidence, and the order should be affirmed. The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in Schmidt v. Brieg, (No. 15,132, this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. LIBERTY SODA-WORKS CO. (No. 15,163.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against the Liberty Soda-Works Company to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellant. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The label of the defendant in this case is the same in size, form, and general design as the plaintiffs'. It differs from the plaintiffs' in general appearance, chiefly in color; and that, as we stated in the Brieg Case, 35 Pac. 623, is not controlling. Unlike all the other cases we have considered, the larger label bears in the upper margin thereof the words "Phosphate Iron," and in the lower margin the words "and Sarsaparilla." In all the other labels, including the plaintiffs', the word "Sarsaparilla" is in the upper margin, and the words "and Iron Water," or "and Iron Phosphate," are between the marginal lines of the lower half of the label. Between the upper marginal line of the lower half of the label and the lower line of the center space on which the name of the manufacturer is printed are the words "San Francisco, California," and below them the usual legend, "A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases," ornamented below with the familiar flourish or scroll. We think the decision in the Brieg Case determinative of the questions involved herein.

There is another question which we have not passed upon in either of the other cases. It is claimed that the court erred in admitting plaintiffs' alleged letters patent. The contents of the document are not set out in the statement. Error must be shown. It appears furthermore that the paper was introduced only to show the formula used by the defendant in the manufacture of its beverage, and the court does not seem to have attached much, if any, weight to it. The same may be said with respect to the commissioner's certificate of registration. In all of these cases, except the case against Welch et al., (No. 15,136,) 35 Pac. 626, the findings support the judgment, and the evidence supports the findings.

It is claimed by appellant that it is impossible to sustain the court's decision without the finding that, at the time of the adoption by plaintiffs of the words "Sarsaparilla and Iron," said name was not in use, or known or adopted, as a designation of the same, or of any similar article of manufacture on sale; that the whole decision of the court rests and turns upon that finding. This contention cannot be sustained. The judgment of the court below does not rest upon the appropriation and use by the defendant of the words "Sarsaparilla and Iron," but upon fraud perpetrated by it in intentionally counterfeiting plaintiffs' labels as a whole, and thereby deceiving the public, and pirating upon the business of the plaintiffs. Were the labels, marks, and devices of the defendant calculated, by reason of their close resemblance to those used by the plaintiffs, to deceive purchasers, and lead them, although exercising ordinary care and prudence in purchasing, to believe that the article contained in the defendant's packages was the article manufactured and sold by the plaintiffs? This question being answered in the affirmative upon sufficient evidence, the only other material question in the case relates to the amount of damages. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (No. 15,132, this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

101 Cal. 338

MARCEAU v. TRAVELLERS' INS CO. OF HARTFORD. (No. 18,199.)

(Supreme Court of California. Feb. 15, 1894.)

Accident Insurance—Action on Policy—Conditions—"Intentional Injuries" to Insured—Insanity of Insured's Murderer—Evidence—Instructions.

1. On an issue as to the sanity of the person who killed insured, the abstract testimony of an expert witness that a person might know a certain act to be wrong, and yet possess no power to resist an insane impulse to commit such act, is not cause for reversal, though such "insane impulse" is not recognized as a defense to a charge of felony.

2. Where the sanity of the person who killed insured was the issue in an action on an accident insurance policy conditioned to be void if death resulted from "intentional injuries inflicted by any person," it was proper to refuse an instruction which intimated that the plea of insanity has led to abuse in the administration of justice, and which advised the jury that it must be examined with care.

3. A judgment roll which showed the trial and conviction of the person who killed the insured was inadmissible to show his sanity when he committed the homicide, by showing that it was not questioned during the criminal trial.

4. While the right to give an opinion as to a person's sanity is limited by Code Civ. Proc. § 1870, subd. 10, to experts and intimate acquaintances, such limitation does not extend to testimony of witnesses as to his peculiar conduct and language.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Amanda J. Marceau against the Travellers' Insurance Company of Hartford, Conn., on an accident insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Lynch, for appellant. Dunne & McPike and W. D. Grady, for respondent.

GAROUTTE, J. The plaintiff and respondent, Mrs. Marceau, was the wife of John D. Fiske, of Fresno. In July, 1890, Fiske was shot to death by one Stillman, who was subsequently convicted of the crime, and sentenced to imprisonment for life. At the time of Fiske's death he was carrying a life insurance policy for the sum of $10,000 in the Travellers' Insurance Company, and this action is brought to recover from such company the amount of the policy. The policy contained a clause declaring it invalid if death resulted from "intentional injuries inflicted by the insured or any other person;" and, while the death of Fiske is not questioned by the defendant, it is claimed that his death resulted from causes that bring it within the prohibition of the clause of the policy we have just quoted, and that consequently plaintiff is not entitled to recover.

It is contended upon the part of plaintiff that Stillman was insane at the time he committed the homicide, and consequently the injuries resulting in the death of Fiske were not "intentional injuries," within the meaning of the policy. It is conceded by opposing counsel that, if Stillman was insane at the time he fired the fatal shot, the policy remains in full force and effect; and thus it appears the insanity of Stillman at the time of the homicide is the fulcrum upon which the entire case rests. Judgment went for plaintiff, and this appeal is prosecuted from that judgment, and also from an order denying defendant's motion for a new trial.

1. An expert witness upon the subject of insanity was placed upon the stand, and the following occurred: "Q. You understand, of course, that insanity is the result of a diseased mind, do you not? A. Yes, sir. Q. That if a person is insane, while they may theoretically know the difference between right and wrong, that they are incapable of judging or resisting an impulse to do wrong? (The defendant objected to the question on the ground that it is incompetent, the witness is incompetent, and the fact is irrelevant and immaterial, as contradicting the rule of insanity established by the supreme court of this state. The court overruled the objection, and the defendant excepted.) A. They have no power to resist the insane impulse they have, although they know it was wrong, and they will hide and conceal the evidences of their crime, very often with more particularity and ingenuity than a sane person would do." In Hoin's Case, 62 Cal. 120, insanity, as recognized in our criminal law, is declared to be such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the particular act with which he is charged. The foregoing appears to be the true rule, as declared by the courts of England, and certainly is the settled law of this state; and we cannot recognize the so-called plea of "irresistible impulse," of itself, as a legal defense to any charge of felony. Upon an examination of the particular question and answer now under consideration, we see nothing to justify a reversal of this judgment and a retrial of the case. Upon a close analysis of the question we are not prepared to say exactly what it does mean. It certainly is not so clear as to be fully comprehended by the average jury of the present day; yet, whatever construction may be given it, (and it is probably susceptible of more than one,) the harm to appellant, if harm was done him, is found in the answer. However objectionable a question may be, if the answer in no way prejudices appellant's rights, then the error of the court in allowing the answer to be given is harmless error, and affords no ground for complaint. By his answer the witness testified, in the abstract, to a certain phase or kind of insanity. His evidence was not addressed to the mental condition of the man Stillman, but was directed to principles touching a certain branch of insanity in general. In order that the jury might intelligently and fully understand the particular issue of insanity that was to be submitted to them, we see no possible objection to a practice of placing before them general information bearing upon this most metaphysical and abstruse subject; and, although the witness testified that a person might know a certain act to be wrong, and yet possess no power to resist an insane impulse to commit the act, still it was for the court, in its instructions to the jury, to furnish the rule by which Stillman's mental condition was to be measured. The test is inexorable; he is sane or insane, tried by that rule alone, and all the evidence upon the subject of insanity is pertinent, and pertinent only, for the purpose of determining whether or not the party's mental condition satisfies the test prescribed.

2. Appellant complains of the court's refusal to give two certain instructions. The first of these instructions embraced the principle we have quoted from the Hoin Case as to the true rule to be applied upon a plea of insanity in criminal cases, and it was substantially given, in various forms, by the court in its charge to the jury. It was not error to decline to again reaffirm the law bearing upon that question. The other instruction contains an intimation that the plea of insanity has led to abuse in the administration of jus-

tice, and advises the jury that it must be examined and considered with care. This instruction, in effect, was given in the criminal case of People v. Pico, 62 Cal. 54; but we see no place for it in a civil action, especially in view of the fact that the party charged with being insane is neither a party to the action, nor even indirectly interested in the final result of the litigation.

3. Previous to the trial of the present action, Stillman had been tried and convicted of the murder of Fiske, and sentenced to imprisonment in the state prison for life. Defendant's counsel offered in evidence what he termed the judgment roll in that case, and, under objection, the evidence was not admitted. As stated by counsel, this evidence was offered for the purpose of showing that, during the pendency of the murder trial, no proceedings were had indicating that Stillman was insane at that time; that no suggestion was made to the court by counsel that he was then insane; that the statute regarding the insanity of defendants at the time of trial was not invoked, and that the record offered indicated no suggestion of insanity; and counsel argues therefrom that the presumptions arise from these facts, first, that the public officials did their duty, and also that the defendant's attorneys in that case did their duty, and that the plea of present insanity not being suggested, either by the public officials or private attorneys, the second presumption follows that Stillman was not insane at the date of his trial; and, further, those presumptions being established, an additional presumption follows therefrom that, if he was not insane upon the day of his trial, he was not insane upon the day of the homicide. We are entirely agreed that the record in the criminal action was properly rejected. The last and material presumption—the one which defendant seeks to invoke to his advantage in this case—arises from no fact, but, on the contrary, is itself based upon a foundation of presumptions; and such a foundation is too unstable to support evidence of the character here sought to be invoked. Again, we think the plaintiff could not be prejudiced by anything done, or omitted to be done, in that case. She was not a party to the action, in no manner interested in the result of the litigation, and her pecuniary interests could in no way be affected by the result of that trial. A striking illustration of this principle is found in Burke v. Wells, Fargo & Co., 34 Cal. 62. One Driscoll was convicted of robbing Wells, Fargo & Co. The parties arresting Driscoll brought an action against that company to recover a reward offered for the arrest and conviction of the thief. It was held by the court that, as against the defendant, Wells, Fargo & Co., that company being a stranger to the action, the record of conviction was no evidence that Driscoll was the thief, and that plaintiff should be required to establish that fact by independent evidence de novo. In the present case, if, in accordance with the statute, the question of Stillman's insanity at the time of the trial had been suggested, and a jury impaneled to pass upon that issue, and after investigation the jury had rendered a verdict declaring him not insane, that verdict would not be evidence in this action against the plaintiff; and, if a verdict upon the direct issue would not be evidence here, it certainly follows that the record offered was properly rejected.

4. It is insisted that the court erred in allowing certain witnesses to give their opinions as to Stillman's insanity, because it is claimed they were not intimate acquaintances, within the provisions of section 1870, subd. 10, Code Civ. Proc. The testimony of some of these witnesses, to the extent of their opinion as to Stillman's insanity, was subsequently stricken out upon motion of counsel offering the evidence, and, inasmuch as the court at the time directed the jury to disregard such testimony of the witnesses, we see no valid objection to the course pursued. It is insisted that the evidence as to the conduct and conversations of Stillman, as testified to by these witnesses, also should have been taken from the consideration of the jury; but we do not understand the law to be that none but intimate acquaintances are allowed to testify to the peculiar conduct and language of a party charged with insanity. The right to give an opinion as to a person's sanity or insanity is limited to the expert and the intimate acquaintance; but the limitation goes no further, and this distinction is recognized in Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101, cited by appellant. Referring to matters, not of opinion, but merely of observation, it is there said: "As to such obvious appearances, I presume it was not intended that the rule should apply." The record is quite voluminous, and appellant has called our attention to but one witness, viz. Graham, who gave an opinion as to Stillman's insanity, based upon an acquaintanceship with him. We have found no other in the record, and, as to Graham, there is no question but that he was an intimate acquaintance, within the provision of the Code, and also within the principles declared in Estate of Carpenter, supra.

5. The following instruction is attacked as stating an unsound proposition of law: "The court instructs you that if you believe, from a preponderance of the evidence, that the said John D. Fiske came to his death by reason of injuries inflicted upon him by one J. L. Stillman on or about July 26, 1890, in this county, and without fault or provocation on the part of said Fiske, and that the said Stillman, at the time of inflicting said injuries, was insane and incapable of discerning between right and wrong in regard to the act he was committing, or that he was then impelled in so doing by an insane impulse which the reason that was left him did not enable him to resist, or to understand its nature, then the injuries were unintentional on the part of said Still-

man, and accidental in that respect, within the meaning of said policy." The latter portion of this instruction, beginning with the conjunction "or," does not strictly follow the beaten paths established by this court in declaring what constitutes insanity, and beaten paths are always safer than new and untried ones; and while, owing to the peculiar wording of the instruction, it is not probable that it in any degree enlightened the jury as to the law of the case, yet upon a fair construction we think it comes within the law of insanity as legally applicable to the present case, and vaguely states, in a different form, the same principle found in the former portion of the instruction. If a man commits a homicide under an insane impulse, and at the time does not possess sufficient reason to understand the nature of the act, he certainly is in such a condition of mind that he is incapable of weighing the moral qualities of the act, and determining therefrom whether it is right or wrong; and we think this to be its legitimate construction. The instruction surely bears no relationship to the theory of irresistible impulse, frowned upon and rejected in People v. Hoin, and does not, either in letter or spirit, countenance the doctrine, which is there cast out, as having no place in the law of insanity in this state. In addition to this instruction, the court fully and correctly stated to the jury the law of insanity in numerous other portions of its charge, and we are satisfied that no material injury resulted to defendant from the charge we have just considered.

6. We will not enter into a discussion of the evidence in detail for the purpose of indicating that it is sufficient to support the verdict of the jury. It is enough for us to say that upon a careful examination of it we find it ample and sufficient. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 235

ANTHONY v. GRAND. (No. 19,256.)

(Supreme Court of California. Feb. 6, 1894.)

ACTION FOR ASSAULT—EVIDENCE—COSTS.

1. In an action for assault, where it was shown that defendant violently assaulted and injured plaintiff, evidence of defendant's reputation for being peaceable was immaterial.

2. Code Civ. Proc. § 1025, providing that no costs can be allowed in an action for damages, where the plaintiff recovers less than $300, forbids the recovery of costs by either party on a recovery of less than $300.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Adolph Anthony against Fred Grand. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Tuppett, Boone & Neale, for appellant. Utley, Thorpe & Holcomb, for respondent.

BELCHER, C. This is an action to recover damages for personal injuries sustained by the plaintiff. The court below found that on the 4th day of July, 1892, the defendant "did willfully and violently assault the plaintiff, Adolph Anthony, and the said defendant did then and there willfully and violently bite off with his teeth, and sever, from said plaintiff's right hand, a portion of the fourth finger of said hand, to wit, said defendant did so bite off the said finger of plaintiff just below the first joint thereof; that by reason of said assault and biting, as aforesaid, said plaintiff has at all times since said 4th day of July, 1892, been disabled from following his usual occupation of a miner, and has been disabled from attending to his business as such," and has been damaged in the sum of $250, for which he is entitled to judgment. Judgment was accordingly entered against the defendant for the sum named, from which, and from an order denying a new trial, he appeals.

It appears from the bill of exceptions that when the plaintiff rested his case, at the trial, a witness was called for the defendant, and testified that he had known defendant for 18 years, and knew the people where he lived. He was then asked, "Do you know his reputation for being peaceable and quiet?" The question was objected to by the plaintiff on the ground that the evidence sought was irrelevant and immaterial, and the objection was sustained, and an exception reserved. It also appears from the bill of exceptions that, before the findings were filed and the judgment entered, "the defendant presented to the court findings of fact and conclusions of law and judgment for signature by the judge of said court, accompanied by a memorandum of costs and disbursements sworn to by the defendant," copies of which are set out. The copies presented are substantially the same as those filed, except that the conclusions of law are "that plaintiff is entitled to judgment against said defendant for said sum of $250, and that said defendant is entitled to judgment against said plaintiff for his costs in this behalf laid out and expended." And the judgment is substantially the same as that entered, except that there is added to it: "It is further ordered and adjudged by the court that the defendant have and recover of and from the plaintiff his costs in this behalf laid out and expended, taxed at the sum of $254.65." The court refused to adopt the findings and judgment so presented, and the defendant excepted to the ruling. It is claimed in support of the appeal that the court erred in excluding the offered evidence, and in refusing to give the defendant judgment for his costs; and these are the only points presented for decision.

We see no merit in either of the points made. The court found that the defendant willfully and violently assaulted the plaintiff, and bit off his finger. The correctness of this finding is not questioned, nor is any of the evidence in support of it brought up in the record. It must therefore be presumed to have been fully justified by the evidence introduced. But, if the defendant committed the wrong complained of in the manner stated, then his reputation for being peaceable and quiet was wholly immaterial, since, however good it may have been, the judgment must necessarily have gone against him.

As to the second point: The allowance of costs is a matter of statutory regulation. Our statute provides that: "No costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars." Section 1025, Code Civ. Proc. This evidently applies to both parties to the action, and forbids the recovery of costs by either of them. The judgment and order appealed from should be affirmed.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

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101 Cal. 233

ESHLEMAN v. MALTER. (No. 18,174.)

(Supreme Court of California. Feb. 6, 1894.)

Deeds—Description—Boundaries.

Where the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter section corners being lost, and the section exceeding 640 acres in area, the division lines of the fractions of the section are determined by a division pro rata of the lines of the section as they appear upon the ground.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by M. D. Eshleman against G. H. Malter. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. D. Tupper, for appellant. Edward Lynch, for respondent.

GAROUTTE, J. This is an action to quiet title to a small strip of land containing about 2.88 acres. Plaintiff, being the owner of section 17 of a certain township and range, sold to defendant the west one-half of the northwest one-quarter of said section, and the location of defendant's eastern boundary line thereof is the point in dispute. It is insisted that the evidence is insufficient to support the finding of the court as to the ownership of the land being in the plaintiff; but, upon an examination of the record, we think the evidence in this regard sufficient. The four corners of the section are established by the evidence with reasonable certainty, and, these four corners being located, any legal subdivision may be readily ascertained. The evidence disclosed that the section contained about 664.43 acres, and that the north line of the section was 82.21 chains in length. Appellant appears to concede that, if the north line of plaintiff's land exceeds 60 chains in length, then the land in litigation is included in her holding; and that the north line of her land is of greater length than 60 chains is very evident. When the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter section corners being lost, and the section exceeding 640 acres in area, the division lines of the fractions of the section are determined by a division pro rata of the lines of the section as they appear upon the ground. This is the doctrine laid down in Miller v. Land Co., (Kan.) 24 Pac. 420, and in the cases there cited. Applying that principle to the present case, the northwest corner of the plaintiff's land would be located at a point upon the north line of the section distant from the northeast corner thereof three-fourths of the length of the north line, and this would give the length of plaintiff's north line to be about 61.65 chains. The fact that defendant claimed by his answer to have made valuable and permanent improvements upon this tract of land while he was in possession thereof is immaterial to the case, and a finding as to such allegation of the answer was not required. Helm v. Wilson, 89 Cal. 593, 26 Pac. 1103. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 229

PEOPLE v. LYNCH. (No. 21,037.)

(Supreme Court of California. Feb. 6, 1894.)

Assault—Justification—Instructions.

1. One person cannot assault another in self-defense, since an assault is in itself unlawful, and since any act done in self-defense cannot be an assault.

2. The fact that a person thinks another is going to inflict bodily harm on him does not justify him in attempting to take such other's life; it being necessary that there should be some act by the other, such as would induce an ordinarily prudent man to believe that he was in immediate danger of death or great bodily injury.

3. On a trial for an assault committed in a street, the refusal of an instruction that defendant had a right to be there, and the presumption was that he was there for a lawful purpose, if error, was not prejudicial, as it was but another form of the charge given by the court,—that defendant was presumed to be innocent till found guilty.

4. A refusal to permit defendant to tell what he understood by prosecutor's threat, a few days before the assault, to "fix" defendant, if error, was not prejudicial, where defendant testified that, immediately before that assault, prosecutor threatened to kill him, and made demonstrations as if to draw a weapon.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Defendant was convicted of assault with a deadly weapon, and from the judgment, and an order denying a new trial, appeals. Affirmed.

James H. & J. E. Budd, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of an assault with a deadly weapon, and appeals from the judgment and order denying his motion for a new trial. He claims the shooting to have been done in self-defense, and contends that the court committed error in its instructions to the jury upon the law of the case.

1. An exception was taken to the following instruction: "If, however, you are satisfied from the evidence in the case, and beyond a reasonable doubt, that the defendant did, at the time charged, and as charged, make an assault on one T. O'Connor with a deadly weapon,—that is, one likely to produce, in the manner in which it is used, death or great bodily injury,—with intent to do him great bodily injury, but are not satisfied that the assault was made with malice, or if you have any reasonable doubt whether such assault was with malice aforethought, your verdict will be, 'Guilty of an assault with a deadly weapon.'" Counsel say: "Suppose defendant had assaulted the prosecuting witness with a deadly weapon, with intent to do him great bodily harm. If it had been done in necessary self-defense he was entirely justified. Yet this instruction clearly directs the jury to find him guilty if such assault alone be proven." A complete answer to this supposition is that no such a state of facts could exist. One person cannot assault another in self-defense. An assault, in itself, is unlawful, and any act done in self-defense cannot be an assault.

2. The court gave the following instruction: "The bare fear that the said T. O'Connor, if defendant had had such fear, was going to inflict bodily injury upon the person of the defendant, would not justify defendant in attempting to take the life of the said T. O'Connor, if he did so attempt; but there must have been some act or acts of the said T. O'Connor such as would induce an ordinarily prudent man to believe that he was in great and immediate danger of death or great bodily injury at the hands of the said T. O'Connor; and, unless you so find, you will find the defendant guilty." We think the instruction entirely correct. To be sure, it says nothing about threats, but threats alone never justify a homicide. Words, however grievous, do not even reduce a homicide from murder to manslaughter. While threats are always admissible as evidence, yet some act or acts of the deceased, indicating danger to the defendant, as a reasonable man, at the time of the shooting, must be present, or the plea of self-defense will be made in vain. The instruction in no way intimates that threats of the prosecuting witness towards the defendant are not admissible as evidence tending to throw light upon the circumstances surrounding the moment of the affray.

3. The following instruction was asked by the defendant, and refused: "The court further instructs the jury that Sacramento street is a public highway in the city of Stockton, and that the defendant had a perfect right to be on said highway at the time and place where he was met by the prosecuting witness, and was under no necessity to leave or depart from said street in order to avoid meeting with the prosecuting witness; and, in the absence of evidence showing that defendant was in said street for improper and unlawful purposes, the court instructs you that the presumption of law is that the defendant was in said street, at the time and place where he was met by the prosecuting witness, for a lawful and legitimate purpose." In the abstract, we are not prepared to say that the mere fact of a man walking upon a public street justifies the presumption that he is there for a lawful purpose. But in the present case, where the defendant was charged with a crime committed upon the public street, we see no legal objection to this instruction, and perhaps it would have been the better course to have given it. At the same time, it was but another form of instructing the jurors that the defendant is presumed to be innocent until he is proven guilty, and that matter was fully explained to them in another portion of the charge.

4. Defendant testified that some days prior to the alleged assault the prosecuting witness, among other things, said to him, "I'll fix you." His attorney then asked him, "What did you understand him to mean by those words?" and an objection was sustained to this question. We assume the purpose of the question was to show that defendant construed the language as a threat of physical injury; and, without deciding the merits of the ruling of the court in this regard, it is sufficient to say we think the defendant was not injured to any degree by such ruling, even conceding that his answer to the interrogatory would have been as indicated. A threat of the prosecuting witness at this time could only be material as bearing upon the circumstances immediately surrounding the shooting, and material only for the purpose of indicating that the defendant fired in self-defense. But the defendant further testified that immediately prior to the affray the prosecuting witness, in a violent manner, said to him, "I'll kill you," and made demonstrations as if to draw a weapon. Under these circumstances, it is plain that defendant was not injured before the jury by the ruling of the court, whatever may have been his understanding of the

language used by the prosecuting witness.

Defendant complains of other rulings of the court, both as to instructions given and refused, and also as to evidence admitted and rejected; but, after careful consideration, we see no error, and find nothing further demanding extended notice. It is ordered that the judgment and order denying a new trial be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 281

PEOPLE v. WALLACE. (No. 21,026.)

(Supreme Court of California. Feb. 7, 1894.)

Criminal Law—Plea — Sufficiency — Juries—Challenge to Panel—Harmless Error.

1. A plea of defense, entered on the minutes, reciting that "defendant thereupon interposes a plea of not guilty as stated in the information," is sufficient, under Pen. Code, § 1017, which provides that such entry shall recite that "the defendant pleads that he is not guilty of the offense charged."

2. Under Pen. Code, § 1064, providing that when the panel is formed from persons not named as jurors a challenge may be taken to the panel on account of bias of the officer summoning them, a challenge to a panel summoned by special venire will not lie on the ground that the panel were nonresidents of the county.

3. The giving of an erroneous instruction is harmless where defendant is acquitted of the offense charged to which the instruction applied.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

John Wallace was convicted of assault with a deadly weapon with intent to murder, and appeals. Affirmed.

R. E. Bledsoe, for appellant. Atty. Gen. Hart, for the People.

VANCLIEF, C. The defendant was tried, in the county of San Bernardino, on an information by the district attorney, for an assault with a deadly weapon with intent to murder, but was convicted of only an assault with a deadly weapon. He appeals from the judgment and from an order denying his motion for a new trial.

1. It is contended that the plea of the defendant, as entered in the minutes of the court, was not in form or substance such as required by section 1017 of the Penal Code, viz.: "Every plea must be oral and entered upon the minutes of the court substantially in the following form: * * * (2) If he plead not guilty: 'The defendant pleads that he is not guilty of the offense charged.'" The minutes of the court show that the defendant was regularly arraigned on March 6, 1893, and, upon being asked whether he was guilty or not guilty, his attorney asked further time to plead, and was given until March 8th. On March 8th the following entry was made in the minutes: "The People of the State of California v. John Wallace. Defendant and his counsel are present and the district attorney is present. Counsel for defendant interposes a demurrer to complaint, the same being overruled by the court. Defendant thereupon interposes a plea of not guilty of the charge as stated in the information." I think the plea entered in the minutes is "substantially" in the form prescribed by section 1017 of the Penal Code. It is claimed that the plea is improperly limited to the charge "as stated in the information," as if the defendant was required to plead to a charge as stated elsewhere than in the information.

2. The jury was not drawn, but was summoned by the sheriff by authority of a special venire facias regularly issued by order of the court. Before any juror was sworn the defendant challenged the panel "on the ground that the panel of the jurors served and returned are nonresidents of the county of San Bernardino." The district attorney said, "Prosecution denies the challenge." Thereupon the court overruled the challenge, for the reason that the only ground of challenge to the panel of a jury summoned by special venire is "bias of the officer who summoned them," as provided in section 1064 of the Penal Code. This ruling seems to be warranted by the case of People v. Welch, 49 Cal. 177; but counsel for appellant contends that, inasmuch as the district attorney denied the challenge, the court was bound to try the issue of fact; that is to say, the court was bound to try an immaterial issue, a decision of which would have been of no consequence on the challenge of the panel, on the sole ground that the jurors summoned were nonresidents of the county. I think the mere statement of this proposition is a sufficient refutation of it.

3. While the jury was being impaneled John Schliesman was called as a juror, and upon examination as to his qualifications answered that he was a resident of that part of the territory which had lately been set off from San Bernardino county into the new county of Riverside. Thereupon the defendant challenged the juror on the ground that he was not a resident of the county of San Bernardino. It is contended by appellant that the court erred in overruling this challenge. No evidence was offered in support of or in opposition to the challenge, except the testimony of the juror above stated. The only question involved in the ruling of the court on this challenge, or discussed by counsel, is whether or not the county of Riverside had been created and existed at the time of the trial of this action; and whether that county had been created and existed at the time of the trial must have been judicially known to the trial court at the time of the trial, and is so known by this court, (Brumagim v. Bradshaw, 39 Cal. 24; Code Civ. Proc. § 1875,) since the fact depended upon the effect of an act of the legislature

approved March 11, 1893, entitled "An act to create the county of Riverside," etc., and the official action of the board of commissioners appointed by that act to organize the county of Riverside, which board was required by the act to "keep a full record of their proceedings, transmitting to the secretary of state a certified copy thereof." The commissioners were required to call an election of the qualified voters residing in the territory of which the new county was to be composed, to be held on May 2, 1893, "at which election shall be submitted to the said qualified electors of said county of Riverside, as herein provided, whether there shall be formed and organized the county of Riverside, as herein provided for." The act further provides that if two-thirds of the vote cast shall be in favor of creating the proposed new county, "then the said territory hereinabove described shall be and become the organized county of Riverside, from and after the day upon which the returns of said election shall be ascertained and declared by the said board of commissioners." In the certified copy of the proceedings of the board of commissioners transmitted to the secretary of state and filed in his office, appears the following: "And now at this time, that is to say, May 9, 1893, Commissioner John McLaren offers the following resolution: 'Whereas, the board of county commissioners of Riverside county, in pursuance of the directions contained in section 5 of the act to create Riverside county, approved March 11, 1893, caused the election referred to in said section to be held at the time and in the manner therein appointed; and whereas, the said board has canvassed the votes cast at said election, and by said canvas has ascertained and do hereby declare the returns of said election to be as follows: The new county of Riverside, Yes, 2,277 votes; the new county of Riverside, No, 681 votes,—and it appearing that said votes cast in favor of the new county of Riverside exceed two-thirds of the votes at said election on said question: Resolved, that in pursuance of the power and authority vested in us by said above-named section, we, the said board of commissioners, do therefore declare that from and after this date the territory described in said act shall be, and it hereby is declared to be, the organized county of Riverside. Dated this 9th day of May, 1893.'" Thus it appears that the returns of the election were "declared" on the 9th day of May, 1893, three days after the trial of this action; and, consequently, the county of Riverside did not exist until after the trial.

4. Appellant further contends that the court erred in giving to the jury the following instructions: "Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Conceding that implied malice is not equivalent to the actual intent to murder, essential to the offense charged, and that the instruction was therefore erroneous, it was, nevertheless, harmless, since the defendant was acquitted of the offense charged, to which alone the instruction applied; and the instruction had no bearing upon the lower offense, of which the defendant was convicted. In the case of People v. Mize, 80 Cal. 42, 22 Pac. 80, cited by appellant, the defendant was convicted of an assault with intent to murder, and was presumably injured by the instruction held to be erroneous in that case. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(101 Cal. 265)

McCONOUGHEY v. JACKSON et al. (No. 19,281.)

(Supreme Court of California. Feb. 7, 1894.)

PLEADING—CONCLUSIONS OF LAW — INFORMATION AND BELIEF — TRUSTEES OF CITY — ALLOWANCE OF CLAIMS—DUTY OF CLERK.

1. A denial of an "indebtedness," without denying the facts on which it is based, is simply a denial of a conclusion of law.

2. The action of the trustees of a city on the presentation of a claim which they have jurisdiction to hear and determine is a judicial act, and, whether right or wrong, is binding on the clerk.

3. On an alternative writ of mandamus requiring the clerk of a city of the sixth class to countersign and deliver a warrant or show cause, an allegation by defendant, on information and belief, of insufficient funds in the treasury to pay the warrant, is defective, since he should, of his own knowledge, know the exact amount in the treasury.

4. A valid claim, properly presented to the trustees of a city, and allowed, and the action accepted by the claimants, is a binding contract, and can be avoided only for such causes as invalidate other contracts.

5. An allegation by defendant that petitioner was a city officer, and "interested, both directly and indirectly, in the pretended contract upon which is based the pretended claim," without alleging any facts upon which the conclusion is based, does not constitute a defense.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Application by O. H. McConoughey for a writ of mandamus to compel W. H. Jackson and others to issue a city warrant. Judgment for petitioner, and defendants appeal. Affirmed.

J. S. Callen, Callen & Neale, and Gibson & Titus, for appellants. A. M. McConoughey, for respondent.

SEARLS, C. The city of Coronado is a city of the sixth class. M. R. Vanderkloot was president of the board of trustees, and W. H. Jackson was clerk of said city. In April, 1892, the petitioner filed a claim in writing with the board of trustees for $500 on account of expenses incurred by him in procuring, at the request of said city, through the board of trustees thereof, counsel and legal services for said city. The bill was approved by the board of trustees, and ordered paid, and a warrant on the city treasurer, payable to petitioner, for the same, was ordered. Vanderkloot and Jackson, the clerk, refused to draw, sign, or countersign the warrant. There was sufficient money in the treasury to pay said warrant. Upon this showing, on petition, the superior court, on the 8th day of February, 1893, issued an alternative writ of mandate to the president and clerk, requiring the president to draw and sign the warrant, and the clerk to countersign and deliver said warrant, or to show cause, etc. The defendants appeared, and demurred to the petition, which demurrer was overruled by the court, whereupon M. R. Vanderkloot, the president of the board, drew and signed the warrant, and made default herein. Defendant Jackson filed an answer, and subsequently an amended answer, to which a demurrer was interposed, and sustained by the court. Defendant thereupon declined to amend, and a peremptory writ of mandate issued, from which he appeals.

The amended answer, for cause why the writ should not issue, (1) denied that the city was indebted to the petitioner; (2) averred upon information and belief that there was not sufficient available money in the treasury that could be legally appropriated to its payment; (3) set up the fact that on the 2d of May, 1892, the board of trustees repealed and rescinded the allowance of the claim and order to draw the warrant; (4) alleged that plaintiff was an officer of the city, and interested in the claim; (5) that the matter is still under consideration by the board of the trustees, and that since the pendency of this action, and on the 30th of January, 1893, the board of trustees determined the warrant had been ordered drawn through mistake, inadvertence, and misapprehension, rescinded the former action, and ordered that the warrant drawn and signed by the president be canceled, annulled, etc. The affidavit, which in proceedings of this character stands as a complaint, is lacking in preciseness of detail and fullness of statement, but was still sufficient as against the general demurrer interposed to its sufficiency. In addition to the merely formal parts of the pleading, it in fact and effect avers an indebtedness of $500 on the part of the city to petitioner for expenses by him incurred in procuring counsel and legal services for the former, at its order and request by its board of trustees; and, being so indebted, the board ordered his bill and written demand therefor paid, and ordered a warrant drawn in his favor for the amount, etc., which the president and clerk refused to draw and countersign; that there was money in the treasury to pay it, etc. These are the essential facts giving to petitioner a right to the writ, and the demurrer to the complaint was properly overruled.

The first defense set out by Jackson, the clerk of the board, denies the indebtedness to petitioner. This, as defense, is wholly insufficient for two reasons: (1) It is the denial of a conclusion of law, and not of the facts, viz. the expenses incurred by petitioner for the city. (2) The law has not constituted the clerk either the guardian of the board of trustees or an appellate court to pass upon the facts once decided by the board. The claim was one which the board of trustees had jurisdiction to hear and determine. Such determination was a judicial act, and involved a determination of the fact of indebtedness, and when so determined, whether right or wrong, its action was binding upon the clerk. A like question was involved in McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113, and reference is made to that case for a more full expression on this subject.

The allegation in the second defense, of a want of funds in the treasury on the 18th of April, 1892, etc., is upon information and belief, and, being a fact peculiarly within the knowledge of defendant, should have been positive in form. As clerk of a municipal corporation of the sixth class one of the duties of defendant was to keep an exact account of all moneys received and disbursed, and a "treasurer's account," which, if correctly kept, showed to a fraction the moneys in the treasury, the warrants drawn thereon, etc. To this extent he discharged one of the functions of an auditor. The treasurer must give duplicate receipts for all moneys received, one of which must be filed with the clerk; and the treasurer can only pay out money on warrants countersigned by the clerk, etc. In short, he is the financial accountant of the city, and practically the only check upon the treasurer. Mun. Corp. Act, §§ 876, 878.

No doubt the legislative department of a municipal corporation, viz. the board of trustees, may at any time before the rights of third persons have vested, if consistent with the law of its creation and its rules of action, rescind previous votes and orders. Dill. Mun. Corp. § 290. Thus it has been held that a resolution to construct a public sewer may be rescinded at a subsequent meeting. People v. City of Rochester, 5 Lans. 11. The right of reconsidering a last measure at the same meeting, or pursuant to its rules at a subsequent one, is a right inherent in all legislative assemblies. Jersey City v. State, 30 N. J. Law, 521. So, in Estey v. Starr, 56 Vt. 690, it was held that a vote of a town meeting rescinding its action at a former meeting in authorizing a subscription in aid of a railroad, was lawful, no rights of third parties having vested, and nothing having been done under the authority to subscribe. Tucker v. Justices, 13 Ired. 434, goes as far as any case we have examined. In that case a public bridge had been constructed, and an order made by the county court upon the proper officer to make payment, which was not done for want of funds. At the next term of court, the bridge having fallen down, the order was annulled, and the action of the court was upheld, and a mandamus denied. A valid claim, however, properly presented to the trustees of a municipal corporation, and allowed and approved by them, and their action accepted by the claimant, becomes a valid and binding contract, and can only be avoided for such cause as invalidates other contracts. Corporations can no more play fast and loose over their contracts than can individuals. In Brown v. Winterport, 79 Me. 305, 9 Atl. 844, it was held that a vote ratifying a contract made by town officers without due authority could not be rescinded so as to affect the validity of the contract. In the present case, when the trustees, upon the presentation of petitioner's demand, allowed it, and ordered a warrant drawn on the treasurer for the amount, it established his right to a recovery; and, being the amount asked for by him, he will be presumed to have accepted the action of the board, or, at any rate, such presumption will arise from his demand of the warrant and thereafter the board was not at liberty, without the consent of petitioner, to rescind its action, except for some cause which would defeat the claim, treated as a contract. Nothing of that kind is shown in the answer. The attempt at a defense by averring upon information and belief that petitioner was a city officer, and "interested both directly and indirectly in the pretended contract, upon which is based the pretended claim referred to in the complaint herein," without the statement of any facts upon which the conclusion is based, or the nature of the contract referred to, cannot be said to rise to the dignity of a defense. There is no contract set out in the petition, except such as is implied from the statement of expenses incurred in procuring counsel and legal services for, etc., at the request of the board of trustees. There being no showing that the order or warrant was irregular on its face, or one which the board was not authorized to draw, it was the duty of the clerk to countersign it, and the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

BARCLAY et al. v. SEVERANCE et al. (No. 19,254.)

(Supreme Court of California. Feb. 7, 1894.)

APPEAL—FINDINGS—REVIEW.

The findings of the court will not be disturbed where the evidence is conflicting.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by H. A. Barclay and others against Caroline Severance and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Chapman & Hendrick and R. B. Carpenter, for appellants. Lee & Scott and W. P. Gardiner, for respondents.

PER CURIAM. Action to recover broker's commissions for negotiating a sale of defendants' land. Defendants had judgment, and plaintiffs appeal therefrom, and the order denying their motion for a new trial. It is claimed by appellants that the findings attacked by the specifications are not sustained by the evidence. This claim cannot be maintained, for the reason that an examination of the record shows that the evidence is substantially conflicting. The findings, therefore, under the well-established rule of this court, cannot be disturbed. Judgment and order affirmed.

(101 Cal. 275)

SANFORD v. EAST RIVERSIDE IRRIGATION DISTRICT. (No. 19,290.)

(Supreme Court of California. Feb. 7, 1894.)

CONTRACT—INTERPRETATION—ACTION FOR BREACH—DAMAGES—SUFFICIENCY OF EVIDENCE—APPEAL—VERDICT—REVIEW.

1. The finding of a jury will not be disturbed where there is a substantial conflict in the evidence.

2. A contract for sinking wells recited that defendant called for proposals for bids for sinking "one or more" wells, and that plaintiff's assignors filed a bid to sink "said wells," and were awarded the contract for sinking "five wells." It provided that they should furnish material to complete "said five wells," that no payment was to be demanded on "any well" until it was sunk 200 feet, and that 25 per cent. of the price was to be detained until "each well" was completed, etc. *Held*, that the contract was for the sinking of five wells.

3. In an action by the assignee of the contractors for damages caused by defendant's refusal to allow such assignors to sink more than one well, it appeared that there were a number of other wells on the same ranch where the wells in dispute were to be sunk, which averaged about 400 feet in depth. Plaintiff's damage was established by evidence of the profit on wells of the average depth of 400 feet, and the verdict for plaintiff was for a less sum than the profits would have been as thus shown. *Held*, that the verdict was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John E. Sanford against the East Riverside Irrigation District, (a corporation.) From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

R. E. Bledsoe, Purington & Adair, J. S. Noyes, and Elmer E. Rowell, for appellant. C. J. Perkins and Paris & Saterwhite, for respondent.

SEARLS, C. Action to recover for work and labor in sinking a well, and damages for violation of a contract. Plaintiff had judgment for $2,300.35 and costs, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

There are two counts in the complaint, in each of which the same contract is set out. One is to recover for services rendered under such contract, the other to recover damages on account of defendant's refusal to comply with the terms of the contract and to permit plaintiff's assignors to prosecute work thereunder. On the 12th day of November, 1891, the corporation defendant, as the party of the first part, entered into the contract in question with J. E. Sanford & Co., as parties of the second part. The contract recites that defendant has published proposals for bids for sinking one or more artesian wells upon its lands, known as the Garner and McKenzie places, on Lytle creek, San Bernardino county, Cal.; that Sanford & Co. have filed bids to sink said wells; and that defendant has, by resolution of its board of directors, awarded to them the contract for sinking five wells, and has authorized its president and secretary to sign a contract therefor. It is thereupon agreed that the party of the second part (Sanford & Co.) shall commence immediately sinking a well on said Garner tract, commencing with a 10-inch casing, and continue as far as such casing can be practicably sunk; then with an 8-inch casing as far as practicable; then with a 6-inch casing as far as practicable; the various depths to be according to the best judgment of the party of the second part; the well to be sunk to the depth of 500 feet, if practicable and possible in the judgment of the second party. Then follows the price to be paid per foot for sinking, which is $4.10 per foot for first 200 feet, $5.75 for third 100 feet, $6.50 for fourth 100 feet, and $7.50 for fifth 100 feet. Party of the second part to furnish all material, labor, and machinery to complete said five wells. It is further agreed that if the engineer of defendant shall direct that said wells shall stop at any point under 275 feet, 25 cents per foot is to be added to price, but if, by reducing the size of pipe, the party of the second part cannot go beyond the depth of 275 feet, nothing is to be added to the price per foot. Payments to be made monthly from time of placing machinery at first well, at the rate of 75 per cent. of contract price for distance sunk, and residue when each well is completed No payment to be made on any well until 200 feet has been sunk. The pipe, workmanship, and other conditions not specified shall be according to the specifications of the engineer, which are attached to and made a part of the agreement. The specifications are lengthy, and their provisions need not be set out except as questions arise under them. To that extent they are as follows: (1) The particular places on the McKenzie and Garner places where the wells are to be sunk are to be designated by the engineer of defendant. (2) All wells are to be sunk to a depth of 500 feet, unless obstacles are encountered which make this impossible; and the contractor shall use his utmost endeavor to attain such depth, but, when impossible to do so, the engineer may receive a well of less depth, after requiring the contractor to perforate the pipe, to admit such streams as are passed in boring; but the engineer must not accept a well of less than 200 feet in depth. The contractor shall perforate the pipe to admit all streams as desired by the engineer. (3) If by accident, without negligence or fault of contractor, any well of 200 feet in depth cannot be reduced and sunk deeper, it may be accepted and paid for on being perforated. But accidents from incompetence or carelessness of contractor or his subordinates must be borne by him.

According to the complaint the contractors commenced to sink the first well about November 12, 1891, and reached a depth of 253 feet, when they met obstacles rendering it impossible and impracticable, according to their best judgment, to go deeper, of which, on May 3, 1892, they notified the defendant in writing, and requested its engineer in charge to notify them if he desired the pipes perforated; but he failed to notify them; that they have been willing and able to do so since. Defendant was requested to designate through its engineer the particular spot or place for starting a second well, or any one of the remaining four wells, all of which were refused. The rights of the contractors, including the right to damages for a breach of the contract, are averred to have been assigned to plaintiff. The answer, according to the contention of appellant, raised three issues: First, that there had never been an assignment of the contract and alleged indebtedness to the plaintiff; second, that said well had not been sunk as deep as possible or practicable; third, that, even if the defendant had failed to carry out the contract, the plaintiff or his assignors had suffered no actual damage thereby. There was an assignment to the plaintiff in evidence, dated February 2, 1892, whereby the money due the firm and the interest of plaintiff's copartner in the contract were transferred to him. In justice to counsel for the appellant, it should be stated that he does not urge this point in his brief.

Under the head of insufficiency of the evidence it is urged that there was no evidence that plaintiff reduced the well to a 6-inch pipe or casing, as required by the contract, or that he attempted to do so; and does show that, if a 6-inch pipe had been used, the well could have been sunk to a greater depth than 253 feet. The testimony involved a substantial conflict. F. C. Finkle, the engineer of defendant, testified, in substance, that he was desirous of having the well sunk deeper than the 253 feet, and that, when he found the bottom of the 8-inch pipe was mashed, he told the plaintiff, if he could not straighten it out, to pull it, and put in a 6-inch pipe, but that plaintiff thought he could straighten it. On the part of plaintiff there was testimony tending to show that they struck granite boulders in the bottom of the well, which crushed the 8-inch pipe, and broke or injured the ring and shoe, which were of steel, and as a result they could not remove or break up the obstacle so as to get a smaller pipe through; that he worked for 20 days with pumps and drills, and 1,500 pounds of iron, trying to break it up and get it out of the way, and failed. There was also testimony tending to show that the 8-inch pipe could not be pulled out of the well. Under these circumstances it was a question of fact for the jury to determine whether or not plaintiff performed on his part all that was requisite under the contract; and, having found in favor of the plaintiff, such finding cannot be disturbed.

It is further objected that the contract did not provide for sinking more than one well, and hence that defendant is not liable for damages beyond those sustained on account of one such well. The contract recites that defendant has called for proposals for bids for the sinking "of one or more artesian wells;" that Sanford & Co. "have filed a written bid to sink said wells," and "was awarded the contract for sinking five wells." Then follows the agreement in which it is provided that plaintiff's assignors agree to furnish all the material, etc., to "complete said five wells." It also provides that the engineer of defendant may direct that said wells may stop at any point under 275 feet. "No payment is to be demanded on any well until it shall have been sunk over 200 feet," and 25 per cent. of the price is to be detained until "each well is completed." The specifications provide where the wells are to be located,—the places "where each well is to be sunk shall be designated by the engineer in charge." There are many other allusions to the different wells, but the foregoing quotations are deemed sufficient to indicate the intention of the parties in the premises to include the sinking of five wells. As a basis for the damages sustained by plaintiff in not being permitted to sink the four other wells provided for in the contract, it was shown that there are a number of wells on the same ranch and in the vicinity of a depth averaging about 400 feet, some of them being as deep as 600 feet, and others not over 200 feet. The damage of plaintiff was established by evidence tending to show the profit upon wells of this average depth of 400 feet, and, as the verdict of the jury was far below the sum which would be reached by the profits shown by the witnesses, it cannot be said the verdict was not supported by the evidence.

It is quite apparent that the problem of profit upon the sinking of artesian wells is not one susceptible of solution with anything like mathematical certainty. The different strata to be pierced, the difficulties to be met with of one kind and another, are factors which are likely to affect the result, but cannot be foretold with certainty. In the present instance the number and character of the wells driven in the vicinity shed light upon the question, and would seem to afford the best means for its solution. The court below seems to have taken this view, and I think correctly. The damages were fairly ascertainable, both in their character and origin, within the purview of section 3301 of the Civil Code. This disposes of the alleged errors urged by appellant. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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101 Cal. 271

PEOPLE ex rel. HOWLAND v. DREHER.
(No. 19,201.)

(Supreme Court of California. Feb. 7, 1894.)

NUISANCE—OBSTRUCTING PUBLIC STREET—ACTION BY PEOPLE—ESTOPPEL—REVIEW OF FINDING OF FACT.

1. In an action by the people on the relation of an individual to abate an obstruction in a public street, where it appears that the street was never dedicated or accepted, plaintiff cannot invoke an estoppel on the ground that relator, an abutting property owner, acted on an agreement with defendant to open the street, since the action by the people is not to vindicate relator's private rights.

2. A finding on conflicting evidence, that an alleged public street was never dedicated, will not be reviewed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by the people, on relation of James L. Howland, against P. J. Dreher, to abate a nuisance caused by obstructing an alleged public street. Judgment for defendant, and plaintiff appeals. Affirmed.

Westerman & Broughton and Atty. Gen. Hart, for appellant. W. A. Bell, for respondent.

SEARLS, C. This is an action to abate a nuisance, alleged to have been committed by defendant by obstructing the south half of a public street for a distance of 660 feet, which street is situate in the city of Pomona, county of Los Angeles, Cal. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment rendered thereon in favor of defendant, from which judgment, and from an order refusing a new trial, plaintiff prosecutes this appeal. The court, upon the issues made by the pleadings as to whether the street in question had been dedicated and accepted as a public street, found that in the month of May, 1887, the locus in quo "was laid out and graded by private citizens, who offered to dedicate the same to the public as and for a public street, but the same was never dedicated as a public street, or used or accepted by the public as a public street, or known by the public as Green street, or any street." The court further found, in substance, that in May, 1891, defendant plowed up the south half of the strip of land in question, planted trees thereon, and surrounded the same by a ditch, so as to render such south half of said proposed street impassable for vehicles, etc., but that the land was not a public street, and was never used or accepted as such; also that the relator, James L. Howland, owns land abutting on said proposed street, opposite the portion so plowed up and obstructed; that he has been in the habit of using it as a mode of egress and ingress to the land of him, the said Howland; and, were it a public street, it would be the only street running by or to his land by which he could have egress and ingress thereto. The court further finds that the public does not, and has not been accustomed to, use said strip of land in any manner; is not discommoded or inconvenienced by said obstructions, etc. A common-law dedication is the setting apart of land for the public use, and, to constitute a valid and complete dedication, two things are necessary, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. Elliott, Roads & S. 85; San Francisco v. Canavan, 42 Cal. 553; San Francisco v. Calderwood, 31 Cal. 585; Harding v. Jasper, 14 Cal. 647; People v. Reed, 81 Cal. 70, 22 Pac. 474. And, before it has been accepted, the owner of the land is not precluded from revoking at any time the offer to dedicate. Holdane v. Trustees, 21 N. Y. 478; San Francisco v. Canavan, supra. Dedication is a question of fact, to be determined by a jury, or by the court sitting as such. Harding v. Jasper, 14 Cal. 648. This being so, and the court below having found the fact of acceptance against the appellant, upon testimony involving a substantial conflict, the result, upon well-established principles, will not be disturbed by this court.

Much of the argument of appellant is directed to the point that the relator, James L. Howland, who, with the defendant, Dreher, agreed to open a public highway upon the line dividing their respective lands, and who was at expense in grading such contemplated highway, and who is claimed to have altered his condition in view of such proposed highway, so that pecuniary injury will ensue to him if the road is not opened, may invoke the doctrine of estoppel as against the defendant. This action is not brought to vindicate the private rights of the relator, or to secure to him any privilege not enjoyed equally by others. It is brought by the people, to conserve the rights which the general public have in the locus in quo as a highway. The predicate of those rights is that it is a highway. Failing in this, the public has no rights to conserve. In Clements v. West Troy, 16 Barb. 251, the proprietors of the village had laid out the same by a plan, upon which an alley was laid down, and house lots conveyed, bounded by the alley. The court said: "As between the original proprietors and those to whom they conveyed, this act of the proprietors secured a right of way. But the alley thus designated, and in respect to which the purchasers had acquired an indefeasible right of way, did not thereby become a public highway. The dedication must be accepted. The highway must be laid out. Until that is done, the alley would remain the property of the original proprietors, subject to the right of way in those who had taken the deeds of lots bounded upon the alley." To much the same effect are Underwood v. Stuyvesant, 19 Johns. 186; Child v. Chappell, 9 N. Y. 257; Oswego v. Oswego Canal Co., 6 N. Y. 257; Trustees v. Otis, 37 Barb. 50. Whether the relator, by reason of the transactions between himself and defendant, has or has not acquired rights peculiar to himself as an individual, which he can enforce, is not a question which, under the pleadings and issues, can be passed upon here. The findings are all supported by evidence, and are conclusive of the case. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

101 Cal. 292

FLETCHER et al. v. DENNISON et al. (No. 19,301.)

(Supreme Court of California. Feb. 8, 1894.)

MORTGAGES—OPTION TO DECLARE PAYABLE—WAIVER.

1. The complaint in an action to foreclose a mortgage, giving the holder the option to compound the interest, or to declare the principal payable, upon any default in interest, alleged that, on the failure of defendant to pay the interest due on a certain day, "plaintiff elected to declare, and did declare, the principal sum due and payable." *Held*, as against a demurrer, a sufficient allegation of election when the interest became due.

2. The holder of a mortgage note containing a condition giving him the option to compound the interest, or declare the principal due,

upon any default in interest, does not waive his right to make an election by a delay of 59 days after a default.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Julia M. Fletcher and others against Lucius Dennison and others to foreclose a mortgage. Judgment for plaintiffs. Defendants appeal. Affirmed.

E. C. Bower, for appellants. A. R. Metcalfe, for respondents.

McFARLAND, J. On October 21, 1891, the defendants gave their negotiable promissory note to plaintiffs for $3,000, due two years after date, with interest at 10 per cent. per annum, payable semiannually, according to coupons attached. The note contained this clause: "If any interest or any installment thereof be not paid when due, it may be compounded semiannually and added to said principal, and thereafter bear interest at the rate of ten per cent. per annum; or, at the option of the holder of this note, if said interest or any installment thereof be not paid when due, the whole of said principal sum shall immediately become due and payable, without notice to us." At the same time, defendants executed to plaintiffs a certain mortgage to secure said note. Interest not having been paid when due, plaintiffs commenced this action to foreclose the mortgage, for a deficiency judgment, etc. Those of the defendants who did not suffer default demurred to the complaint, upon the general ground of want of statement of sufficient facts, and upon the special ground of ambiguity and uncertainty. The demurrer was overruled; and, defendants declining to answer, judgment was rendered for plaintiffs. Defendants appeal from the judgment upon the judgment roll alone, relying upon the alleged insufficiency of the complaint.

Appellants' counsel argues that respondents' election to consider the principal due was not declared until 59 days after such election might have been declared, and that, by thus waiting, they waived their right to elect at all. This contention is based upon the fact that this suit was not brought until 59 days after the election might have been made, and upon the theory that there was no election until it was declared by the institution of the suit. The record before us shows that the time was only about 39 instead of 59 days. But, in the first place, assuming the time to be as stated by counsel, and that there was no election until the suit was brought, still we could not hold that, as a matter of law, 59 days was an unreasonable time within which to make the election. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423. In the second place, it is averred in the complaint "that on the failure of the defendants to pay the installment of interest which, by the terms of said promissory note and the said coupons, became and was due on the 21st day of October, 1892, the plaintiffs elected to declare, and did declare, the said principal sum and the interest thereon due and payable." This, as against a demurrer, was a sufficient averment of election at the time the interest became due. There is an averment in the complaint that the principal sum, together with interest "to be compounded semiannually from October 21, 1891, is now due and payable." This averment was evidently made upon the notion entertained by respondents, or their counsel, that, after having elected to consider the principal due, they could nevertheless, according to the terms of the note, recover compound interest. But, assuming this notion to be wrong, still the averment did not make the complaint vulnerable to the assault of either the general or the special demurrer; and, as a fact, judgment was not rendered for compound interest. To reverse the judgment in this case for any of the reasons urged by appellants would be to establish a precedent that would tend to make mortgage securities exceedingly insecure. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(101 Cal. 303)

SPEARS v. MODOC COUNTY et al. (No. 18,204.)

(Supreme Court of California. Feb. 9, 1894.)

CONVICTION UNDER ORDINANCE—REPEAL PENDING APPEAL—EFFECT.

A judgment of conviction under an ordinance cannot be enforced if, pending an appeal therefrom, the ordinance is repealed.

Department 1. Appeal from superior court. Modoc county; C. L. Claflin, Judge.

Action by one Spears against the county of Modoc and others to restrain the enforcement of an execution. From a judgment entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Goodwin & Goodwin, for appellant. D. W. Jenks, E. E. Copeland, and Spencer & Raker, for respondents.

HARRISON, J. The plaintiff was convicted in a justice's court, January 27, 1890, of violating an ordinance of the county of Modoc forbidding the keeping of a saloon where spirituous liquors were sold, and on the same day judgment was entered against him, by which he was sentenced to "pay a fine of five hundred dollars, and, in default of payment thereof, be imprisoned in the county jail of said county of Modoc for the period of one day for each dollar of said fine, or until such fine be satisfied." From this judgment he appealed to the superior court. On the 19th of February, 1891, that court affirmed the judgment of the justice's court. Before the hearing of the appeal the ordinance under which the conviction was had was repealed, the repeal taking effect January 24, 1891. June 3, 1891, an execution upon this judgment was issued out of the justice's court, under which the sheriff levied upon certain property of the plaintiff herein, and was proceeding to sell the same when this action was brought to restrain the enforcement of the execution. A demurrer to the complaint was sustained by the court, and from the judgment entered thereon the plaintiff has appealed.

By the appeal to the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. Pen. Code, § 1470. As no undertaking on appeal was required, the appeal itself operated as a supersedeas. McGarrahan v. Maxwell, 28 Cal. 91. The effect of the appeal was, therefore, to preserve the rights of the parties in the same condition as they were prior to the entry of the judgment, (Dulin v. Coal Co., 98 Cal. 304, 33 Pac. 123;) and, until the determination of the appeal, the proceeding was a pending action, in which the rights of neither party had been conclusively determined. In People v. Frisbie, 26 Cal. 135, an appeal had been taken from a judgment for delinquent taxes, rendered in favor of the plaintiff, and the judgment of the district court was affirmed. Pending the appeal, and before decision thereon, the legislature passed an act authorizing an additional defense to be interposed by the defendant in pending suits, and it was held that the appeal had suspended the operation of the judgment, so that the action was still pending, and that the rights of the plaintiff were limited to its cause of action, and that it did not have a vested right to the judgment. See, also, People v. Treadwell, 66 Cal. 400, 5 Pac. 686. In Kay v. Goodwin, 6 Bing. 576, 4 Moore & P. 341, it was said by Tindal, C. J., that the effect of repealing a statute is "to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute, without any saving clause, has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. "The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal." Sedgw. St. & Const. Law, 130. See, also, End. Interp. St. § 479. The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment, no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction, and before judgment, no judgment can be rendered. If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings. "If a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed, or judgment reversed." Suth. St. Const. § 166. Until the determination of the appeal, the proceeding is pending in court, and the judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had, it operates as a discharge of the defendant. "The repeal of the law imposing the penalty is of itself a remission." Per Taney, C. J., State v. Baltimore & O. Railroad Co., 3 How. 552. In Speckert v. City of Louisville, 78 Ky. 287, an appeal had been taken from a judgment against the defendants for violating a city ordinance. Pending the appeal, the ordinance under which the penalty was imposed was repealed, and, upon that fact being brought to the knowledge of the court, the judgment was for that reason reversed, with directions to dismiss the proceeding, the court saying: "The effect of the appeal was to suspend the judgment, and while the judgment below is regarded as final for the purposes of an appeal, its execution cannot be enforced until the appeal is disposed of. It is well settled that no judgment can be rendered in an action to enforce a penalty when the statute under which the proceeding is had has been repealed. When such a statute is repealed, it ends all the litigation under it, and if the judgment is not final,—that is, if the action seeking to recover the penalty is not finally disposed of, the right to the penalty depending upon the affirmance or reversal of the judgment,—and the repeal is brought to the knowledge of the court, it must necessarily result in a dismissal of the action." The same doctrine is maintained in Tuton v. State, 4 Tex. App. 472; Monroe v. State, 8 Tex. App. 343.

The judgment rendered in the justice's court was the infliction of a penalty for the violation of a law, and not the determination of any rights of the parties arising out of contract or obligation; and the attempt to take the property of the plaintiff, under an execution issued on that judgment, is only the enforcement of the penalty which the county, by its repeal of the ordinance, has remitted. The county has no greater right to enforce the penalty in this manner than it would have to arrest and confine the appellant under a warrant issued upon the same judgment. Section 329 of the Political Code is limited in its application to the repeal of a "law," and does not extend to the repeal of a municipal ordinance. See People v. Tisdale, 57 Cal. 104. The judgment is reversed.

We concur: PATERSON, J.; GAROUTTE, J.

101 Cal. 326

WEBSTER v. SAN PEDRO LUMBER CO.

(No. 19,273.)

(Supreme Court of California. Feb. 9, 1894.)

EVIDENCE—ACCOUNT BOOKS—PRELIMINARY PROOF.

1. The determination of the trial court as to the insufficiency of the preliminary proof necessary for the introduction of any documentary evidence will not be disturbed if there has been no abuse of discretion.

2. The mere fact that defendant's bookkeeper manipulated its books in order to defraud it does not, of itself, necessitate a reversal of the lower court's ruling that they were sufficiently correct to be used in evidence against plaintiff.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by E. W. Webster against the San Pedro Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Graff & Latham, for appellant. Stephen M. White and R. H. T. Variel, for respondent.

McFARLAND, J. This is, in form, an action to recover certain moneys alleged to have been deposited by plaintiff with defendant at various times from January 1, 1887, to November 1, 1889, to be held by defendant in trust for plaintiff. The answer denies that any moneys were deposited with defendant in trust, and avers, substantially, that, during the times mentioned in the complaint, defendant was engaged solely in the business of buying, selling, and dealing in lumber; that it was not engaged in banking business, and was not in any respect a trust company; that from August 31, 1887, to October 31, 1889, plaintiff was an employe of the defendant in the lumber business; that between August 31, 1887, and April 29, 1889, plaintiff did make certain deposits of money with defendant, but that they were made at the request of plaintiff, and for his accommodation and convenience, and not for the accommodation of defendant; that, during said times, plaintiff made purchases of lumber from defendant; that defendant has fully paid plaintiff for his services, and for all money deposited; that defendant kept a full and accurate account of all transactions between it and plaintiff, and that upon a settlement of the accounts between them on October 31, 1889, there was due and owing from plaintiff to defendant the sum of $81.24. The answer also set up the statute of limitations as to all items prior to April 29, 1889. The court found, substantially, that all the averments of the answer were true, except, perhaps, as to the statute of limitations, and gave judgment for defendant for the $81.24. Plaintiff appeals from the judgment and from an order denying a motion for a new trial.

The main contention of appellant is that the evidence does not support the findings, but this contention cannot be maintained. Appellant does not pretend to have kept, himself, any general account of the various transactions between him and the respondent. He relied upon the books of account kept by respondent of its general and current business, and made no objection to the state of his accounts with respondent, as reported from its books, until long after he had gone out of its employment. The only evidence of importance offered by him was his own testimony, based mainly upon written memoranda which he said he had made from memory of a certain book in which he had made some entries, and which had been destroyed. His recollection of the things to which he testified was so uncertain, and his testimony in chief was so modified in his cross-examination, that, if there had been no other evidence in the case, we would not be justified in disturbing the findings of the court.

Appellant contends that the court erred in admitting in evidence the account books of respondent. The objection to the introduction of the books was not upon the general ground that the books of respondent were not competent evidence, but upon the ground that the preliminary proof of their correctness, etc., was not sufficient. The general rule is that, where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and that his determination of the matter will not be disturbed unless there has been an abuse of discretion. Bryce v. Joynt, 63 Cal. 378; Butler v. Beech, 55 Cal. 28; Verzan v. McGregor, 23 Cal. 342. In the case at bar there was clearly sufficient evidence of the correctness, etc., of the books to warrant the court in admitting them in evidence. Afterwards, one of the chief bookkeepers of respondent absconded, and it appeared that he had made certain manipulations of some of the books, particularly the cash book, for the purpose of defrauding the respondent and embezzling some of its funds; but there was clearly sufficient evidence as to the correctness of the books, so far as the accounts and rights of those dealing with the respondent were concerned. The evidence as to the acts of the absconding bookkeeper is not sufficient to upset the ruling of the court as to the sufficiency of the preliminary proof to warrant the introduction of the books. There is nothing in the objections to questions asked witnesses about the correctness of the books, and there is no other point in the case which needs notice. Judgment and order affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

101 Cal. 312

HOLLENBACH v. SCHNABEL. (No. 19,-248.)

(Supreme Court of California. Feb. 9, 1894.)

REPLEVIN—EVIDENCE—JUDICIAL NOTICE.

1. The affidavit, bond, and sheriff's return, being filed by the sheriff, as required by Code Civ. Proc. § 520, each describing the property as in the complaint, and the latter reciting its taking and delivery to plaintiff, need not be formally introduced as evidence, but the court may take judicial notice of them as showing the fact of plaintiff's possession.

2. A finding that plaintiff did not rescind certain sales to defendant is one of fact, and not a conclusion of law.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Claim and delivery by Phil Hollenbach, trading as Phil Hollenbach & Co., against E. C. Schnabel. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry Bleeker, for appellant. Graff & Latham and M. E. C. Munday, for respondent.

SEARLS, C. This is an action of claim and delivery, to recover possession of certain liquors sold and delivered by plaintiff to defendant Schnabel, and which it is claimed were procured by fraudulent representations of defendant. The cause was tried by the court, written findings filed, and judgment ordered in favor of defendant (1) for the return of the property; (2) for the sum of $721.75, the value thereof, in case a return cannot be had. Plaintiff moved for a new trial, and, his motion being overruled, appeals from the order denying such new trial. The court found, among other things, that on the 28th day of December, 1889, the sheriff of Los Angeles county, under and by virtue of an affidavit, undertaking, etc., filed by direction of the plaintiff, took possession of the property, and thereafter and on the 3d day of January, 1890, delivered the same to the plaintiff, and that the value thereof was and is $721.75. Appellant contends that there was no evidence in support of these findings. There was on file, among the papers in the case, the affidavit and undertaking on behalf of plaintiff for a return of the property, describing it as in the complaint; the return of the sheriff duly certified, showing the taking of the property from defendant, and describing it precisely as in the complaint and affidavit; and the statement that he delivered it to the plaintiff, as found by the court. These papers were not formally offered in evidence at the trial, but, being on file as papers in the case, were used by the court in making its findings. Treated as evidence, they showed conclusively the delivery of the property to plaintiff, and the question arises, should a new trial be granted for this cause?

The Code of Civil Procedure (section 520) requires the sheriff to file the affidavit, notice, and undertaking, with his proceedings thereon, with the clerk of the court in which the action is pending. The answer demanded a return of the property, or a recovery of its value and damages. I am of opinion the court was at liberty to take judicial notice of the previous proceedings had in the cause, the evidence of which, under the official signature of its sheriff, was, as provided by the Code, on file in the case. Courts will take judicial notice of their records and officers. The case of Blum v. Stein, 68 Tex. 608, 5 S. W. 454, involved a like principle. The plaintiffs had brought an action, and wrongfully sued out a writ of attachment, under which property of the defendant had been levied upon, sold, and the proceeds paid into court. Defendant had answered, averring the wrongful issue of the attachment, and asking damages on account thereof, which he recovered. The court entered judgment, without reference to the fund arising from the sale of the attached property. On appeal, the supreme court held this to be error, and said: "The court knew judicially that the money was in court;" and, after specifying what should have been done with it, added: "To have authorized the court to do this, it was not necessary that the evidence rejected should have been introduced." In State v. Bowen, 16 Kan. 475, it was held that the court will take judicial notice of all prior proceedings in a case, and hence that, on a plea in bar of "once in jeopardy," it was unnecessary to introduce evidence of a former trial and the verdict rendered on such trial. In every case where a demurrer is interposed to a complaint upon the ground that the cause of action is barred by the statute of limitations, the court must and does, for the purpose of passing upon the question thus presented, take judicial notice of the date at which the action is commenced. And we think it may be said generally that, when necessary for the administration of justice in a given case, the court will take such notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause.

The findings of the court show that defendant is the owner of and entitled to the possession of the property in dispute. Plaintiff introduced in evidence the proceedings in insolvency of defendant, which showed his claim of right to the property, and that it was taken from him by the sheriff, and was held by the latter for the plaintiff. Its value was averred in the complaint, and not denied by the answer; hence the only question was as to the possession by plaintiff. To prove this, the return of the sheriff was proper evidence, and, that return being of record, the court might well avail itself of it in determining the fact, or, if the fact had not been found, in determining the right of defendant as a question of law to a judgment for its return. Waldman v. Broder, 10 Cal. 379. The findings of fact cover all the material issues made in the case. The finding "that plaintiff did not rescind said sales, or either of them," was one of fact, and not a conclusion of law, as contended by appellant. It was the ultimate fact, of which the other facts mentioned in the complaint were but evidentiary. See Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161, where the distinction between conclusions of law and deductions of fact is discussed at some length. This fact being found, manifestly all the others become unimportant, for the reason that, if plaintiff failed to rescind the contract, he was not in a position to recover the property sold in an action for claim and delivery, even had the court found the defendant guilty of fraud. The order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(101 Cal. 105)

EGENER v. JUCH et al. (No. 19,155.)

(Supreme Court of California. Feb. 10, 1894.)

In bank.

On rehearing. For original opinion, see 35 Pac. 432.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. The affidavits upon which the attachment was dissolved present no real or substantial conflict as to the facts. The attorney for the respondents made an affidavit stating in general terms that at the time the attachment issued they were actually residing in Los Angeles. But this was merely his conclusion or opinion. The affidavits filed by the plaintiffs, on the other hand, are full and specific as to the facts from which the question of residence is to be determined, and they are not contradicted. They show clearly and beyond any question or room for doubt that the defendants had been, and for many years were, residents of New York; that they were in California at the time of the attachment as members of a theatrical troupe, traveling from place to place, giving performances according to a definite programme, and intending to leave the state within a few days. The case is in no substantial particular like Hanson v. Graham, 23 Pac. 56, or any of the cases upon the authority of which it was decided; and the order of the superior court cannot be upheld upon any theory except that the mere presence of a defendant in the state at the time an action is commenced, under circumstances which enable the plaintiff to secure a personal service of the summons, will make him a resident within the meaning of the attachment law. I do not assent to this proposition, and the court, I am sure, would hesitate to affirm it.

(101 Cal. 260)

EAMES v. CROSIER et al. (No. 19,288.)

(Supreme Court of California. Feb. 7, 1894.)

ACTION ON NOTE — SUFFICIENCY OF COMPLAINT—ISSUES RAISED BY PLEADINGS — CONFORMITY OF FINDING—BURDEN OF PROOF.

1. A complaint alleging that plaintiff is the owner and holder of the note in suit, and that the payee, for value and before maturity, assigned it by indorsement in blank, sufficiently shows plaintiff's title.

2. The complaint alleged that the note was indorsed in blank, and delivered by the payee to plaintiff, which the answer denied, averring that the payee indorsed and delivered the note to one R., who "is still the owner of the note." The evidence showed that the note was indorsed in blank by the payee, and delivered to R., who assigned it, before maturity, to T., and that T. transferred and delivered it to plaintiff. *Held*, that a finding that T. purchased and received the note in good faith, and without notice of any of the facts stated in the answer, was not outside of the issues raised by the pleadings.

3. Where fraud in the inception of a note is shown, the burden of proof is on the indorsee to show that he is an innocent holder; but the burden is discharged, and a prima facie case made in his favor, where he shows that he purchased for value in the usual course of business.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Eames against Crosier and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal.

Thomas J. Carran, for appellants. Chas. Lantz, for respondent.

PATERSON, J. The plaintiff recovered judgment in the court below for the sum of $681.52 and costs of suit on two promissory notes for $250 each, dated May 9, 1889, payable in 6 and 12 months, respectively, after date. It is claimed by the appellants that the second count does not state a cause of action. The point made is that it is insufficient to allege that the "plaintiff is now the holder and owner of said promissory note." The point would be well taken if this were the only allegation showing ownership in the plaintiff. It is alleged, however, that at the time the note was made it was delivered to Bandholt, the payee named therein, and "that thereafter J. F. Bandholt, for value and before maturity, assigned said note by indorsing same in blank on the back thereof." This, taken in connection with the allegation of possession, was sufficient to show the plaintiff's title; the effect of an indorsement in blank being to make the paper payable to the plaintiff, not as an indorsee, but as bearer. Poorman v. Mills, 35 Cal. 120; Curtis v. Sprague, 51 Cal. 241.

It is alleged in the first count that the note was indorsed in blank, and delivered by Bandholt to the plaintiff; but the findings and evidence show that the note was indorsed in blank by Bandholt, the payee, and delivered to one Runels, who, before the maturity thereof assigned and delivered the same to M. M. Talmage, and that the latter afterwards sold and transferred the note to the plaintiff. It is claimed by appellants that, inasmuch as the plaintiff acquired the note after maturity, he can recover only upon showing title in a prior bona fide holder, and that this cannot be done because of the allegation of a direct assignment of the note from Bandholt to himself. The court found that Talmage "purchased and received and paid for said notes in good faith, without notice of any of the facts stated in the answer." This finding, it is claimed, is outside of the issues raised by the pleadings; and this would be the fact if there were nothing more in the pleadings on the subject than the allegation of the complaint that the note was indorsed and delivered by Bandholt to the plaintiff. In the answer, however, it is denied that Bandholt ever assigned or delivered said note to the plaintiff, and it is alleged that the note was indorsed and delivered by Bandholt to Runels, and that the latter "is still the owner of said note." The finding, therefore, is not outside of the issues raised by the pleadings.

The court found, in accordance with the allegation of the answer, that the defendants were induced to make and deliver the notes by false representations as to the value and character of certain lands, but that Talmage "purchased and received and paid for said notes in good faith, without notice." Appellants contend that this finding that Talmage "purchased and received and paid for said notes in good faith, without notice," is not supported by the evidence. It is admitted that the notes were acquired by both Talmage and the plaintiff for value; but it is claimed that proof, on the part of the defendants, that the notes were procured from the defendants through fraud, cast upon the plaintiff the burden of showing that the plaintiff or Talmage purchased without notice of the equities set up in the answer. Authorities are cited which support this contention, but later decisions qualify the rule as to the burden of proof. Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities. This view is entirely consistent with what was said by the court in Jordan v. Grover (Cal.) 33 Pac. 889. The statement of the learned justice who wrote the opinion therein, that the plaintiffs, in order to sustain the burden cast upon them, must show that they purchased the note before maturity, in good faith, for value, in the usual course of business, and "under circumstances which create no presumption that they knew the facts which impeach its validity," is merely appositional to the rule which had already been stated, that, "where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder." As before stated, this burden is discharged, and a prima facie case is made in his favor, when he shows that he purchased for value in the usual course of business. In Davis v. Bartlett, 12 Ohio St. 541, the court, referring to Munroe v. Cooper, 5 Pick. 412, cited by appellants herein, said: "And the judge refers to the case of Munroe v. Cooper, 5 Pick. 412, as particularly in point to sustain this view. If to show that he purchased the negotiable paper in the usual course of trade, before due, and for a valuable consideration, in such a case, be understood by the judge as a fair prima facie showing that he acted honestly and without a knowledge of the fraud, the correctness of the remark must be admitted, but, if the remark is to be understood as meaning more, it must be regarded, I think, at variance both with authority and correct reasoning;" and, in summing up, the court used the following language: "But it is certain that it cannot be maintained, either upon authority of the cases, English or American, that, from the fact of the defendants proving a fraudulent diversion or transfer of the paper, it then becomes incumbent upon the plaintiff to prove, not only payment of value and a purchase in the usual course of trade, but also his own ignorance of the fraudulent diversion or transfer." In 1 Daniel, Neg. Inst. (4th Ed.) § 819, the author says, speaking of the holder: "He makes out a prima facie case by proving that the instrument was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any better way. These, at least, are the conclusions of well-considered decisions, which rest, as we think, on sound reasoning; but in others the courts have indicated a more stringent rule, and a disposition not to relieve the plaintiff of the burden of proof by mere proof that he gave value. Unless there were circumstances which seemed to bring home to him notice of the fraud or illegality imputed, the requirement of further proof than the giving of fair value seems unreasonably harsh and exacting." This, we think, states the true rule. No circumstances were shown in this case which would impute to the plaintiff or to Talmage any notice of fraud, and it is in evidence that Talmage paid $450, and that plaintiff paid $500, for the notes. We have referred to Talmage particularly, because, to recover on the first note, plaintiff, who took the note when overdue, must show that a prior holder took the note for value before maturity. It is a settled principle that if the party who transferred the instrument to the holder took the note for value, and before maturity, unaffected by any infirmity in it, the holder acquired as good a title, although he took the note when overdue. The findings support the judgment, and we find no error in the record. The judgment and order are therefore affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(101 Cal. 330)

LEONIS v. BISCAILUZ. (No. 19013.)

(Supreme Court of California. Feb. 12, 1894.)

APPEAL—INTERVENTION BY CREDITOR.

Since Code Civ. Proc. § 387, permits any one interested to intervene before trial, and a judgment confessed to defraud a creditor does not bind the latter, a stranger to the record cannot oppose a motion to reverse and remand, to which the parties of record assent, on the ground that, since rendition of the judgment appealed from, intervener has recovered a money judgment against respondent, and levied on the land in controversy; that she believes that on technical merits the judgment should be affirmed, but that the parties are colluding, as against intervener, for a judgment to divest respondent of title; and that respondent is insolvent and has no other property to satisfy intervener's judgment.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

In the matter of the appeal of Jean Leonis against M. V. Biscailuz. Motion for reversal and remand for new trial, opposed by Victoria J. de Yorba. Motion granted.

Reymert & Orfila and Smith, Winder & Smith, for appellant. R. Dunnigan, J. R. Dupuy, and E. H. Bentley, for respondent.

DE HAVEN, J. The parties to this action have filed a stipulation herein to the effect "that the errors assigned by the appellant in the record in this case are well taken," and that the judgment and order appealed from shall be reversed, and the cause remanded to the superior court for a new trial, and have moved for a judgment in accordance with this stipulation. The motion is opposed by one Victoria J. de Yorba, who has filed an affidavit to the effect that, since the rendition of the judgment appealed from, she has recovered a money judgment against the respondent here, and has caused an execution thereon to be levied upon the land in controversy in this action; "that she is informed and believes that, upon the technical merits of this appeal, the respondent, Biscailuz, will be entitled to have his said judgment against Leonis confirmed, but the affiant avers that she is informed and verily believes that, since her said levy on the said interest of Biscailuz in said Leonis' lands, an arrangement has been arrived at between the appellant, Leonis, and respondent, Biscailuz, that by some form of consent judgment, or by some device, the particulars of which cannot be ascertained by affiant, a judgment of this court shall be suffered by said Biscailuz to be taken against him, as respondent, in favor of the appellant, Leonis, the effect of which arrangement will be to divest the said Biscailuz of title to the lands and property levied on by affiant, and thereby prevent the affiant from the collection of her said judgment from the said Biscailuz." It is also stated in the affidavit that the respondent, Biscailuz, is insolvent, and has no other property than that in controversy here out of which to satisfy the judgment of the affiant, and she asks to be allowed to intervene in the action in this court, and to file briefs on the technical merits, and that the court dispose of the cause on its merits, and without reference to the stipulation of the parties to the record.

The application is certainly a novel one. Under section 387 of the Code of Civil Procedure, one who has an interest in the matter in litigation may be permitted to intervene before the trial of an action, but there is no authority for such intervention after judgment, and while the cause is pending in this court on appeal; nor has a stranger to the record any right to call upon this court to investigate and pass upon the merits of an appeal, when the parties to the record have consented to an affirmance or reversal of the judgment without such investigation and decision. Nor is it at all necessary that the judgment creditor in this case should be permitted to obtrude herself into the case at this time in order to protect her rights. The cause is to be reversed, and when it is remanded to the superior court she will have the right, at any time before judgment in the action, to present her petition for intervention in accordance with section 387 of the Code of Civil Procedure, and have the same determined in accordance with what may then appear to be her rights in the premises; but, if it were otherwise, and final judgment was to be rendered in this court or in the superior court against the respondent herein, upon his confession or stipulation, such judgment, if fraudulently confessed by the alleged judgment debtor for the purpose of preventing the application of the property in controversy to the satisfaction of the claim of the judgment creditor, and the appellant herein participating in such fraudulent purpose, would not conclude the rights of such creditor, although her rights were acquired by the levy upon such property during the pendency of this litigation. It is to "fair and bona fide judgments, and not to fraudulent ones, that the right of their enforcement against purchasers pendente lite is given. For no obligation, either legal or moral, withholds one from setting up his vendor's title as against him who has fraudulently contrived with his vendor to weaken or destroy it after he has conveyed the property to him. No principle of policy or convenience requires that such judgment should conclude his rights." Haywood v. Sledge, 3 Dev. 338.

It follows from what has been said that the motion for leave to intervene, and to file a brief herein, must be denied, and the judgment and order appealed from will be reversed in accordance with the stipulation. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

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101 Cal. 286

ST. LOUIS NAT. BANK v. GAY. (No. 19,202.)

(Supreme Court of California. Feb. 8, 1894.)

SET-OFF—WHEN ALLOWABLE — ASSIGNED CLAIMS.

1. Civ. Code, § 1459, provides that the assignee of a nonnegotiable written contract for money takes it subject to all defenses existing in favor of the maker at the time of the indorsement. Code Civ. Proc. § 368, provides that in the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off existing at the time of or before notice of the assignment. *Held*, that the one section is merely an enlargement of the other, and that a defendant may avail himself of a set-off acquired before notice of assignment.

2. "Set-off," as used in section 368, applies to demands independent in their nature and origin, and not arising out of the note or contract sued on.

3. To constitute a "set-off existing at the time of or before notice of the assignment" of the chose in action, within the meaning of Code Civ. Proc. § 368, the set-off need not be actually due at the time of such notice.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the St. Louis National Bank against John H. Gay, Jr., to recover on notes. Defendant pleaded as a counterclaim another note, and the court deducted the amount thereof from plaintiff's judgment. Plaintiff appeals. Affirmed.

Burnett & Gibbon, for appellant. Conklin & Hughes, for respondent.

McFARLAND, J. On February 4, 1891, defendant Gay made and delivered to D. D. Dare two nonnegotiable notes, each for $2,500 and interest, and each payable one year after date. On February 24, 1891, Dare assigned these notes to the plaintiff. On February 12, 1891, Dare made and delivered to J. M. Collins his negotiable promissory note for $5,000 and interest, payable one year after date; and on October 21, 1891, said note to Collins was purchased by and regularly assigned to defendant. At the time of this purchase defendant had no notice that his note to Dare had been assigned to plaintiff, but several months afterwards, on February 1, 1892, he was notified of such assignment, and at the time of such notice the note from Dare to Collins was not quite due; the date of its maturity being February 12, 1892. The two notes sued on matured February 4, 1892. The present action was commenced August 1, 1892, several months after all the notes had matured. The defendant pleaded as a counterclaim the said note from Dare to Collins, and the court allowed it, and deducted its amount from the judgment in favor of plaintiff. The plaintiff appeals from the judgment upon the judgment roll, and contends that the court erred in recognizing said Collins' note as a legal set-off.

The first contention of appellant is that the set-off was not available, because it was not acquired until after the said assignment from Dare to appellant, notwithstanding the fact that it was acquired before notice of such assignment. This contention is based on section 1459 of the Civil Code, which provides that the assignee of a nonnegotiable written contract for money or personal property takes it "subject to all the equities and defenses existing in favor of the maker at the time of the endorsement." But section 368 of the Code of Civil Procedure provides as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before maturity." These two sections must be construed as though they "had been passed at the same moment of time, and were parts of the same statute." Pol. Code, § 4480. Section 1459 is not restrictive; and the maxim, expressio unius, etc., does not apply to it when considered in connection with said section 368, which became law at the same moment. The two sections are not contradictory, and therefore the rules of construction which aid in cases of contradictory provisions need not be invoked. The one section is merely an enlargement of or addition to the other, and the law as declared by the two sections is that a defendant may avail himself of a set-off acquired before notice of assignment, provided the set-off be in other respects good. It was so held in McCabe v. Grey, 20 Cal. 510, and has been assumed to be the law ever since. Appellant refers to the fact that in Pomeroy on Remedies and Remedial Rights, (section 166,) McCabe v. Grey is hostilely criticized; but, in this instance at least, the opinion of the text writer has not overruled the decision of the court. We see nothing in the contention that one of the sections should be construed as referring to choses in action different from those embraced in the other. Section 368 embraces every kind of things in action except negotiable paper, which paper alone is excepted from its operation. Appellant seems to contend that there can be a value set-off to a nonnegotiable note only when the matter of set-off arises out of the note itself, as want of consideration, etc., and that it cannot arise out of another distinct, independent contract; but this is not the meaning of "set-off," as used in section 368, although such meaning might be not inaptly given to what was once commonly called "recoupment." The meaning of set-off is correctly stated in Abbott's Law Dictionary, with authorities cited, as follows: "Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin while recoupment implies a cutting down of a demand by deductions arising out of the same transaction." "Counterclaim," as used in our Code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. It may be used by defendant to plead, as against the plaintiff: "(1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the cause of action; (2) in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civ. Proc. § 438.

The only point of any difficulty in the case at bar is raised by appellant's contention that respondent cannot use the note from Dare to Collins as an offset, because it was not due at the time he received notice of the assignment from Dare to appellant, although full title to it had been acquired before such notice. His position is that a set-off is not available against an assignee unless it be due, payable, and suable at the time of notice of assignment. There are New York authorities to this effect, but the statute law of New York upon the subject is essentially different from that of California. The New York cases go upon the theory that the statute there provided that the counterclaim must be such as might have been set off while the contract belonged to the assignor. Myers v. Davis, 22 N. Y. 491; Martin v. Kunzmuller, 37 N. Y. 396; Fuller v. Steiglitz, 27 Ohio St. 355. But there is no such statute in this state. By section 438 of the Code of Civil Procedure, in an action on contract the defendant may set up any cause of action arising upon contract and "existing at the commencement of the action." If Dare had kept his note and sued on it in August, 1892, respondent could unquestionably have set off the Collins note; and it seems a clear proposition of law, under the sections of our Code above stated, that, in an action by the assignee of a chose in action not negotiable, the defendant may successfully plead any set-off which he could have so pleaded against the assignor, if he had retained and brought suit on it, provided he acquired it before notice of assignment, and provided, further, that it was "existing at the commencement of the action." It is contended that at the time of the notice of assignment the Collins note was not an "existing" set-off because it was not then quite due, and therefore not presently suable. But the thing itself—the note, the chose in action—was then existing, and it was pleadable by counterclaim when this action was commenced. The point under review has not been definitely determined in this state; and it may be considered res integra. There has been a diversity of decisions on the subject in other states, and, as was said by the supreme court of Ohio, in Fuller v. Steiglitz, supra, "the phraseology of different statutes gives rise to this diversity in the cases." Under our statutory provisions we think that the correct rule is that stated in Bank v. Balliet, 8 Watts & S. 311. In that case suit was brought upon a bond given by defendant to the bank, and assigned to one Swader, and defendant set up certain obligations of the bank which he had acquired before notice of the assignment—some of such obligations, it seems, not being due at the time of such notice. The court say: "The court was right in admitting the evidence, because, although the liability of the bank was not complete when the defendant had notice of the assignment, yet the transaction out of which the defense arises commenced before he was informed of the transfer of the bond." And, again, the court say: "The time the contract begins between the assignee and the obligor is when the latter has notice of the assignment. It is the duty of the obligee or assignee to inform the obligor that he has parted with the bond, and if this is omitted they are in default, and not the obligor, who, until he is informed otherwise, has a right to suppose that the bond is still the property of the obligee, and to act and contract with the obligee, or others, under that reasonable supposition." This rule seems to us to be just and right. A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross demands which may be counterclaimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment. When a stranger voluntarily interferes with relations between third parties, and takes an assignment of an obligation from one of the latter to the other, he is in no position to beg for equitable consideration, and has only such right in the premises as the statute gives him, and under the statute he stands in the shoes of his assignor until he gives notice of the assignment; but such notice in no way destroys or impairs any right which the debtor had acquired against the creditor prior to such notice. The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action; for, under the rule invoked by appellant, a debtor could not use a note falling due before his own obligation, if before its maturity he received notice of assignment. Moreover, under such rule, if A. should give B. his nonnegotiable note for a certain sum of money, due in six months, and B. should afterwards employ A. to render certain services, to be paid for at the maturity of said note, the latter could not safely rely upon the value of the services as a set-off to the note; because, after the services had been rendered, the set-off could be defeated by an assignment of the note and notice of the assignment before compensation for the services was in praesenti due and payable. The judgment is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

101 Cal. 322

REDONDO BEACH CO. v. BREWER et al.
(No. 19,243.)

(Supreme Court of California. Feb. 9, 1894.)

GARNISHMENT—WHEN LIES—EQUITABLE CLAIM.

Where the vendee of land makes a part payment on the purchase, and fails to make the deferred payments as agreed, he has no claim against his vendor for the amount of his part payment, or for the value of improvements placed by him on the land, which can be the subject of a garnishment in favor of his judgment creditor.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Redondo Beach Company against R. G. Brewer, the California Loan & Trust Company, and others. From a judgment for plaintiff, defendant loan and trust company appeals. Affirmed.

Walter Bordwell, for appellant. Sheldon Borden, for respondent.

McFARLAND, J. This is an action to quiet title to a certain parcel of land. R. G. Brewer, Ernest A. Miller, and certain other persons were made defendants, and suffered default. The California Loan & Trust Company was also made a defendant, and filed an answer and cross complaint, to each of which plaintiff interposed a general demurrer. The demurrers were sustained, and judgment was rendered for plaintiff. The said loan and trust company appeals from the judgment. The answer and cross complaint set up substantially these facts: On October 1, 1889, plaintiff and the defendant Brewer made a written contract for the sale by the former to the latter of the land described in the complaint. By this contract Brewer was to pay, and did pay, at its date $120, and was to pay $325 on April 1, 1890, and $325 on October 1, 1890, when plaintiff was to give him a conveyance of the land. No part of either of the said deferred payments was ever made. On May 27, 1890, Brewer assigned all his interest in the contract to the defendant Miller, who, prior to October 1, 1890, erected a building on the land worth $400. No part of the $150 or $400 has been repaid to Miller or any other person. Subsequent to October 1, 1890, plaintiff, it is averred, elected to declare the contract forfeited and at an end. Subsequent to said alleged election, the defendant and appellant, the said loan and trust company, recovered a money judgment against said defendant Miller for $950, upon which he caused an execution to be issued, and the sheriff "by virtue of said writ of execution duly attached the debt then due from the plaintiff, the Redondo Beach Company, to the said defendant E. A. Miller." And it is averred that, by virtue of the said levy under execution, said loan and trust company is entitled to recover from the plaintiff the said $120 paid on said contract, and the said $400, value of said building erected by Miller, with interest, and that it has a lien on said land for said two amounts of money.

We think that the demurrers were properly sustained. The briefs of counsel contain quite an elaborate discussion about the respective rights of parties to contracts for the sale and purchase of land, when the vendee, having made the first payment, fails to make any of the deferred payments. But we do not think it necessary to deal with this discussion, for we think that counsel for respondent is right in his contention that, under any view of the subject, appellant did not acquire anything by the garnishment under his execution, which he can use as a defense or cross claim in the present action. We may assume that Miller, although he had utterly failed to comply with the contract with respondent, had still some sort of a claim against the latter with respect to the $150 paid by Brewer. (We find no authority for any claim for improvements in such a case.) We may assume, also, that if respondent had been "indebted" to Miller, or had owed him a "debt" within the meaning of sections 717 and 720, Code Civ. Proc., the appellant could have set up such debt directly in the answer and cross complaint, without resorting to proceedings supplementary to execution, or to a creditor's bill, which proposition is doubtful. See Herrlich v. Kaufmann, (Cal.) 33 Pac. 857. Still, whatever right Miller had in the premises was nothing more than an equitable claim upon $150, paid by Brewer, subject to respondent's right to recoup damages for breach of contract. It was, at best, a mere equity, and not a cause of action upon which he could have maintained a common-law action of debt, or indebitatus assumpsit, and, therefore, was not the subject of garnishment under the execution. "It is well settled that the word 'debt' as used in the law of garnishment includes only legal debts—causes of action upon which the defendant in the attachment, under the common-law practice, can maintain an action of debt, or indebitatus assumpsit—and not mere equity claims." Hassie v. Congregation, 35 Cal. 385, 386. There is an averment in the complaint that appellant, prior to the judgment against Miller, had caused a writ of attachment to be issued, and had, under said writ, attached the interest of Miller in the land; but nothing further seems to have been done under said attachment, and no right under it is insisted on in the briefs of appellant. He rests his case on the garnishment under the execution. Judgment affirmed.

We concur: **DE HAVEN, J.**; **FITZGERALD, J.**

(101 Cal. 317)

FRANDZEN v. SAN DIEGO COUNTY. (No. 19,289.)

(Supreme Court of California. Feb. 9, 1894.)

COUNTY CLERK—POWERS — CONTRACT FOR PRINTING.

Pol. Code, § 1115, providing that the clerk shall have printed a sufficient number of copies of the lists of voters, taken in connection with Laws 1891, p. 309, (County Government Act, § 34,) providing that the board of supervisors must provide printed copies of the "great register" and of other books and papers there mentioned, does not empower the clerk to make a contract for the printing of the "great register" which shall be binding on the county.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Eugene Frandzen against the county of San Diego. From a judgment for plaintiff, defendant appeals. Reversed.

M. L. Ward, Dist. Atty., for appellant. Shaw & Holland, for respondent.

HAYNES, C. This is an appeal from the judgment upon the judgment roll, and the only question presented by the record is whether the county clerk had authority, as the law stood in 1892, to bind the county by his contract with the plaintiff to print the great register for that county. In July, 1892, the board of supervisors fixed the price for printing the great register for that year at 15 cents per name for the first 500 copies, and 75 cents for each additional copy. On August 26, 1892, W. M. Gassaway, then county clerk, contracted with the plaintiff to print the register at the prices fixed by the board. On September 26th, and before any of the copy had been furnished the plaintiff, Gassaway was superseded as such clerk by C. W. Thompson, who refused to permit the plaintiff to print the register, and employed other parties to do the work; and this action is to recover damages from the county for the breach of said contract. The cause was tried by the court, and resulted in findings and judgment for the plaintiff. The question to be decided is raised by demurrer to the complaint, and upon the findings.

The opinion of the learned judge who tried the cause is printed in respondent's brief, (and which constitutes the principal part of it,) and the conclusion reached is based upon his construction of section 1115 of the Political Code, and of subdivision 23 of section 25 of the county government act, (Laws 1891, p. 305,) and section 34 of the same act, (page 309.) By section 236 of the act of 1891, (page 422,) all acts and parts of acts inconsistent with it are repealed. By section 1115 of the Political Code it is provided that "within fifteen days after making such lists, [of voters,] the clerk must have printed a sufficient number of copies thereof," etc.; and section 1116 directs the clerk to distribute them. These sections are in that part of the Political Code which provides for the government of the state and the registration of electors. Section 1115, as well as other sections of the chapter, show that the board of supervisors have a general control over the matter, and may order new registrations, or, if a sufficient number of former registers are on hand, may direct the clerk "to cancel all names thereon required to be canceled," and to prepare a supplement of additional names; that assistants may be employed by the clerk, for such times and at such compensation as shall be fixed by the board, which shall be paid out of the county treasury; but no other expense is provided for by this chapter of the Code. The county clerk is the clerk of the board, and by the Code is specially charged with the duty of preparing the great register, and, having performed that duty, is very appropriately charged by the statute with the printing of it; but this does not necessarily imply that he has the power to contract, on behalf of the county, for the expense of printing. All these statutes should be construed in the light of the general scheme of county government created by the act; not that a positive provision clearly expressed should be nullified because it is not, in our opinion, in consonance with the general frame of the act, but, where a provision is not clear, it should be read in the light of the whole act and of its purposes, and the whole brought into harmony and consistency, if that can be done without violence to its provisions. It is much easier for a legislator to conceive a harmonious scheme of county government than it is to frame a bill for that purpose that shall be clearly consistent in all its provisions. The board of supervisors are the chief legislative and executive authority of the county. They have not only the powers expressly given, but such powers, also, as are necessary to the discharge of duties imposed by law. Unless, therefore, the county clerk is clearly authorized to make a contract on behalf of the county, so as to charge it, not only with the duty of performing it, but with damages for its breach, this judgment cannot be sustained.

Section 34 of the county government act (Laws 1891, p. 309) is as follows: "The board must provide printed copies of the great register, poll lists, poll books, blank returns and certificates, proclamations of elections, and other appropriate and necessary appliances for holding all elections in the county, and allow reasonable charges therefor, and for the transmission and return of the same to the proper officers." This is the only section in the act which in terms refers to the great register. Whether such work as the great register can be properly classed as "job printing," as used in subdivision 23 of section 25 of the same act, is not material. It is clear that it is not necessary to "fix the price" of printing the great register "annually," as our elections are biennial, and the statute does not require the great register to be printed at every election, though at least a supplement may be necessary at each election. This subdivision does not, in express terms, require bids for job printing and advertising, though after requiring the board to annually fix the price at which the county shall be supplied with job printing, blank books, and advertising; and after stating that "each county officer shall procure such blank books, job printing, and advertising at a price no greater than is so fixed, and certify the bills therefor to the board of supervisors," it is immediately added: "And in all cases bidders shall estimate by ems or squares for each character or class of work to be done; and no greater price shall be charged for similar work when done by authority of law, whether said work is done for the city, city and county, or for private individuals." It is not necessary to hazard a guess at the meaning of the above provisions. There is nothing in them which clearly or necessarily includes the printing of the great register, while it could not come within the direction to bidders to "estimate by ems or squares." There are, however, many things to which it can apply, aside from the great register; and hence there is no conflict between that subdivision and section 34 above quoted. The learned judge whose opinion we have referred to thought it necessary, in order to harmonize these provisions, to interpolate the word "for" between the words "provide" and "printed" in section 34; but that suggestion concedes that, as section 34 appears in the statutes, the board is required to procure the great register to be printed; and, if that is the true construction of the section, (and we think it is,) the controversy is ended.

Counsel for respondent cites Publishing Co. v. Whitney, 97 Cal. 283, 32 Pac. 237; but there is no conflict between our conclusion here and that case. That case involved the printing of the delinquent tax list, which was there held to be county advertising, and so within the provisions of subdivision 23. Maxwell v. Board, (Cal.) 32 Pac. 443, (not reported in the California Reports,) was mandamus to compel the board to advertise for bids for county advertising. The writ was refused on the authority of Publishing Co. v. Whitney, supra. As suggested by counsel for appellant, if the legislature intended the printing of the great register to be included and provided for in subdivision 23 of section 25, there was no occasion for again alluding to it, or providing for it in section 34. Besides, "where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." End. Interp. St. p. 288. We think the county clerk had no power to make the contract in question, and that the judgment should be reversed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

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101 Cal. 307

FIRST NAT. BANK OF SAN LUIS OBISPO v. HENDERSON et al. (No. 19,253.)

(Supreme Court of California. Feb. 9, 1894.)

PENAL STATUTE — REPEAL PENDING APPEAL—EFFECT.

Since the provision of Act April 1, 1876, that a corporation engaged in the banking business should not maintain any action in the courts of the state unless it had filed or published certain statements as required by the act, was in the nature of a penalty, and intended merely to secure compliance with the statute, the repeal thereof pending the appeal in an action brought by such corporation deprived the appellate court of the power of rendering a judgment enforcing the provision.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the First National Bank of San Luis Obispo against M. F. Henderson and others. From a judgment for plaintiff, defendant Greenberg appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

HARRISON, J. The plaintiff is a banking corporation, and brought this action upon an account stated between it and the defendants for the amount of certain payments made upon their checks. Judgment was rendered in its favor, and the defendant Greenberg has appealed therefrom. One of the defenses set forth in his answer is the failure of the plaintiff to comply with the provision of the act of April 1, 1876, (St. 1876, p. 729,) in that it had failed to file with the county recorder or to publish the statements therein required. It sufficiently appears from the findings and evidence that this defense was established at the trial; but it is contended by the respondent that, inasmuch as the legislature has repealed the statute since the appeal was taken herein, the error has been thereby released, and the judgment should be affirmed. The judgment herein was entered January 12, 1893, and the appeal therefrom was taken January 21, 1893, and the statute referred to was repealed March 9, 1893, without any saving clause.

Ordinarily, it is the province of an appellate court to review the judgment of the inferior court as of the time when it was rendered, as ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action. This rule is not, however, inflexible. Matters may arise, subsequent to the commencement of an action, which will affect the rights of the parties thereto and the judgment to be rendered therein, and supplemental pleadings are authorized in order that these matters may be properly brought before the court. So, too, matters may arise subsequent to an appeal affecting the judgment appealed from; and, although additional pleadings are not permitted in the appellate court, yet upon proper suggestion and proof of such matters they will be considered by it. See Dakota Co. v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428. An appeal from a judgment will be dismissed upon it being properly shown that the trial court had granted a new trial subsequent to the appeal, and had thereby vacated the judgment appealed from. When the jurisdiction of the appellate court depends upon a statute, the repeal of the statute takes away its jurisdiction. In actions of a penal character, depending upon a statute, the repeal of the statute pending the appeal will deprive the appellate court of any power to render a judgment by which this penalty may be enforced. Cooley, in his treatise on Constitutional Limitations, says, (page 469:) "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." In U. S. v. The Peggy, 1 Cranch, 103, a decree of condemnation had been made, from which an appeal was taken, and pending the appeal the United States entered into a treaty with France, by which the two nations mutually agreed to restore all property that had not been definitely condemned. To the argument that the court could only inquire whether the judgment of condemnation was erroneous when delivered, and that, if it was then correct, it could not be made otherwise by anything subsequent to its rendition, Chief Justice Marshall said: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed or its obligation denied. In such a case the court must decide according to existing laws, and, if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." This principle was again affirmed by the same court in Yeaton v. U. S., 5 Cranch, 281, where the law under which the condemnation was rendered had expired pending the appeal; and again in The Rachel v. U. S., 6 Cranch, 329, although the vessel had been sold, and the proceeds paid over to the United States. See, also, U. S. v. Preston, 3 Pet. 57; Price v. Nesbitt, 29 Md. 263; Lewis v. Foster, 1 N. H. 61; Speckert v. City of Louisville, 78 Ky. 287; Musgrove v. Railroad Co., 50 Miss. 677. In the latter case the court say, (page 682:) "If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after rendition of the original judgment, and pending the appeal, the case must be heard and decided in the appellate court according to the then existing law. If, therefore, the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed, the court will not reverse and remand, because the inferior court must recognize the repeal, and conform, on the second trial, to the law as it then was, and not to the law as it may have been at the time of the first trial." In Atwell v. Grant, 11 Md. 101, a promissory note had been received in evidence without the revenue stamp which was required by a statute in force at the time of the trial, and upon appeal this was assigned as error. This statute was repealed after the entry of the judgment, and before the hearing of the appeal; but the court refused to reverse the judgment, for the reason that upon a subsequent trial no stamp would be necessary to render the note a valid instrument of evidence. In State v. Norwood, 12 Md. 195, a bond offered in evidence had been excluded for want of a stamp, and the court, upon appeal, reversed the judgment, for the reason that the exclusion of this evidence was in the nature of a penalty for a failure to comply with the statute, and that the repeal of the statute made the contract as valid, in law, as if the stamp act had never been passed. The statute in question in the present case was intended to secure a compliance with the requirements that the legislature had prescribed for persons or corporations engaged in a banking business, and the provision prohibiting them from maintaining any action in the courts of this state without such previous compliance was in the nature of a penalty, which it was competent for the legislature to remit at any time. The privilege which the defendant had, under this statute, to avoid the enforcement of his contract, was not given with the view of giving him any advantage, but was conferred upon him by the state for its own purposes. Only the state, and not the defendant, had any interest in the enforcement or remission of this penalty; and, after the state has remitted it, the appellant is no longer able to avail himself of the privilege which it conferred. See Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408. It would be an unjust hardship upon the parties, and would be sacrificing substance to form, to reverse the judgment of the court below, and send the case back for a new trial, when the only result would be that the court would render the same judgment that it has already given. Code Civ. Proc. § 475.

Upon the facts constituting the plaintiff's cause of action, the appellant is not in a position to question the sufficiency of the evidence to sustain the findings. There is no plea on his part of the statute of limitations, and by his answer he admits the allegations of the complaint that, at the time when the account was stated, and also at the commencement of the action, the defendants were partners. At the trial he himself testified that the account was correct, and that the partnership owed the plaintiff the amount sued for. The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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101 Cal. 381

In re OGIER'S ESTATE. (No. 19,332.)

(Supreme Court of California. Feb. 24, 1894.)

Wills—Selection of Attorney—Executors.

1. A provision in a will, whereby testator selects a certain person as the attorney of his estate, and directs that his executrix consult and employ him in all matters pertaining, does not constitute a selection binding on his executrix, but is merely advisory.

2. Such provision gives no power to the attorney to act as executor.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Petitions of J. De Barth Shorb and John W. Mitchell that the will of Anna Ogier be admitted to probate, etc. From an order denying the petition of Mitchell, he appeals. Affirmed.

John W. Mitchell, in pro. per., (Wellborn & Hutton, of counsel,) for appellant. Chapman & Hendrick and Graves, O'Melveny & Shankland, for respondent.

BELCHER, C. Anna Ogier died on the 16th day of March, 1893, in the county of Los Angeles, leaving an estate therein, consisting of real and personal property, of the value of more than $60,000, and also leaving a duly-executed last will and testament, which contained, among others, the following provisions: "Twenty-seventh. I appoint the said Mrs. J. De Barth Shorb the executrix of this my last will, and direct that she may be exempt from giving bonds as such, but charge her faithfully to see that my estate is distributed as herein directed. If she should die, or be unable to act, then I appoint John M. Elliott my executor, with the same conditions. Twenty-eighth. I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this, my last will. Twenty-ninth. If my said executrix and my said attorney deem it advantageous to my estate, and those interested therein as legatees and devisees, not to sell my real property, other than sufficient to pay my just debts, immediately after my demise, then I desire the sale of my property, for the purpose of paying legacies, delayed to such time, not exceeding two years after my demise, as my executrix and my said attorney may mutually agree. And my said executrix is hereby authorized to sell any and all of my said real property at public or private sale, and at such price and upon such terms as she and my said attorney may deem advantageous and to the best interest of my estate. And, if my said executrix and my said attorney deem it advisable, my executrix may sell my real property for part cash and part deferred payments, secured by mortgage on the property so sold. And in that event there shall be distributed pro rata to the devisees named herein the cash so received, and at the time it be received: provided, however, that such sales shall be made so that my estate can be finally closed and distributed within three years after my demise, if it be possible to do so without detriment to any interest involved." On March 24th the said will was filed in the superior court of Los Angeles county, accompanied by a petition of Mrs. Shorb, who was named as executrix, asking that the will be admitted to probate, and that she be appointed executrix thereof. The petition was signed by the petitioner, and by Graves, O'Melveny & Shankland, as her attorneys. On April 5th, John W. Mitchell filed a petition alleging that he was interested in the said estate, being named in the will as attorney in the administration thereof, and, according to its tenor, coexecutor thereunder, and praying that said will be admitted to probate, and that joint letters testamentary be issued to Mrs. Shorb and himself, and that he (the petitioner) be declared to be, and be entered as, the attorney of record for said estate, in the matter of the administration thereof, in lieu of, and in place and stead of, said Graves, O'Melveny & Shankland. To this petition, Mrs. Shorb filed an answer denying that Mitchell was interested in the said estate, or was named in the will, according to its tenor, as coexecutor thereof; admitting that she had employed Messrs. Graves, O'Melveny & Shankland as her attorneys to present the said will for probate, but denying that this was done in disregard of the terms or directions of the will, or in disregard of the rights of Mitchell, and praying that the petition of Mitchell be denied. The two petitions were heard together, and on May 12th the court filed its findings of fact and conclusions of law, and entered its order admitting the will to probate, and appointing Mrs. Shorb executrix thereof, and denying the petition of Mitchell. From this order denying his petition, Mitchell appeals.

The first question presented is, Was appellant entitled to be entered and recognized as the attorney of record for said estate, in the place of the attorneys employed by Mrs. Shorb? No cases are cited in support of appellant's contention in this regard, and it is admitted that none can be found; but it is said that, "since it was the declared will of the testatrix that appellant should act as the attorney of her estate, it is both reasonable and just that the will should be observed in this as well as in other respects." There is no such office or position known to the law as "attorney of an estate." When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate, and for his services the executor is personally responsible. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, (section 1613 Code Civ. Proc.;) and while, in the settlement of his account, he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, (section 1616, Id.,) still, such allowance can be made only to him, and not to the attorney, (Henry v. Superior Court, 93 Cal. 569, 29 Pac. 230.) And if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator. Our conclusion, therefore, is that the language employed by Mrs. Ogier, "I hereby select, as the attorney of my estate, John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this, my last will," did not constitute a selection which was binding on the executrix, but was simply an advisory provision, which she could disregard, if she chose to do so. In Young v. Alexander, 16 Lea, 108, the will under review contained the following clause: "I hereby nominate and appoint my nephew, M. B. Young, of Jackson county, Tennessee, as advisory and counsel of my said executors, who will assist them in winding up my unfinished and unsettled business." The executor refused to recognize or employ Young as counsel in the administration of the estate, whereupon he instituted the suit to compel such recognition and employment. The supreme court said that, "however persuasive such a provision may or might be, it can only be effective as an advisory provision;" and it was held that the provision was not binding upon the executor, and that he might ignore it, and appoint other counsel, at his discretion. In Foster v. Elsley, 19 Ch. Div. 518, the will under review contained the following clause: "And I declare that my solicitor, William Edward Foster, shall be the solicitor to my estate, and to my said trustees in the management and carrying out the provisions of this my will." It was claimed that this clause imposed on the trustees the duty of employing Foster as their solicitor, but it was held that it imposed no such trust or duty.

The second and only other question presented is, did the court err in refusing to direct letters testamentary to be issued to appellant as coexecutor with Mrs. Shorb? The contention that appellant was entitled to have letters so issued is based upon section 1371 of the Civil Code, which provides: "Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor." Does the will show that it was the intention of Mrs. Ogier to commit to appellant the execution of her will and the administration of her estate? To this question there can be, in our opinion, but one answer, and that must be in the negative. The only paragraphs of the will relating to the matter are those above quoted. The twenty-seventh paragraph appoints Mrs. Shorb executrix, and charges her "faithfully to see that my estate is distributed as herein directed." The twenty-eighth paragraph selects appellant as the attorney for the estate, and directs the executrix to consult and employ him in all matters pertaining thereto. And the twenty-ninth paragraph speaks of "my said executrix" and "my said attorney," and directs what "my said executrix" may do, if she and "my said attorney" deem it advantageous and advisable. By these paragraphs, no power to act as executor is given to appellant; and it seems evident that the intention of the testatrix was simply to make him the attorney and counselor of the executrix, and not to commit to him the administration of the estate. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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4 Cal. Unrep. 472

ROBINSON v. DUGAN. (No. 19,241.)

(Supreme Court of California. Feb. 24, 1894.)

CLAIMS AGAINST DECEDENT'S ESTATE — EVIDENCE —COMPETENCY OF WITNESS.

1. In an action against the estate of decedent, a brother of plaintiff, there was in evidence a paper in the handwriting of decedent, headed "S. R. [plaintiff] in Acct. with W. R., [decedent,] Cr.," reciting by cash a certain amount, and by certain articles certain other amounts. A witness testified that he saw decedent hand plaintiff a paper like that in evidence; plaintiff having just before asked decedent what plaintiff had to show that decedent owed him. A witness testified that, on several occasions before and after decedent's death, plaintiff said that decedent did not owe anything. *Held*, that a finding that decedent was not, at the time of his death, indebted to plaintiff was justified by the evidence.

2. There was no error in refusing to allow plaintiff to state that the paper introduced by him was in his possession at decedent's death, he having already been permitted to testify that the paper had been in his possession ever since decedent's death, which was, in effect, the same thing.

3. Under Code Civ. Proc. § 1880, subd. 3, forbidding a party to an action on a claim against a decedent's estate to testify to facts occurring before decedent's death, plaintiff cannot testify that a paper showing a debt from decedent to him was unpaid at decedent's death.

4. A witness who had stated that plaintiff on several occasions said that decedent owed no debts was properly allowed to state that in those conversations plaintiff made no exception in favor of himself.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by S. G. Robinson against John R. Dugan, administrator of William Robinson, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

Eugene W. Squier, for appellant. E. B. Hall and J. W. Taggart, for respondent.

BELCHER, C. The plaintiff brought this action to recover the sum of $814.50 upon an account alleged to have been stated between himself and William Robinson, in October, 1891. William Robinson died intestate in March, 1892, leaving a small estate, and thereafter the defendant was duly appointed and qualified as administrator thereof. The usual notice to creditors was published, and within the time prescribed the plaintiff presented his claim to defendant as such administrator for allowance, and the same was allowed and approved for $4.50, and disallowed as to the balance. The answer of defendant denied that at the time named, or at any other time, an account was stated, or settled, or agreed to, by or between the plaintiff and said intestate, or that the said estate was indebted to the plaintiff in any sum, other than the $4.50, which was allowed; and averred that all and every indebtedness or liability on the part of said intestate to the plaintiff, except the said $4.50, had been fully paid and discharged before the death of said intestate.

The case was tried by the court without a jury, and among other things it found: "(5) That there was no account stated as between the plaintiff and said deceased, and that said William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff in any sum or amount other than said $4.50, approved and allowed by defendant as administrator, as aforesaid, and that none of the allegations contained in paragraph 1 of plaintiff's complaint are true."

And as conclusions of law from the facts the court found: "(1) That plaintiff is entitled to be paid, in due course of administration, the sum of $4.50, approved and allowed by said defendant before the commencement of plaintiff's action herein. (2) That defendant's intestate, William Robinson, deceased, was not at the time of his decease indebted to said plaintiff in any sum or amount other than said $4.50. (3) That defendant is entitled to judgment," etc.

Judgment was accordingly entered that the plaintiff be paid, in due course of administration, the $4.50 allowed him, and that his action be dismissed, and defendant recover his costs. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

It is contended that the judgment should be reversed, because the finding above quoted was not justified by the evidence, and portions of it were inconsistent with other portions thereof, and because the court erred in making certain rulings on the admission of evidence. To show that an account was stated between himself and the decedent, plaintiff introduced in evidence a paper (marked "Plaintiff's Exhibit No. 1") which was proved to be in the handwriting of decedent, and was as follows:

S. G. Robinson in Acct. with Wm. Robinson.

Cr.

By cash on settlement..............	$560 00
By cash from McAllester............	250 00
Fruit cans	75
Pasturage	1 75
Pasturage	2 00
	$814 50

The plaintiff then called as a witness one McLaughlin, who testified that he knew the plaintiff and decedent in his lifetime; that decedent was sick in Santa Barbara, and went to San Francisco for medical treatment about the month of October, 1891. That, four or five days before he went, witness heard a conversation between him and the plaintiff in which he stated that if he did not get better he would never return to Santa Barbara. That plaintiff then said: "What have I to show that you owe me money?" That decedent then went to his house, and in about 15 minutes returned and handed to plaintiff a paper which looked exactly like his Exhibit No. 1, and that plaintiff said nothing, looked at the paper, and folded it up. "It was about as large as that, [Exhibit No. 1.] It was about as wide as that. I can't say how long it was." "He didn't let me see the writing." "I was about as far from them as from here to the stove, [across the courtroom.] I couldn't swear whether it was just as long as that or not." "It might have been twice as long as this. I couldn't tell." The plaintiff was then called as a witness, and was asked by his counsel: "Mr. Robinson, will you look at this paper, [showing witness paper marked "Plaintiff's Exhibit No. 1,"] purporting to be an account stated, and state whether or not this paper was in your possession and unpaid at the time of your brother's death?" The question was objected to, and the objection sustained, and thereupon the witness testified: "This paper [Exhibit No. 1] has been in my possession ever since the death of William Robinson. The amount, $814.50, has not been paid. None of it has been paid since the death of my brother." It was further proved that decedent stopped in San Francisco about three months, and then returned to Santa Barbara, and remained there until he died. One Palmanteer was then called as witness for defendant, and, after stating that he was acquainted with the decedent in his lifetime and with the plaintiff, said: "I have had conversations with S. G. Robinson both before and since his brother's death. * * * The conversations were about William Robinson's affairs. I had a conversation with S. G. Robinson,—I think it was the day before his brother's death,—and, among other things, he told me that his brother had money in the bank and owed no debts. I also had some talk with S. G. Robinson a week or so after his brother's death in regard to his brother's affairs. * * * He stated that there were no debts. He said he had some money in bank. I think six or eight or ten hundred dollars." On cross-examination the witness testified: "I think I had eight or ten conversations with S. G. Robinson,—some before and after his brother's death,—in relation to settling up the estate. * * * He told me twice that his brother owed no debts when we were talking about the administration, and once when we were talking about a filly that his brother had given him. * * * He said that William Robinson was not a man that owed debts; he was not that kind of a man; he did not owe anything; something of that kind." And on redirect examination the witness was asked by counsel for defendant: "Did he (S. G. Robinson) ever, in any of those conversations, make any claim that William Robinson owed him anything?" The question was objected to by counsel for plaintiff, and the objection overruled, and the witness then answered: "I never heard him." In rebuttal, the plaintiff testified: "I may have said to Mr. Palmanteer that William Robinson did not owe any debts, but I did not mean to include myself in it when I was speaking to him."

In view of this evidence,—and there was more in the same line,—it is not necessary to determine whether the paper introduced by the plaintiff constituted an account stated; for, conceding that it did, still the account may have been paid and discharged before the decedent's death. The only question, therefore, that need be decided is, was the finding that "William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff, in any sum or amount other than said $4.50," justified by the evidence? The question whether all indebtedness from decedent to the plaintiff, other than the $4.50 allowed, had been paid, and whether there was any existing indebtedness on the part of the estate to plaintiff, was one of fact, to be passed upon by the trial court; and on this question the evidence introduced by the defendant raised, in our opinion, at least a substantial conflict. This being so, the finding cannot, under the well-settled rule of this court, be disturbed on appeal. The objection that portions of the finding quoted are inconsistent with other portions thereof is based upon the fact that, by his complaint, the plaintiff sought to recover only on an account stated; and it is said that the finding that no account was stated is wholly inconsistent with the further finding, in effect, that the estate was liable to plaintiff for the sum of $4.50. But there was no issue as to the $4.50. The complaint alleged that that sum was allowed to the plaintiff on presentation of his claim, and the answer admitted and alleged the same facts. We see no merit, therefore, in this objection.

The errors in law relied upon for a reversal of the judgment are: (1) the refusal of the court to permit the plaintiff to answer the question propounded to him as to whether or not the paper (Exhibit No. 1) was in his possession and unpaid at the time of his brother's death; and (2) the overruling plaintiff's objection to the question asked of the witness Palmanteer, as to whether the plaintiff in any of the conversations related made any claim that William Robinson owed him anything. We see no error in either of the rulings complained of. When the plaintiff testified, as he did without objection, that the paper had been in his possession ever since the death of his brother, he in effect stated that it was in his possession at the time of his brother's death. The balance of the question, as to whether the account was then unpaid or not, was intended to elicit evidence which was clearly inadmissible under section 1880, subd. 3, of the Code of Civil Procedure. The witness Palmanteer had stated that, in the conversations which he had had with the plaintiff, the latter had more than once said that his brother owed no debts,—that he did not owe anything,—and it was therefore entirely proper to ask him if, in any of those conversations, the plaintiff made any exceptions in favor of himself. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

101 Cal. 508

WILCOXON v. CITY OF SAN LUIS OBISPO. (No. 19,178.)

(Supreme Court of California. March 1, 1894.)

WIDENING STREET—ASSESSMENT—COST OF GRADING.

Under Act March 6, 1889, authorizing a city council to widen a street and acquire land therefor, the expense of the work or improvement to be assessed on the district benefited, the assessment cannot include the cost of grading and graveling.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Wilcoxon against the city of San Luis Obispo, in the nature of a suit to quiet title. Judgment for plaintiff. Defendant appeals. Affirmed.

William Shipsey, for appellant. Wilcoxon & Bouldin, for respondent.

HARRISON, J. In December, 1890, the city of San Luis Obispo instituted proceedings under the act of March 6, 1889, (St. 1889, p. 70,) for the widening of about 300 feet of Chorro street, and designated the exterior boundaries of the district of lands to be affected or benefited thereby. In its resolution of intention, it declared that "the public interest and convenience require that Chorro street, of said city, between Monterey street and Higuera street, be widened as hereinafter specified," and, after describing the land to be taken therefor, continued: "And the work to be done and the improvements to be made shall consist of removing from said land the buildings and other structures and obstructions now thereon, and filling in with earth so as to bring the land taken (not including the creek) to the present grade of Chorro street, and gravel the same." After proper publication of its resolution, commissioners were appointed to assess the benefits and damages to be produced by the improvement, and in due time made a written report thereof to the city council, in which they estimated that the aggregate amount of the value of the land to be taken, and damage to improvements and property affected, and the cost of work and improvements, and the expenses, would be $11,082.52, and assessed that amount upon the lands within the aforesaid district. One item of this aggregate amount is designated in their report to be: "Cost of contemplated work and improvement specified in resolution of intention, $1,722.52." Subsequent to the confirmation of this report, a certified copy thereof was placed in the hands of the street superintendent, who by virtue thereof sold a lot belonging to the plaintiff herein to satisfy the assessment thereon. This action, in the nature of a suit to quiet title, was brought by the plaintiff for the purpose of having it adjudged that by the aforesaid proceedings no lien was created upon his land, and that the sale of the superintendent was void. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

Section 1 of the act of March 6, 1889, gives authority to the city council of any municipality "to order the opening, extending, widening, straightening up in whole or in part of any street, square, lane, alley, court or place within the bounds of such city and to condemn and acquire any and all land and property necessary or convenient for that purpose." The only "work to be done or improvement to be made," under the provisions of this act, is that for which power is conferred by this section; and, before the municipality can acquire jurisdiction to exercise this power, it is required to pass a resolution of its intention to do so, "describing the work or improvement." Hence, the only work or improvement which the municipality has any jurisdiction to order is limited, in the first place, to that which is designated in section 1 of the act, and next to that which it has described in its resolution of intention. The resolution of intention, in the present case, is for the "widening" of a portion of Chorro street. The "widening" of a street, which is authorized by this act, does not include the additional work of making the street suitable for travel and general use. The expense of such work is to be undertaken after the street has been widened, and, by section 869 of the municipal government act, (St. 1883, p. 272,) is to be borne by the adjacent property. To widen a street is merely to enlarge its width, and the term "widen" cannot, under any construction of language, be extended to include grading and graveling. "To grade a street" is to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent; and "to gravel a street" is to cover the surface of a street already existing with some durable substance. Neither of these kinds of improvement or work is embraced in section 1 of the act aforesaid, and consequently the power to make an assessment for the expense incurred thereby has not been conferred upon the city council. A consideration of the entire act shows that the assessment which is authorized to be made upon the district defined in the resolution of intention is to be limited to the cost of the lands and improvements to be taken or damaged, and the expenses that the commissioners are by the act authorized to incur in effecting the widening of the street. In Reed v. City of Toledo, 18 Ohio, 161, the court held that, under the authority conferred upon a city council for opening a street and assessing the damages caused thereby upon a district, it was not authorized to include the expense of improving the street, saying: "By the term 'opening,' we do not understand the improvement of a street or highway by grading, culverting, etc. The term is generally—we think always—clearly distinguishable from such kind of improvement. The term 'opening' refers to the throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface." See, also, Dill. Mun. Corp. § 608. The widening of a street is only an additional opening of it, throwing a larger space open to public use than previously existed. We are of the opinion, therefore, that it was not within the power of the municipal authorities to include in the assessment the cost of grading and graveling the lands taken for the widening of the street, and that for that reason the assessment was illegal, and created no lien upon the land of the plaintiff. The judgment and order are affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.

BEATTY, C. J. I concur in the judgment, not only upon the ground stated, but because I am of the opinion that the act of 1889 is unconstitutional.

4 Cal. Unrep. 471

BURR v. NAVARRO MILL CO. (No. 15,576.)

(Supreme Court of California. Feb. 13, 1894.)

APPEAL—DELAY IN FILING DISMISSAL.

An appeal not filed within the time prescribed by court rules will be dismissed, no good cause for the delay being shown, though no notice of the motion to dismiss was served on appellant's assignee in insolvency, he having, however, knowledge of the notice served on appellant's attorneys.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Maggie E. Burr against the Navarro Mill Company. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

Young & Powers, for appellant. A. Morgenthal, for respondent.

PER CURIAM. Respondent moved to dismiss the appeal upon the ground that it was not filed within the time prescribed by the rules of the court. It is apparent from the certificate of the clerk of the lower court that such is the fact, and the appeal must be dismissed, unless good cause for the delay appears.

The action is one for personal injuries, and a judgment was entered upon the verdict of the jury for the sum of $1,000 in favor of plaintiff. Subsequently defendant appealed the case to this court, and gave a bond with two sureties, staying execution upon the judgment. After the appeal was perfected and the stay bond given, the defendant was adjudged an insolvent debtor, an assignee was appointed, and an order made by the court staying all proceedings against the insolvent. Thereafter, upon application of respondent, the order was modified to the extent of allowing the present action to be prosecuted to final judgment, for the purpose of fixing the liability of the sureties upon the aforesaid bond. The attorneys representing the defendant in the trial of the case and on the appeal thereof were regularly served with notice of the motion to dismiss now under consideration, but counsel for the assignee was not served with the notice, and now comes before the court asking for a continuance of the hearing, and also, in effect, objecting to the consideration of the matter because of a failure to serve notice upon him. The continuance was denied at the time, and his presence in court at the hearing was indicative of the fact that he had actual notice of the proceeding, and neither he nor the defendant's attorneys of record in the case make any showing upon the merits of the motion. It is ordered that the appeal be dismissed.

101 Cal. 429

CONNER v. SOUTHERN CALIFORNIA MOTOR ROAD CO. (No. 19,269.)

(Supreme Court of California. Feb. 28, 1894.)

REVIEW ON APPEAL — CASE ON MOTION FOR NEW TRIAL—TIME OF SETTLEMENT.

If the proposed statement of the case on motion for new trial, together with the amendments proposed by the adverse party, are not, within ten days after the service of the amendments, presented to the judge or clerk for settlement, as required by Code Civ. Proc. § 659, subd. 3, the statement must be disregarded on appeal from an order denying the new trial, the time for settlement not having been extended, and there being no explanation of the delay.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; J. C. Campbell, Judge.

Action by H. Conner against the Southern California Motor Road Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Rolfe & Freeman and Chas. N. Fox, for appellant. Harris & Gregg, for respondent.

HAYNES, C. Appeal from judgment, and an order denying defendant's motion for a new trial. It is conceded by appellant that the appeal from the judgment cannot be considered, because taken too late; and respondent contends that the appeal from the order denying a new trial cannot be considered upon its merits, because the statement was not settled within the time required by subdivision 3, § 659, Code Civ. Proc. Appellant's counsel did not notice the question in their opening brief, and, as no reply has been filed, we are without the benefit of any suggestions from them.

The statement contains the following: "It is agreed that the statement on motion for a new trial herein was served August 17, 1891, and that the proposed amendments thereto were served in April, 1892; and that neither the proposed statement nor amendments thereto were ever presented to the judge prior to this date, and that they have never been filed with the clerk of this court. Plaintiff objects to a settlement of the proposed statement on the grounds that the moving party in this case has not complied with subdivision 3, § 659, of the Code of Civil Procedure, in that he did not, within ten days after the service of the amendments, present the same to the judge who tried the case for settlement, nor to the clerk of the court for the judge, and failed and refused to adopt said amendments, or to present said proposed statement to the clerk of the court for the judge prior to this day, [November 28, 1892.]" The objection to the settlement of the statement was overruled, and plaintiff excepted, and the statement was thereupon settled.

The delay of seven months in presenting the statement and amendments to the judge for settlement is wholly unexplained. The settlement having been objected to on the ground that it was too late, "it became the duty of appellant to incorporate in the bill [statement] the matter, if any, going to excuse his apparent delay; otherwise, the exceptions, though settled, cannot be considered here." Higgins v. Mahoney, 50 Cal. 444. In Tregambo v. Mining Co., 57 Cal. 503, it was said: "If a statute actually fixes the time within which an act must be done, it is peremptory. The act cannot be done at any other time, unless during the existence of the prescribed time it has been extended by an order made for that purpose under authority of law." This language was used in relation to the time within which a bill of exceptions might be taken under the statute, and is therefore applicable here. To hold that the statement may be settled when no steps were taken until after the expiration of the ten days, the time for doing so not having been extended, and respondent objecting thereto, would be a judicial abrogation of the statute. See, also, Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780. The statement must therefore be disregarded. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McINTYRE v. SOUTHERN CALIFORNIA MOTOR ROAD CO. (No. 19,267.)

(Supreme Court of California. Feb. 28, 1894.)

Department 1. Appeal from superior court, San Bernardino county; J. C. Campbell, Judge. Action by Allan McIntyre against the Southern California Motor Road Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Rolfe & Freeman and Chas. N. Fox, for appellant. Harris & Gregg, for respondent.

PER CURIAM. In this case the appeal from the judgment was taken too late, and the same objection is made by respondent to a consideration of the appeal from the order denying a new trial as was made in Conner v. Motor Road Co., (No. 19,269, this day decided,) 35 Pac. 990. All the facts touching the settlement of the statements on motion for a new trial are the same in each case, and, upon the authority of that case, the judgment and order appealed from are affirmed.

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101 Cal. 349

In re THOMPSON'S ESTATE. (No. 19,295.)

(Supreme Court of California. Feb. 15, 1894.)

PLEADING — WAIVER OF FORM — APPEARANCE — TRUSTEES — ACCOUNTING — INTEREST — ALLOWANCE—COMPENSATION.

1. A petition entitled "In the Matter of the Estate of T., Deceased," asking for an accounting by the trustees under the will of deceased, filed after the probate jurisdiction of the court is exhausted by final distribution, and discharge of the executors, will be treated as a bill in equity; the court having equity as well as probate jurisdiction, and no objection having been made to the form of the petition.

2. The fact that a court has not jurisdiction of a party is waived by appearance without objection.

3. Where a trustee mingles the trust funds with his own, and uses them in his business, which pays a net profit of 11 per cent. per annum, there is no error in charging him 10 per cent. compound interest.

4. An item of $250 for retainer fee is properly disallowed a trustee on accounting, he not having shown it a proper disbursement.

5. Though a will provides for compensation for trustees, it is properly disallowed, where they have been negligent in the discharge of their duties.

6. A decree on accounting by a trustee should not provide that he be charged with 10 per cent. compound interest so long as he remains a trustee, as it is to be presumed that in the future he will faithfully discharge his duties.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge. Petition, entitled "In the Matter of the Estate of Jonathan Thompson, Deceased," for accounting by the trustees under the will of deceased. From the decree, Isaac Goldtree, one of the trustees, appeals. Modified.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Myrick & Deering and L. Lamy, for respondent.

PATERSON, J. This is an appeal by Isaac Goldtree, one of the trustees of the estate of Jonathan Thompson, deceased, under the will, from a decree settling an account. Thompson died in the county of San Luis Obispo on December 5, 1875, leaving a will, in which, after making certain specific bequests, he directed the residue of his estate to be distributed to three trustees, to hold and invest the same, and deliver the income thereof to four sets of beneficiaries during their lifetimes, and thereafter to deliver the estate to the children of the first-named beneficiaries. The will was duly admitted to probate, and on March 16, 1877, the estate was distributed to the trustees, and the executors were discharged. On December 22, 1884, one of the trustees named in the will was removed from his office as trustee, and the appellant, Goldtree, was appointed a trustee to fill the vacancy. Ever since said last-named date, Goldtree and John Thompson have been sole trustees of the estate; Grierson, one of the trustees named in the will, having resigned on the 22d day of December, 1884.

The estate consisted of a large amount of real estate lying in different counties, $11,453.84 in money, and $11,015.22 in promissory notes, cattle, horses, wagons, machinery, etc. It was arranged between Thompson and Goldtree that the latter should hold all the money collected or belonging to the trust, and manage the lots in the towns of San Luis Obispo and San Jose, and that Thompson should take charge of all other portions of the trust estate. On the day of his appointment, Goldtree received the $11,453.84 cash belonging to the estate, and deposited the same to the credit of the general account of Goldtree Bros., a partnership of which he was a member, and thereafter said money was mingled with the funds of the partnership. In the years 1885 to 1886, inclusive, he received, on notes belonging to the estate, the sum of $2,639.60, which the court found, "together with the $11,453.84, making a total of $14,093.44, constituted a part of the corpus of the trust estate." This amount was reduced by payments made pursuant to orders of the court aggregating $1,742.90, leaving, the court finds, "corpus, for which Isaac Goldtree was chargeable on October 2, 1892, the sum of $12,350.74." All of the moneys received by Goldtree were deposited in the name of his firm, and mingled with the funds thereof. No separate account was ever kept of the moneys received by him as trustee. The general account was drawn upon and used for the purposes of the business of their partnership, as well as for the trust estate, by checks signed "Goldtree Bros." The profits of the general business of Goldtree Bros. netted them, on the average, for the years 1885 to 1892, inclusive, about 11 per cent. per annum. The firm was engaged in various enterprises, including speculation in land, buying grain, the lending of money, and the carrying on of a banking business. In 1890, Goldtree left the state, with his family, for Europe, and at all times since said date has remained out of the state. During this time he has left the management of the trust to the bookkeeper of his firm, and to his attorney. During the years 1884 to 1892, inclusive, various portions of the estate had been in litigation, and the appellant has paid out, as necessary and proper disbursements, including attorney's fees, something over $13,000, and, including payments to beneficiaries, something over $14,000. The beneficiaries, becoming dissatisfied with the action of the trustees, filed a petition asking that the latter be required to account, and that they be removed from office. Thereupon, appellant filed an account showing receipts by him of trust funds, to certain items of which an objection was made; and after a hearing the court disallowed items aggregating $1,070.73, charged appellant with the corpus of the estate received by him, together with interest thereon, at the rate of 10 per cent. per annum, compounded annually, and credited him with the allowed disbursements. Compensation was denied to the trustees, and appellant was directed to pay 10 per cent. per annum on the trust money belonging to the trust, and in his possession, as long as he remained trustee; the court, in its findings, however, saying "that said Isaac Goldtree be given the privilege of resigning said trust." The petition asking for the account and removal of the trustees is entitled "In the Matter of the Estate of Jonathan Thompson, Deceased;" and, in accordance with its prayer, there was issued from the probate division of the superior court a citation to the trustees, requiring them, at a certain time to appear and render an account.

It is contended by the appellant that the superior court, sitting in probate in the estate of Thompson, deceased, had no jurisdiction of the matter of the settlement of the account of the trustees, and, technically speaking, this is true. The will of Thompson had been probated, and the estate distributed and delivered up to the distributees. The executors had been discharged in the probate court 15 years before this petition was filed. Goldtree's powers came through an order of the superior court in equity, but while it is true that the probate and equity jurisdictions of the superior court are separate and distinct, that the former furnishes a method of administering the affairs of a decedent, and when final distribution has been had its jurisdiction is exhausted, and it is peculiarly for a court of equity to appoint and control trustees in the management of trust estates, yet under our system the same tribunal exercises equity and probate jurisdiction. The appellant made no objection to the form of the petition. The court had jurisdiction of the subject-matter, and the objection is raised for the first time in this court that the court did not have jurisdiction of the person, which, of course, was waived by the appearance of the defendant without objection. The petition under these circumstances, may be regarded as a bill in equity addressed to the equitable powers of the superior court, and the form of its title is immaterial. It is not true that there were no issues, or that a burden was placed upon the appellant which would not have been upon him in a court of equity. The petitioners alleged mismanagement and failure to account or report. Pursuant to the order contained in the citation, appellant did appear and file an account of his dealings with the trust estate, and thereafter specific objections were made to certain items. The same matters were in issue that would have been in issue if the complaint had been filed in equity, and the burden of proof was no greater in the one case than it would have been in the other.

The court did not err in its statement of the account, or in charging Goldtree with interest at the rate of 10 per cent. per annum. The funds with which the moneys of the estate were mingled earned about 11 per cent.

per annum, net, and there was gross negligence in the management of the estate. "In regard to interest upon trust funds, the general rule is that if a trustee has made interest upon those funds, or ought to have invested them so as to yield interest, he shall, in each case, be chargeable with the payment of interest. In some cases courts of equity will even direct annual or other rests to be made, the effect of which will be to give to the cestui que trust the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it. Thus, for example, if a trustee, in manifest violation of his trust, has applied the trust funds to his own benefit and profit in trade, * * * courts of equity will apply the rule of annual or semiannual rests, if it will be most for the benefit of the cestui que trust. The true rule in equity, in such cases, is to take care that all the gain shall go to the cestui que trust." 2 Story, Eq. Jur. (13th Ed.) § 1277; 1 Perry, Trusts, (4th Ed.) § 471.

We are unable to see that the court erred in disallowing the item of $250 retainer. The court evidently thought it was an unnecessary expenditure. The burden of proof was upon the appellant to show that it was a proper disbursement, and the same may be said of the other items mentioned in finding 21.

Neither did the court err in refusing to allow the trustees commissions. Compensation is allowed, in cases of this kind, only to faithful stewards, for their care, trouble, and responsibility in the management of an estate; and it matters not that the will itself provided for compensation, which is conditioned upon a faithful performance of the trust. There are many reported cases in which the courts have refused to allow commissions where the negligence exercised by the trustees was not so great as that shown in the case at bar. Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; Norris' Appeal, 71 Pa. St. 126.

We think it clear, however, that the court erred in charging the appellant with interest at the rate of 10 per cent. per annum, compounded annually, so long as he may remain a trustee. The court had the right to deprive him of commissions, and to impose upon him interest compounded annually up to the time of the settlement of the accounts, but did not have the right to impose a penalty for his future conduct of the affairs of the estate. It must be presumed that in the future the appellant will faithfully discharge the duties of his office. The cause is remanded to the court below with directions to eliminate conclusion of law No. 10 from its decision, and to modify its decree by striking from the ninth paragraph the words, "so long as he shall remain in office;" and, as so modified, the decree will stand affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

101 Cal. 333

CITY OF SAN PEDRO v. SOUTHERN PAC. R. CO. et al. (No. 19,230.)

(Supreme Court of California. Feb. 14, 1894.)

MUNICIPAL CORPORATIONS — RIGHT TO CONSTRUCT WHARF — RAILROAD RIGHT OF WAY OVER PUBLIC LANDS — PERMIT — FORFEITURE — RIGHT OF STATE.

1. Under the municipal government act, (section 862,) which authorizes a city to construct and operate wharves on any land bordering on any navigable bay within its corporate limits, or contiguous thereto, a city has no absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others.

2. Under Civ. Code, § 478, which requires the surveyor general, on the selection of a railroad right of way over public lands, to "issue to the corporation a permit to use the same unless on petition presented to the court a review is had and such use prohibited," the permit continues until such use is prohibited.

3. Where a railroad company has selected a right of way over public lands, and the surveyor general has issued a permit to use them, a delay in the construction of the railroad will not, of itself, work a forfeiture of the permit.

4. Where the surveyor general issues a permit to use a part of a city water front for a railroad right of way, the city cannot enjoin the construction of a wharf thereon by the railroad company without proof that a municipal right has been invaded, and cannot allege a trespass to public lands by the railroad, or a forfeiture of a corporate privilege by delay, since the state, only, can complain of such trespass, or enforce such forfeiture.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Bill by the city of San Pedro to enjoin the Southern Pacific Railroad Company and others from constructing a wharf in Wilmington bay. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

John D. Bicknell and Bicknell & Trask, for appellants. Cheney & Cronin, for respondent.

HARRISON, J. In March, 1887, the Southern Pacific Railroad Company made selection of a right of way over certain public lands of the state for the location and construction thereon of tracks and other works necessary in the extension of its Wilmington branch, and on the 7th of April, 1887, the surveyor general, under the provisions of section 478, Civ. Code, issued to it a permit to use the same. The lands over which the right of way was so selected are located in Wilmington bay, within the corporate limits of the plaintiff, and a portion thereof are tide lands,—that is, lands between the lines of high and low water,—while another portion is continually covered by the waters of the bay. In December, 1891, by virtue of the permit thus granted by the surveyor general, the defendants commenced to drive piles from the extremity of the wharf theretofore constructed by the railroad company, and had driven them for the length of about 660 feet, when the plaintiff brought the present action to enjoin and restrain them from further prosecuting their work. The grounds upon which the plaintiff bases its right to the relief sought are that the lands upon which the defendants were driving the piles are within its corporate limits, and form a portion of its water front; that it has certain statutory and riparian rights over said land and water front, and that, in the exercise of these rights, it was about to construct a wharf and landing place at the point where the defendants were driving the piles; that the driving of the piles and building a wharf at that point by the defendants will prevent it from erecting a wharf or landing place there; and that the acts of the defendants are without any right or authority. The court made findings in support of the averments in the complaint, and rendered judgment in favor of the plaintiff. From this judgment, and an order denying a new trial, the defendants have appealed.

The court finds "that the defendants were proceeding to drive said piles in a continuous row, close to the line of mean low-water mark, and almost parallel to the channel of Wilmington bay; that for a distance of about 200 feet the said piles were driven below mean low-water mark; and that said piles were driven below low tide at that portion of the premises described in plaintiff's complaint as adjoining the southerly end of the wharf of the Southern Pacific Railroad Company." It does not appear that the state has ever parted with its title to these lands, either those between the lines of high and low tide, or those which are at all times covered with water; and, unless the plaintiff has some right in the lands which the acts of the defendants will tend to impair, it is not entitled to the relief sought. The plaintiff cannot enjoin the defendants from prosecuting their work of driving piles within the terms of the surveyor general's permit, unless such work is an invasion of some right of the plaintiff, and the burden of establishing that fact rests upon it. If it should be assumed that the acts of the defendants are a trespass upon the rights of the state, the state alone has the right to complain; and, in the absence of any complaint on its part, the defendants are not to be questioned about the nature of these acts of trespass. People v. Davidson, 30 Cal. 379. Hence, it is unnecessary to determine whether the legislature could by special act disincorporate the town of Wilmington. St. 1887, pp. 108, 109.

The plaintiff is a municipal corporation of the sixth class, and was organized as such February 27, 1888, subsequent to the date of the permit given to the defendants by the surveyor general. As such municipal corporation, it is only one of the agencies of the state to aid it in the discharge of its political duties; and, although the lands upon which the defendants were driving the piles are within the corporate limits of the plaintiff, the plaintiff has not, for that reason, any proprietary interest in these lands, nor is it the owner of the soil, or clothed with any riparian rights. Its right to construct a wharf rests upon the provision of section 862, subd. 11, of the municipal government act, (St. 1891, p. 234,) by which it has authority "to construct, maintain and operate on any lands bordering on any navigable bay within the corporate limits of such city, or contiguous thereto, wharves, piers," etc. The authority given in this section does not, however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others; but it is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess, and to give to its acts a sanction which they would not otherwise have. A municipal corporation can exercise only such powers as are conferred upon it by the legislature, and in the absence of the authority above conferred the plaintiff would not be authorized, under any circumstances, to erect or maintain a wharf; but the authority thus given does not authorize it to prevent the erection of a wharf by another person, who has a right therefor, or who does not infringe upon any of the plaintiff's rights.

The court also found that there had been an abandonment and nonuser of the portion of the lands within the limits of the permit beyond the existing wharf, and that by reason thereof these lands were excluded from the permit. The record does not contain any evidence showing an "abandonment" of the rights conferred by the permit, and we have been cited to no statute or rule of law by which a failure on the part of the railroad corporation to construct its wharf immediately upon receiving the permit would work a forfeiture of its rights. Section 478, Civ. Code, under which the permit is granted, does not limit the time within which the work shall be commenced; and the clause therein by which the surveyor general is directed to "issue to the corporation a permit to use the same, unless, on petition properly presented to the court a review is had, and such use prohibited," implies the continuance of the permit until such use is prohibited in the manner therein prescribed. As the permit is only a license for a right of way over the public lands of the state, and does not confer any proprietorship in the lands themselves, the state would have the right to revoke the license at any time, and would be justified in doing so if it should appear that there was unnecessary delay on the part of the corporation in availing itself of the privilege; but, unless the state makes the objection, the privilege cannot be declared forfeited at the instance of any other person. Upon the organization of a railroad corporation, it makes a selection of the route over which it intends to construct its road; and, in making such selection, ordinary prudence would dictate that it should include the entire route over which its road would ultimately be constructed. Necessarily, some time must elapse before the road can be completed, and circumstances may arise during the process of its construction which will render a delay or suspension of work not only prudent, but even necessary. Such delay or suspension will not of itself work a forfeiture of any privilege which the state may have granted, unless the statute under which it was granted expressly so provides, as has been done in the case of street railroads, (Civ. Code, § 502,) and it is a well-recognized rule that, when only the right to the forfeiture of a corporate privilege or of a franchise exists, it can be invoked only at the instance of the state. See Western R. Co.'s Appeal, 104 Pa. St. 399. The judgment and order denying a new trial are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

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101 Cal. 295

BROWN v. KLING. (No. 19,279.)

(Supreme Court of California. Feb. 9, 1894.)

CONTRACTS — VALIDITY — RESTRAINT OF TRADE—TIME OF LIMITATION—INJUNCTION.

1. Civ. Code, § 1673, provides that a contract in restraint of trade, otherwise than provided in the next two sections, "is to that extent void;" and section 1674 provides that the seller of "the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory, so long as the buyer or any person deriving title to the good will from him carries on the business." *Held*, that a provision, on sale of a good will, that the seller shall not engage in the business for three years in a certain city, is not void, but the contract will be limited to such time, not exceeding three years, as the buyer or his assignee carries on the business.

2. The breach of a valid contract in restraint of trade may be enjoined, though nominal damages, only, can be proved.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by A. P. Brown to enjoin Theo. Kling from breach of contract, and for damages. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

Victor Montgomery, for appellant. E. E. Keech, for respondent.

TEMPLE, C. In this case a demurrer was interposed to the complaint on the ground of insufficient statement of facts. It was sustained, and plaintiff declined to amend. Judgment was thereupon entered, and plaintiff appeals.

The complaint, in substance, states that theretofore defendant and one Challis carried on a retail butcher business in Santa Ana and the city of Orange, which cities are about 3½ miles apart. They had shops in these cities, and ran wagons distributing and selling meat in the vicinity. April 18, 1892, plaintiff purchased their shops, implements, wagons, fixtures, and stock for $4,650 paid to them, and at the same time bought the good will of the business, for which he paid the further consideration of $600, and defendant and Challis at the same time, in consideration of such purchase, each for himself agreed with the plaintiff that he would not at any time thereafter, and within the period of three years from said 18th day of April, 1892, engage, directly or indirectly, or concern himself in carrying on or conducting a butcher business in said city of Santa Ana, or within a radius of five miles from said city. Plaintiff has ever since continued to conduct said business at the towns of Santa Ana and Orange. On the 19th day of September, 1892, defendant set up a retail butcher business in the city of Santa Ana, which he has since continued to conduct at that place, to the damage of plaintiff in the sum of $500, for which sum he asks for judgment, and that defendant be enjoined.

The principal point made on the demurrer is that the agreement sued on is void because in restraint of trade, and not in accordance with section 1674, Civ. Code, which only authorizes one selling the good will of his business to agree to refrain from doing business "so long as the buyer or any person deriving title to the good will from him carries on a like business therein." Here the purchaser is, as a matter of fact, still carrying on the business purchased, but it is not so limited in the contract. In form, defendant agreed not to carry on the business for three years; non constat that plaintiff or his assignee may do business there for three years; therefore, defendant bound himself for a period which may extend beyond the period for which he was authorized to bind himself to refrain; therefore, the contract is wholly illegal and void. Section 1673, Civ. Code, reads as follows: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Section 1674 is as follows: "One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." The contracts which are here declared void are not declared unlawful. Certain contracts not made in a certain mode are declared void by the statute of frauds, but they are not therefore illegal. This contract is not against public policy. At common law, such a contract would have been valid. A contract restraining one from following a lawful trade or calling at all is invalid because it discourages trade and commerce, and prevents the party from earning a living; but the right to agree to refrain from his calling, within reasonable limits as to space, may have the contrary effect. It encourages trade, for it gives value to a custom or business built up by making it vendible. One would have an inducement, therefore, to serve the public honestly and efficiently, for he is not only profiting by the business, but the custom attracted by so doing is valuable, even after he is ready to retire from business; and, besides, the rule enables him to find a purchaser who will also have an interest in so serving the public. The period of the restraint is not unreasonable. While it has been said that a restraint of this character, independently of any statute upon the subject, is binding even if the party in whose interests the restraint was imposed has retired from business and has no assignee, still in such case only nominal damages could be recovered. The statute does not provide that such contracts, though not in accordance with the Code, shall be wholly void. It says they shall be "to that extent void." It may be said (and perhaps that is the correct construction) that the restraint which is other than that prescribed shall be void. But it is a familiar rule of law that, where there is a statute upon a certain subject, it enters into, and becomes a part of, such contract upon such subject, if the contract can be so construed. The contracting parties are presumed to have had the law in view. Sometimes the terms of the contract will rebut this presumption, but in the present case they do not. One rule at common law applicable to this matter was that the restraint shall be no greater than is necessary to protect the purchaser. This rule would limit the restraint to the time during which the purchaser or his assignee is in business, for beyond that time there is nothing to protect. As, at common law, the restraint as to time was not objectionable, this question did not arise. The question as to space was a very different affair. The court could not hold such a contract valid for a reasonable extent of country, and void as to the excess. To what part of the specified country would the court confine the business? If the described space were the state of California, to what city or town within the state should the operation of the contract be confined? To confine it to any part would be to make a new contract. The courts have generally done this, however, when the circumstances permitted. Upon this point, Baines v. Geary, 35 Ch. Div. 154, is very instructive. The plaintiff was engaged in the business of selling milk, and the defendant engaged as an employe as milk carrier, and agreed that "he will not during such service, or after being discharged or quitting such service, serve, or cause to be served, with milk or any other dairy produce, for his own benefit or that of any other person or persons, * * * any customers served or belonging at any time to the said Clement Baines, his successors or assigns." Action for injunction. Judge North said: "It is quite clear that a covenant in restraint of trade is good if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee. The courts have, however, seen their way to treat such a covenant as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. * * * No case, however, was cited to me in which a covenant of this kind had been held to be divisible in regard to time, and I postponed my judgment that I might see if any such case had been reported, and I have found the case of Nicholls v. Stretton, 10 Q. B. 346. In that case, the defendant, on being articled for five years to the plaintiff, who was a solicitor, covenanted that he would not, during the five years, 'nor at any time after the expiration of the term,' etc., do business 'for any person who had already been, or who should, from time to time thereafter, become or be, the client,' etc. * * * Mr. Cowling then contended that the contract was at least good so far as it concerned the clients who carried on business with the plaintiff at the time of making the indenture, or during the continuance of the articles, and the breaches are confined to these. 'It is true,' he said, 'that when any contract, whether under seal or not, is in part illegal, the whole contract fails. But that is different from the present case, where the contract is not to to do anything illegal, but only to abstain from certain acts, some of which a party cannot bind himself not to do, but may still legally abstain from doing. In such case, the law will enforce such restrictions as the party can bind himself to.' Mr. Bramwell replied, and the court took time to consider their judgment. Lord Denman, C. J., delivered the judgment of the court, thus: 'This case must be decided in favor of plaintiff,' etc. * * * I must therefore grant an injunction, but limited to restraining the defendant from serving or interfering with any persons who were customers of plaintiff, Baines, at any time during defendant's employment by him." The contract was enforced to the extent to which it was deemed reasonable, and was held void as to excess. In Moore, etc., Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 6 South. 41, defendants sold their business to plaintiffs, and agreed not to handle any more plow stocks or plow blades. There was no restriction as to time or place. It was objected to as unreasonable because unlimited. The court said, however, in substance, that a contract was to be construed with reference to the circumstances of the parties and the object sought to be attained by the contract; that, in fact, the firm was dealing only within a limited territory, and the evident purpose was to protect the plaintiff in his business.

The contract was, therefore, to be construed as limited to the territory covered by plaintiff's business.

I think this case an advance upon former precedents upon the subject. But, whatever difficulty there may be in limiting such a contract as to space, there is none whatever in doing so as to time. In fact, it is practically so limited in the nature of things. The obligation when the purchaser is not engaged in the business within the limited territory is mostly ideal, as only nominal damages could be recovered for a breach, and equity, under such circumstances, would not intervene to prevent a breach. The sole purpose here was to protect the plaintiff in the enjoyment of what he had purchased, and the contract was presumably made in view of the law. All the parties sought to attain was within the limits of the law. We neither add to nor take from the contract by supposing that the parties contemplated that it should be so limited. This principle seems to be recognized in Langan v. Langan, 91 Cal. 654, 27 Pac. 1092. I think, therefore, the contract was valid. I think the complaint sufficiently states a breach of the contract. Even if only nominal damages could be proven, plaintiff would be entitled to his injunction, partly, perhaps, upon the very ground of the difficulty in proving damage. I advise that the judgment be reversed, and the court directed to overrule the demurrer.

We concur: SEARLS, C; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below directed to overrule the demurrer.

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101 Cal. 358

WILHELM et al. v. SILVESTER. (No. 18,085.)

(Supreme Court of California. Feb. 20, 1894.)

MINES—LOCATIONS—INTERSECTING VEINS.

Rev. St. U. S. § 2322, giving locators of quartz claims exclusive possession of all the surface within their location lines, and the entire depth of all veins whose apex is within the surface lines extended vertically, is not repealed by § 2336, providing that, where two or more veins cross each other, the prior location shall have all ore within the space of intersection, but the latter shall have right of way for working through said space, since the latter section may well apply to ledge locations made before May 10, 1872, and to possible intersections on the dip; and the former still stand to preserve to the prior locator, under federal laws, the ownership of a vein crossing his on the strike, whose apex is within his surface lines. De Haven, J., dissenting.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by T. H. Wilhelm and others against Henry Silvester on agreed facts. Judgment for defendant. Plaintiffs appeal. Affirmed.

Kitts & Bowman, for appellants. A. Burrows, for respondent.

McFARLAND, J. This case was submitted to the court below upon an agreed statement which shows the following facts: Defendant's grantor, in December, 1879, discovered a gold-bearing quartz vein, which he called the "New Idea Lode," and made a valid location thereof, including surface ground 1,500 feet long and 600 feet wide. The New Idea lode runs nearly north and south through the center of said surface ground; and the land on which the location was made was at the time public, unclaimed, and unoccupied public land of the United States. It is admitted that said location was a valid one, and that since then defendant and his grantor have complied with all the laws and customs necessary to continue the validity of said location. About a year afterwards, to wit, on December 4, 1880, the plaintiffs discovered a gold-bearing lode which commenced east and outside of the said New Idea claim, and thence ran westerly across said New Idea claim at nearly right angles, and intersected said New Idea lode; and they attempted to locate a claim 1,500 feet long and 600 feet wide across the said prior location of the defendant, and did the formal acts which are required by mining laws and customs in making valid locations, and have since done the necessary work, etc., to maintain said location. The said asserted location of plaintiffs is called the "South Scotia Lode and Claim;" and they contend that by said subsequent attempted location they have acquired the title to, and right of possession of, the said South Scotia lode, where it lies within the surface ground of said defendant's New Idea claim. Defendant claims that the plaintiffs, by said attempted subsequent location, acquired no right whatever to any portion of the said South Scotia lode, which lies within the boundaries of defendant's location. The plaintiffs brought this action to enforce their right to the South Scotia lode within the limits of the said prior location of defendant. The court found in favor of defendant, and the plaintiffs appeal from the judgment.

We think that the decision of the superior court was right, and that the judgment should be affirmed. Section 2322 of the Revised Statutes of the United States, which is a re-enactment, in this respect, of the act of May 10, 1872, provides that the locators of quartz claims, where no adverse claim existed on the 10th of May, 1872, so long as they comply with the laws of the United States and local customs, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically." This language is clear and explicit, and, in designating the property rights of locators, is in no wise ambiguous or uncertain. It expressly, and in language which needs no construction, grants to such locators every ledge or lode, the top or apex of which lies within the surface lines of the location; that is, such part of the ledge as lies within such lines. And there is no limitation or exception of any such ledge on account of the direction in which it may run. It may be parallel with the originally discovered ledge, or may approach it at right angles, or at an obtuse angle, or at an acute angle, it may intersect it or not, and still it will be clearly within the language of the said section.

It is contended, however, by appellants, that this positive language of said section 2322 is overcome or repealed, or in some way rendered nugatory, by the provisions of section 2336 of said Revised Statutes. That section is as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." It will be observed, however, that this latter section does not undertake to give to any person the right to make a valid location of a quartz ledge across either the surface ground or the lode of a prior locator. It merely assumes that there may be instances where there may be certain kinds of intersections of lodes where both the prior and the latter locators may have some rights; and if there can be a reasonable and apparent construction of section 2336, by which it will not be in conflict at all with section 2322, then such construction should govern. Now, there are cases where the owners of ledges which intersect may each have rights entirely distinct from, and which do not conflict at all with, the clear and positive language of section 2322. Passing the consideration of the possibility of a subsequent locator acquiring rights, as against the prior locator, by adverse user, it must be remembered that the Revised Statutes were not intended to impair the rights of quartz miners, in cases where the locations were made before May 10, 1872. Rev. St. § 2344. Prior to the time when congress undertook to legislate upon the subject of the location of quartz mines, such location was regulated entirely by local rules and customs; and, while those rules and customs had a general similarity throughout mining regions, there were still some districts in which they differed quite materially from the general customs. For instance, in some localities quartz claims were held by square location,—the owner not being allowed to go beyond his side lines to follow his lead under ground,—and in other localities there were what are known as "ledge locations;" that is, where the ledge alone was located, without any surface ground. Now, then, the provisions of section 2336 can readily be construed as intending to protect the rights of such old ledge locations. But, in the second place, there are two kinds of intersections of quartz ledges. They sometimes intersect, and sometimes unite, in their horizontal extension, or, as the miners call it, their "strike." But they may also intersect or unite on their dip; that is, they may intersect laterally in their downward course. Now, when they intersect laterally, as last above stated, the owner of each ledge has rights at the point of intersection entirely consistent with all of the provisions of section 2322. In such a case the owner of a claim on land adjoining that of a prior locator would have a right to follow his ledge as it dipped laterally underneath the surface ground of his neighbor, and, if his ledge intersected the ledge of the prior locator, he would have the right of way through it under the statute, the older locator merely having the quartz at the exact point of intersection; but his right to thus follow his vein underground would be an entirely different thing from the right asserted in the case at bar by appellants,—to enter upon the surface of defendant's prior location, and locate a claim, the top or apex of which was within the surface location of defendant's ground. And to such an intersection the provision of section 2336 can be readily applied, in perfect consistency with the provisions of section 2322. Moreover, there is strong reason for thinking that such an intersection was the very one in the mind of congress when it passed section 2336; for in that section, and speaking of the same subject, it says that: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of union." And, if the other kind of intersection was in the minds of the legislators at that time, they would not have used the word "below;" for "below" would not apply at all to a union on the strike of two veins, such as the appellants' rights depend on in the case at bar. These views make the two sections under review entirely harmonious, and the fundamental rule of construction is to reconcile apparently contradictory provisions of the statute, where it can be reasonably done. And, if we look at the apparent intention of congress, there would seem to be no possible reason for giving to the first locator all the veins within his surface lines, except those that happen to run in a particular way. Under appellants' contention, if the course of a vein was such that it intersected with the original vein of the prior locator a few feet before it reached the end line, it would not belong to such original locator; but, if the point of intersection was a few feet beyond his end line, then he would own it. There would be no good reason for supposing that congress intended such a result, when not using any language to express such intention. Moreover, how was it possible for appellants to locate any part of a quartz ledge on the surface of respondent's claim? It is the universal rule that a valid mining location can be made only upon unappropriated public land; that is, at least, as against the prior appropriator. It was even held by the supreme court of the United States in Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, that a mining location made partly upon a former valid location was void throughout its entire length, as against a third party. That is no doubt a somewhat extreme doctrine, but it is certainly clear that such a location is invalid as against the prior appropriator himself; and as, in the case at bar, the appellants' whole claim rests upon a location made within and on top of the former valid location of the respondent, it is impossible to see how there is any basis at all for their asserted rights. And it must be remembered that section 2336 refers to a case where "priority of title" governs, and of course it can have no application to a party who has no title.

We are aware that the supreme court of Colorado, in Branagan v Dulaney, 8 Colo. 408, 8 Pac. 669, reached a different conclusion on this question; but, while we have the highest respect for the decisions of that court, we are not able to concur with its conclusion on the point under discussion. The opinion in that case went upon the theory that the two sections of the Revised Statutes above referred to are utterly inconsistent, and the court say: "We see no way out of the dilemma, except by the application of the arbitrary rule of construction suggested by the court in the case of Hall v. Smelting Co., [Morr. Min. Rights, (3d Ed.) 282, Fed. Cas. No. 5931,]—that, as between conflicting statutes, the latest in date will prevail, and, as between conflicting sections of the same statute, the last in order of arrangement will control." But that rule of construction is to be invoked only as a last resort, and where the conflict is so sharp and complete as to leave no possible room for giving both effect; and, as appears from the views above expressed, in our opinion, there is no such conflict between the two sections named. Both, in our opinion, can easily stand together, and we see no difficulty in reconciling them. The construction contended for by appellants would leave the rights of prior locators in the greatest confusion. Their property interests in their claims would be undefined, and the result would be ruinous litigation, and perhaps personal conflicts. But to give section 2322 its clear and undoubted meaning is to accurately fix the rights of prior locators as we think congress clearly intended them to be fixed.

After the foregoing opinion had been written, our attention was called to the case of Mining Co. v. Leach, (decided by the supreme court of Arizona,) 33 Pac. 418, in which that court reached the same conclusion as that heretofore stated. In the opinion of the court, delivered by Kibbey, J., there is an elaborate discussion of the subject, leading to the result that section 2336 does not conflict with, nor does it in any way repeal, any part of section 2322; that the former section had reference to mining rights existing prior to its passage; and that "congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A.'s lode might legally cross B.'s lode on the strike."

The judgment is affirmed.

We concur: HARRISON, J.; FITZGERALD, J.; GAROUTTE, J.; PATERSON, J.

I dissent: DE HAVEN, J.

BEATTY, C. J. I concur in the judgment, and in the conclusion of the court as to the proper construction of sections 2322 and 2336 of the Revised Statutes. I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent in assuming that the provisions of section 2336 cannot be applied to locations made since the passage of the mining law of 1872, on veins which intersect upon their strike, without bringing it in conflict with the plain terms of section 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent. The sum of the argument in favor of the construction thus imposed upon the statute—which is, in effect, a nullification of the express terms of section 2322, and a relegation of mining rights to the same condition of uncertainty and confusion in which they were before the act of congress was passed—has been that section 2336 must be allowed some operation and effect; that its only possible application is to veins which cross on their strike, because parallel veins never do intersect on their dip; and that, if it is to be applied to veins which cross on their strike, the necessary inference is that congress intended that the discoverer of a cross vein should have the right to lay his surface location across the surface location of the intersected vein. But in truth this conclusion is a perfect non sequitur. There is no proposition in geometry plainer or more easily demonstrable than this: that surface locations on cross veins may be so made as not to conflict, while at the same time the portions of the veins included in or covered by the respective locations will intersect in depth,—in some cases within the surface lines of one or the other location extended downward vertically, and in other cases altogether without the surface lines of both locations. This results from the fact that veins generally, if not universally, descend into the earth, not vertically, but at a greater or less inclination or dip. This being so, and the law allowing the locator to follow his vein on its dip outside of his side lines projected downward vertically, and within the vertical lines of an adjoining or neighboring claim, it may easily happen that the parts of two intersecting veins included within entirely distinct surface locations will intersect in depth either outside of both claims, or within one or the other, according to the angle of the dip and the relation of the surface claims to the point where the apices or croppings of the veins intersect. Suppose, by way of illustration, a north and south vein, dipping to the west, intersected by an east and west vein dipping to the north at the same angle. Assuming these veins to be perfectly regular in strike and dip, their intersection will be along a diagonal line descending into the earth from the point of intersection at the croppings, (which, for brevity, I will call "Point A,") and extending in its horizontal projection to the northwest. Now, suppose a location on the north and south vein, commencing three hundred feet or more north of point A, and extending to the north along the vein. It is evident that a full surface claim, 1,500 feet in length, and extending 300 feet on each side of the croppings, may be located on the east and west vein without at all conflicting with the supposed location on the north and south vein; and it is equally evident that such location may be made to include point A, or altogether east of it or west of it. If made wholly to the east, it will not include any part of the intersection at the surface or below the surface. If made to extend but a short distance west of point A, it will include some of the intersection, but the diagonal of the line of intersection will carry it beyond the vertical plane of the west end line before the dip of the vein carries it beyond the south line of the other location. If made somewhat further to the west, the intersection will fall more or less within the surface lines of the north and south location, and will make a case for the application of section 2336. If made still further to the west, the line of intersection of the portions of the respective veins covered by the two locations will be wholly outside of the surface lines of either location, and still another case for the application of section 2336 will arise. Here, then, are two cases for the application of section 2336, without bringing it in conflict with section 2322; and the mere possibility that such cases might sometime arise under distinct locations, each entitled to all the rights conferred by the plain terms of section 2322, was a sufficient reason for incorporating in the law the provisions of section 2336. Of course, the hypothesis of two perfectly regular veins dipping at the same angle, and crossing at right angles, is one which will never be realized. But the very fact that veins, instead of being regular and uniform in strike and dip, are in every way irregular and eccentric, increases the possibility of intersections of cross veins under ground, outside of the lines of surface locations, and, so far from diminishing the force of the illustration used, only proves how infinitely it might be varied. If these views are correct, it follows that the only reason ever suggested for construing section 2322 against the plain import of its terms is based upon a geometrical absurdity; and the practice of miners in making, and of the land office in permitting, cross locations on the surface, is without any justification in the mining law.

(101 Cal. 367)

TALMADGE v. ARROWHEAD RESERVOIR CO. (No. 19,303.)

(Supreme Court of California. Feb. 20, 1894.)

POWERS—SUBSTITUTION—SUBMISSION TO ARBITRATION.

A reservoir company's power of attorney to bargain, contract, agree for, purchase lands, etc., in the donee's judgment required for the company's business, "with full power of substitution or revocation," will not sustain his agreement to arbitrate the price of a tract he desires to buy for the company so as to bind the company by an award of a majority of the arbitrators, not concurred in by those whom he appointed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by F. L. Talmadge against the Arrowhead Reservoir Company on an award of arbitrators. Judgment for defendant. Plaintiff appeals. Affirmed.

H. C. Rolfe and F. B. Daley, for appellant. Willis, Cole & Craig, for respondent.

BELCHER, C. It is alleged in the complaint in this case that in April, 1892, the plaintiff and defendant entered into a written agreement, which is set out in full, and the material parts of which are as follows: "Whereas, the Arrowhead Reservoir Company, a corporation organized and existing under the laws of the state of Kentucky, and doing business in the county of San Bernardino, state of California, is desirous of purchasing from F. L. Talmadge" the east half of a certain sixteenth section of land in San Bernardino county; and "whereas, said parties cannot agree among themselves as to the exact amount to be paid and received for said premises: Now, therefore, we, the undersigned, * * * do hereby submit said controversy to the arbitrament of" five men, two chosen by each of the parties named, and one to be chosen by the said four, "and we do mutually covenant, promise, and agree to and with each other that the award to be made by said arbitrators, or a majority of them, shall in all things by us, and each of us, be well and faithfully kept and observed, and that said arbitrators shall fix the amount or value of said premises, * * * which said amount said Arrowhead Reservoir Company promises and agrees to pay to said F. L. Talmadge within thirty days after said arbitrators have delivered to said company their decision therein; and the said Frank L. Talmadge promises and agrees, upon receiving the amount so fixed by said arbitrators of said property, that he will then and there give to said Arrowhead Reservoir Company a duly-executed grant deed, conveying to said company the legal title to the property hereinbefore described. And that the value fixed upon said property by said arbitrators shall be final between the parties hereto, and that neither party hereto shall appeal to or resort to any court from the decision of said arbitrators. And that said award be made in writing under the hands of said arbitrators, or a majority of them, and ready to be delivered to said parties in difference, or such of them as shall desire the same, on or before the 1st day of June, 1892. * * * And it is hereby stipulated and agreed that this submission to arbitration shall be entered as an order of the superior court in and for the county of San Bernardino, state of California." The agreement is signed: "The Arrowhead Reservoir Co., by Adolph Wood, Vice President and General Manager. F. L. Talmadge."

It is further alleged that the four so-called arbitrators, chosen by the parties, chose a fifth, and that on May 12, 1892, all of said five men met to consider the matter submitted to them, and both plaintiff and defendant appeared before them, and produced and submitted evidence as to the value of the premises, and were fully heard; that thereafter, on May 13, 1892, a majority of them fixed the value of the said premises at $18,000, and made their decision in writing, a copy of which is set out; that the decision was on the day of its date delivered to the plaintiff and defendant, and thereafter, on June 8, 1892, the plaintiff offered and tendered to the defendant a duly-executed grant deed, conveying to defendant the legal title to said property upon payment to him of the sum of $18,000, and again, a week later, made the same offer and tender, and demanded of defendant the said sum, but defendant then refused, and still refuses, to receive the said deed, or any deed of the said premises, or to pay to plaintiff the said sum; and that plaintiff is still ready and willing to deliver said deed, and to transfer and convey the legal title to said property to the defendant upon payment to him of the said sum of $18,000. Wherefore, he demands judgment against the defendant for the sum of $18,000, with interest and costs.

The answer denies most of the averments of the complaint, and, among other things, that defendant ever entered into any agreement with the plaintiff in reference to the purchase of the described land, or any other land, or ever entered into the agreement set forth in the complaint, or ever agreed or stipulated in writing to purchase said property, or any part of it, or ever agreed to submit the price of it to arbitration or otherwise.

At the trial the plaintiff offered in evidence a state patent to himself for the land described in the complaint, and a power of attorney to Adolph Wood, executed May 27, 1891, by the president and secretary of the defendant company, in pursuance of a resolution of its board of directors, and also the two other papers above referred to as set out in the complaint. By the power of attorney the company made, constituted, and appointed Wood "its true and lawful attorney for it, and in its name, place, and stead, and for its use and benefit, in said state of California, to bargain, contract, agree for, purchase lands, tenements, hereditaments, which in his judgment may be required or necessary for the company's business, and to receive and take such property, and all deeds and assurances therefor; and in case land is purchased by said company, and the entire purchase money is not paid therefor in cash, to mortgage such lands for the balance of purchase money upon such terms and conditions, and under such covenants, as he shall think fit, and to deliver and execute such instruments in writing as may be necessary or proper in the premises, * * * giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents, as said corporation might or could do if personally present by its board of directors and corporate officers, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney or his substitutes shall lawfully do or cause to be done by virtue of these presents." The defendant objected to all the offered evidence upon the ground that it was irrelevant and immaterial, and to the power of attorney upon the ground that it did not confer any power to make the submission, and also to the power of attorney and the agreement and award set out upon the further ground that the complaint did not state a cause of action, for the reason that it did not show any case for submission to arbitration, or any compliance with the statute in regard to arbitrations, or that any contract had ever been made between plaintiff and defendant for the purchase of any land, or upon which any civil action could have been brought or maintained by either party. The court sustained the objection that the complaint did not state a cause of action, and rendered judgment for the defendant, from which the plaintiff appeals.

It is not, in our opinion, necessary to consider the question as to whether the complaint stated a cause of action or not, or as to whether the agreement, if authorized, constituted a statutory or common-law submission to arbitration, (Church v. Seitz, 74 Cal. 287, 15 Pac. 839;) for if, as claimed by respondent, the power of attorney did not authorize Wood to submit to third parties the matter of fixing the price to be paid for the land, then there was no completed contract which was binding upon or enforceable against either party. It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties. Association v. Phillips, 56 Cal. 539; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179. It is also a general rule of law that an agent cannot delegate his authority to another, unless he is specially authorized so to do. Mechem, Ag. §§ 184-186; Ang. & A. Corp. § 277. Wood did not sign the agreement as the attorney in fact of the corporation, but as vice president and general manager, and it does not appear that he held either of those positions, nor, if he did, what were his powers as such. Waiving that objection, however, and still it only appears that he was authorized "to bargain, contract, agree for, purchase lands, tenements, hereditaments, which, in his judgment, may be required or necessary for the company's business," "with full power of substitution and revocation."

It is contended for appellant that the power of substitution conferred authority to submit to the so-called arbitrators the matter of appraising the land and conclusively fixing its price, and that, when the appraisement was made and delivered to the parties, the contract was complete. This contention cannot, in our opinion, be sustained. Wood was authorized only to substitute another to take his place and perform his duties as attorney or agent for the principal, not to substitute the judgment of another for his judgment while he was still acting as agent, and himself performing the duties pertaining to his position; but, even if he had the right to substitute another to make the appraisement and fix the price, still he certainly had no right to agree that his principal should be bound by an appraisement not made by his substitute, but by other persons. Here it appears that the appraisement was made and concurred in by only three of the so-called arbitrators, namely, the two chosen by appellant, and the fifth chosen by the other four. Under these circumstances, it is clear that no price for the land was ever agreed upon by the contracting parties, and no enforceable contract was ever made. It follows that the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

101 Cal. 373

CITY OF LOS ANGELES v. COHN et al.
(No. 19,210.)

(Supreme Court of California. Feb. 21, 1894.)

ESTOPPEL OF CITY—OCCUPATION OF STREET.

Where one erects a valuable building projecting into a street, after the agent of the city instructed by it, with the concurrence of the lot owner, to investigate and report to the council the city's rights in the land, reports that it has no rights, and such report is received and filed among the records of the city, it is estopped to claim the land.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the city of Los Angeles against Kaspare Cohn and others. Judgment for defendants. Plaintiff appeals. Affirmed.

C. McFarland, for appellant. Houghton, Silent & Campbell and Stephen M. White, for respondents.

GAROUTTE, J. Plaintiff bring this action to recover the possession of a small tract of land which lies at the intersection of Spring and Main streets, in the city of Los Angeles, and which is covered by a portion of the building known as "Temple Block." It is claimed by the city that this land is a part of a public street. At the conclusion of the trial the court made its findings of fact, to the effect that defendants were the owners of the land at the time the action was commenced, and that they and their grantors and predecessors had been in the active and exclusive occupation and possession of the property for more than 40 years. Upon these findings, judgment went for the defendants, and this appeal is prosecuted from that judgment, and from the order denying a motion for a new trial.

Owing to the views we entertain upon another branch of the case, we do not find it necessary to discuss in detail the sufficiency of the evidence to support the finding of the trial court as to the character of the possession, and the period of time of the possession, of these defendants, and their grantors and predecessors, over this tract of land. Upon examination of the evidence, we think it established to a certainty that this possession had been continuous and exclusive for almost 50 years. This is something unusual in litigation of the present character, and is a feature of the case to which we would attach considerable importance, if the consideration of the element of possession were necessary to support the title of defendants to the land. An uninterrupted possession of 40 or 50 years is full of meaning, even against a municipal corporation, and in some states such conduct upon the part of the city would conclusively indicate an abandonment by it of all right to the land as a public highway. In 1871, Temple began the erection of a block of buildings upon a certain parcel of land, which included, upon the north end thereof, the strip in dispute. The contemplated structure was to be three stories in height, of great value, and extended over this tract of land. The foundations being laid, it was reported to the city council by the street commissioner that Temple, the owner, was encroaching upon the public street with his building, and, upon an order of the council, the matter was referred to the city attorney for investigation. Subsequently, as shown by the minutes of the proceedings of the council, the city attorney made a lengthy report to that body, wherein, in detail, he reviewed the merits of the claims of both parties, and in conclusion held that Temple was the owner of the land, and was justified in erecting the building as he had begun it. This report was ordered received and placed on file, and a full synopsis thereof was entered upon the minutes of the board. Thereupon the building was at once erected to completion, and nothing further was ever done by the city in the premises until the present action was brought, 20 years later. Stephen C. Foster, who had been a former alcalde of the pueblo, and later a mayor of the city, and a witness in whom, it appears, all parties reposed confidence, testified that, at the time the city attorney was investigating the rights of the city to this land, he heard Temple, the owner of the building, tell the attorney that he wanted to do what was right; "he wanted the matter fixed at once;" and the witness also stated that his impression was that Temple said he would leave it to Howard, (city attorney,) and act upon his opinion as to where the north line should be placed.

Various questions pertaining to title and dedication arise in the case, and those questions have been fully argued by counsel. We shall not discuss them, but rest our decision upon the history of this piece of realty, as disclosed by the facts we have quoted from the record. If it be conceded that the legal title to this land has always been in the city, that fact alone avails the plaintiff nothing, for an assertion of its claims upon that ground has been barred by the statute of limitations for many years. A dedication of the property as a public highway, resulting from the filing of a certain map among the public records of the county in the year 1849, forms the basis of plaintiff's cause of action; and, conceding the filing of this map to have had all the force and effect claimed for it, and that dedication ipso facto resulted therefrom, yet we think plaintiff's conduct has been such that, whatever merit its claim may have possessed years ago, there is no merit in it now. While municipal corporations do not own their public streets, and while the laches of municipal officers cannot defeat the rights of the public in those streets, yet individuals have some rights which, in the exercise of common justice, the municipality must respect. Its conduct towards a citizen, pertaining to the boundary line of one of its highways, may be such that it would be a violation of every principle of right and morals to allow it to recede from the stand taken or the agreement made. The foregoing principle is well illustrated, and strongly put, by Dillon in his work upon Municipal Corporations, (section 675,) wherein it is said: "It will, perhaps, be found that necessities sometimes arise, of such a character that justice requires that an equitable estoppel shall be asserted, even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle; but there is no danger in recognizing the principle of an estoppel in pais, as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere process of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." The author cites many cases to support the text, and upon examination of these citations we find the principal recognized and approved, especially by the decisions of the Illinois court. In the later case of Simplot v. Railway Co., 16 Fed. 360, the text from Dillon is quoted with approval, and Judge Shiras says: "In the latter cases [referring to cases like the present one] the courts may apply the doctrine or principle of an estoppel, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights." This doctrine is also directly declared in the recent case of Crocker v. Collins, 37 S. C. 327, 15 S. E. 951; and while it is not for us to say whether or not the facts of that case were sufficient to justify an application of the principle of estoppel in pais as against the public, yet the law is there well declared, as follows: "We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town which is a public highway, cannot confer a title; but, where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of the town, and expended his money in erecting buildings thereon, without interference on the part of the public, these, or perhaps other, circumstances connected with adverse possession for the statutory period, may afford good ground for estoppel."

To our knowledge, there is nothing to be found in the decision of the court opposed to the doctrine laid down in the text we have quoted from Dillon's work on Municipal Corporations, while in the case of Fresno v. Fresno, etc., Irrigation Co., 98 Cal. 182, 32 Pac. 943, the principle was stated, and incidently approved. The question being a new one in this state, and a most important one, we will content ourselves with an application of it to the facts of the present case, and not attempt to promulgate any general rule by which every case invoking this doctrine may be weighed and measured. If we concede the existence of the principle of estoppel in pais against the public in certain exceptional cases, then this case is rightly decided, for this is an exceptional case. If this character of estoppel may be pleaded where justice and right require it, then it may be successfully pleaded in this case, for justice to these defendants demands it. There are limits beyond which even a city, in representing the rights of the public, may not go, and we think the city, in the present action, has gone beyond those limits. If the city had expressly agreed by its officers, with defendants' grantors, even in parol, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong; and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street.

It is unnecessary to again detail the facts. Before the building was erected, with a knowledge and concurrence of the owner, the city instructed its agent to investigate and report to the council its rights in the land. The agent did investigate, and reported that the city had no claim or title. This report was received, placed on file, and entered, in substance, upon the minutes of the proceedings of the council. Nothing more was ever done by the city until this action was brought,—a period of 20 years later. Upon the reception of the report, and its filing among the records of the city, defendants' grantors at once proceeded to the erection of a large and valuable building, and there it stands at the present day. A judgment for plaintiff would result in a destruction of this property. These facts are potent in themselves, and in our researches we have found no case which may so well be termed an "exceptional case." We have found no case which, with better reason, should form a "law unto itself." It is a case where an estoppel in pais is properly pleaded. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(101 Cal. 387)

SOLARI v. SNOW. (No. 19,225.)

(Supreme Court of California. Feb. 24, 1894.)

IMPEACHMENT OF WITNESS—COMPLAINT IN ANOTHER CASE—DEED—NOTICE.

1. A complaint not verified or signed by plaintiff, and whose contents are not shown to have been known by him, is not admissible against him, in another action, to contradict his testimony.

2. Where defendant took a deed signed by G., not only individually, but as attorney in fact of plaintiff, he was charged with notice of plaintiff's interest.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Giobatti Solari against S. P Snow. Judgment for plaintiff. Defendant appeals. Affirmed.

E. B. Hall and B. F. Thomas, for appellant. Richards & Carrier, for respondent.

FITZGERALD, J. Action to quiet plaintiff's title to the land described in the complaint, against the claims of defendant, and for the recovery of the possession thereof, also to cancel a tax deed issued to defendant therefor, as a cloud on plaintiff's title, and for rents and profits, and damages for withholding. Plaintiff had judgment, and defendant appeals from the judgment and the order denying his motion for a new trial. The evidence shows that plaintiff was the owner of the property described in the complaint, at the date of its purchase by the defendant. This being so, it is only necessary to consider but two of the questions discussed by counsel in their briefs, as their decision necessarily disposes of the others raised by the record on this appeal. These questions are: (1) Did Domingo Grondoma, who joined—individually and as attorney in fact of plaintiff—with his wife and son in the execution of the deed to defendant of the premises in controversy, sustain, or claim to sustain, at and prior to the execution thereof, the relation of attorney in fact to plaintiff? (2) If so, did defendant purchase said property with notice, either actual or constructive, of such relation, and of plaintiff's ownership thereof? On these questions, the court, in its decision, found adversely to appellant; and as the findings thereon, as well as the other findings attacked by the specifications, are fully justified by the evidence, they will not, under the well-established rule of this court, be disturbed, unless the rulings of the court complained of, in relation to the admission and rejection of evidence bearing upon these questions, were erroneous.

There are 30 assignments of error claimed to have been committed by the court during the trial of the cause, but the only one necessary to be noticed—the others being immaterial or unimportant—is the one relating to the admission, against defendant's objection, of an unverified complaint signed by the attorney alone, the contents of which were not shown to have been known to the plaintiff therein, filed September 1, 1887, in a certain action brought in the superior court of Santa Barbara county, notice of which was thereafter duly recorded and filed, wherein the said Domingo Grondoma was plaintiff, and his son, Jose H., and Encarnacion, the wife of the said Domingo, were defendants. That action, which was dismissed on the day after the execution of the deed to defendant herein, was brought to set aside and vacate, on the ground of fraud, two deeds to the property in question,—one a deed of gift executed by Domingo to his son Jose H., conveying to him the whole of said property; the other, also a deed of gift, from Jose H. to his mother, Encarnacion, conveying to her a part thereof. The complaint in that action contained the allegation, among others, that said Domingo Grondoma was "at all the times hereinafter mentioned the duly appointed, qualified, and acting administrator and trustee of the estate of Giobatti Solari, who is civilly dead, and the real property hereinafter described belongs to said estate." The property referred to and hereinafter described is the property involved in this action. This complaint was offered and admitted in evidence, against defendant's objection, for two purposes: First, as an admission by Domingo Grondoma of the relation which he claimed to sustain to plaintiff, thereby contradicting his testimony at the trial on that point; and, secondly, to charge the defendant with notice of the contents thereof. The complaint was clearly inadmissible as evidence for either purpose, for the reason that it was unverified, and not signed by the plaintiff therein, and not shown that he had any knowledge of its contents. But it affirmatively appears from the record that defendant could not have been injured by its admission, as the evidence, independent of the complaint, was overwhelming in support of the finding that defendant purchased the property with full knowledge of plaintiff's ownership, and of Domingo Grondoma's assumed relation, as his attorney in fact, in connection therewith. The deed to defendant of the property in question was signed by the said Domingo as the attorney in fact of plaintiff. This was, of itself, sufficient to charge the defendant with notice of the character and extent of plaintiff's interest in the property, and of Grondoma's real or pretended relation to him, at and prior to the purchase of the property by the defendant, and he took it subject to such interest. Judgment and order affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

(101 Cal. 390)

AMES et ux. v. CITY OF SAN DIEGO. (No. 19,291.)

(Supreme Court of California. Feb. 24, 1894.)

MUNICIPAL CORPORATIONS — ADVERSE POSSESSION AGAINST—EFFECT OF FINDINGS.

1. Land obtained from the United States by a city, as successor of a former pueblo, may, if not dedicated for some public use, be lost by the adverse possession of another.

2. A finding that the land in controversy was conveyed to defendant city, as successor of a pueblo, "in trust for municipal purposes," taken in connection with a previous finding that plaintiffs have been in adverse possession since 1846, occupying it as a place of residence during that period, is not to be construed as declaring that the land was dedicated to public use as a street or park, or for a public building, or that it was conveyed to defendant for such a purpose, so as to show a conflict between the findings.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Catalina S. Ames and husband against the city of San Diego. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

William H. Fuller, for appellants. William Darby, for respondent.

DE HAVEN, J. The plaintiffs are husband and wife, and this action was brought for the purpose of determining an adverse claim made by the defendant to certain land which the complaint alleges is owned by the plaintiff Catalina S. Ames. The answer alleges that the defendant is the owner of the land in controversy, and this was the only issue made by the pleadings. The action was tried by the court without a jury, and judgment was rendered in favor of plaintiffs. The defendant appeals from the judgment and from an order denying its motion for a new trial. It is claimed by the defendant that the findings do not support the judgment, and also that the finding in respect to the plaintiffs' adverse possession is not justified by the evidence. The court did not find in direct terms that the plaintiff Catalina S. Ames is the owner of the land in dispute, but it found the following among other facts: "(2) That, ever since the year 1846, the said plaintiffs and their grantors have been continuously in possession of the lands and premises hereinafter described, claiming the same adversely to defendant, and that the same have been during the whole of said time inclosed with a substantial fence; and that there has been erected, and is now standing on said lands, a two-story adobe dwelling house and a frame dwelling house, and that said adobe dwelling house has been occupied by said plaintiffs and their grantors as a dwelling continuously from the said year 1846." "(4) That on the 10th day of April, 1874, the title of said defendant as successor to the Mexican pueblo of San Diego was confirmed, and that on said day a patent was issued to defendant by the United States of America for the land and premises hereinafter described, with other lands, as the pueblo lands of said defendant, and in trust for municipal purposes."

The foregoing finding numbered 2, although somewhat informal, was evidently intended as a finding to the effect that the plaintiffs had, before the commencement of this action, acquired title to the premises in controversy by adverse possession, and that such is its proper construction is not denied by counsel for defendant; but it is urged that the latter finding, numbered 4, is in conflict with the former, and shows that plaintiffs did not and could not have acquired such title as against defendant. The finding last above quoted, and upon which the defendant relies, shows clearly that the defendant city obtained from the United States title to the land in controversy as the successor of the former pueblo of San Diego; and it is well settled in this state that land thus acquired cannot be sold under an execution issued upon a money judgment against the city succeeding to the rights of the pueblo. Hart v. Burnett, 15 Cal. 530; San Francisco v. Canavan, 42 Cal. 541; Townsend v. Greeley, 5 Wall. 326. The reason for this rule is that such lands are not held as the absolute property of the city, but in trust for its inhabitants. The nature of the title of a pueblo to the lands within its limits, and the trust upon which it was held by the pueblo, are very clearly stated by Baldwin, J., in delivering the opinion of the court in Hart v. Burnett, 15 Cal., at page 568. He said: "We have carefully examined their references to laws and text-books, and it seems to us that, taken together, they show that under the old Spanish system the lands assigned to towns, whether by general law or special act, were in the sense of endowments to be held in trust for the purposes and objects specified in the laws or in the particular grant; or, as expressed by Perez, en clase en de dote o privilegio de poblacion, (in class of endowment or town privilege,) but not in absolute ownership, with full right of disposition. The lands so assigned were for the general object of building up and sustaining the town and its population, and were to be applied to that object in the manner which might be directed by the laws or by royal orders. The government, or its authorized agents, were therefore to designate the portions of such lands which were to be used for particular purposes, as those which were to be given to individuals in solares and suertes, those which were to remain common for the use of all alike,—as the pastures, woods, public squares, watering places, etc.,—and those from which the municipal officers were to derive revenues for their support and the expenses of the municipal government. The lands so assigned to these special objects could not all be used or disposed of in the same manner. Thus, the building lots were to be given to the settlers for their individual and exclusive benefits, but the commons were for the common use of all, and could not, in general, be reduced to individual ownership, except by common consent or the exercise of the right of eminent domain."

The defendant city, as successor of the former pueblo, took its lands upon the same trust upon which they were held by the pueblo, and succeeded to the same right of alienation; and, while the land held upon such a trust is not subject to sale upon an execution issued upon a judgment against the trustee, it does not by any means follow that title to such portion of the pueblo lands as has not been dedicated to some specific public use cannot be acquired by adverse possession. Of course, it is well settled that land held by a city in trust for the general public upon a dedication to the public for use as a street, park, or for a public building, cannot be alienated by the city, and the title of the public thereto cannot be lost by a possession adverse to the city. Hoadley v. San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437; County of Yolo v. Barney, 79 Cal. 375, 21 Pac. 833; Board v. Martin, 92 Cal. 209, 28 Pac. 799. But in case of lands the legal title to which is vested in the city, and which may be alienated by it, the rule just stated in relation to land dedicated to the public use does not apply. As to land which is the subject of alienation, we are clearly of the opinion that the title of the city thereto may be lost by the adverse possession of another for the requisite period of time; and in regard to pueblo lands of this latter character, such as house lots, we see no reason why the statute of limitations should not apply in favor of an adverse possessor, precisely the same as if such land had been acquired by the city by purchase, and for purposes of sale, or for any other use not strictly municipal.

The remaining question upon this point is whether the finding upon which the defendant relies shows that the land in controversy is held by the city for some specific public use as a park, street, common, or as a site for public buildings. The language of the finding is that the land was conveyed to the defendant, as successor of the pueblo, "in trust for municipal purposes." We do not think, in view of the specific finding to the effect that the plaintiffs have been in adverse possession of the land since 1846, occupying the same as a place of residence during all that period, that the court intended by the language above quoted to say that this land was ever dedicated to public use as a street, park, or for public building, or that the same was conveyed to the defendant in trust for either of such purposes. Findings are to be liberally construed in support of a judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points; and, unless the conflict is clear, and the findings are incapable of being harmoniously construed, a judgment will not be reversed upon the ground of a conflict in the findings. We thing the court below only meant to say, in the findings now under consideration, that the defendant acquired the title of the former pueblo of San Diego to the land in controversy and other pueblo lands, impressed with the same general trust upon which they were held by its predecessor, but did not mean that the land in controversy was held by the defendant in trust for a specific public use.

What we have said in regard to the construction of the findings disposes of the further contention of defendant that the finding in relation to the adverse possession of plaintiff is not sustained by the evidence. The stipulation relied upon by defendant to overthrow this finding of the court is as general as the finding we have just considered, and in view of the other evidence in the transcript, in which we find no intimation that the lot in controversy was ever dedicated to a public use, or that any claim of such dedication was ever made upon the part of the defendant, we would not be justified in holding it to be a stipulation by the plaintiffs that such land was so dedicated to public use and is not a house lot such as the former pueblo might have alienated, and which the defendant, as the successor to the pueblo title, was authorized to convey in private ownership. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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4 Cal. Unrep. 477

TIBBETS v. BAKEWELL et al. (No. 19,162.)

(Supreme Court of California. Feb. 24, 1894.)

EJECTMENT—EVIDENCE—SUFFICIENCY.

In ejectment, in which the answer denied ouster and the possession and withholding by defendants, it appeared that the land in dispute is a strip six feet wide, on which a water ditch is located. The evidence showed that defendants frequently put a pressure board in the ditch, which cut off plaintiff's water, and diverted it into a flume made by them. *Held*, that the evidence established a trespass, merely, and did not justify a judgment for plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John C. Campbell, Judge.

Action in ejectment by Luther C. Tibbets against Thomas Bakewell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. C. Tibbets and A. B. Paris, for appellant. Frank O. Oster, for respondents.

HAYNES, C. Ejectment to recover a strip of land six feet in width. The complaint was in the usual form. The answer denied the seisin of plaintiff, and the ouster and the possession and withholding by the defendants. It appears from the evidence that a water ditch is located upon this strip of land, and that at some point of the land in question the water was diverted by the defendants to other land belonging to them. Plaintiff, after giving evidence tending to prove title, etc., testified: "I had ordered my water in said ditch, and had been using it. When I found I had been getting no water, I went up to the box to see what the trouble was; and I found a board put in, and the water running into a flume that Thomas Bakewell and the Riverside Water Company had made. There was a pressure board put in, so that all of my water was shut off." He further testified that this occurred about every time he had "gone to irrigate" since then. He also testified that he "had been damaged in the loss of the use of that strip of land, and by the prevention by the defendants of his running water on said land, in the sum of two hundred dollars." Plaintiff having rested, defendant moved for judgment of nonsuit, which was granted; and this appeal is from that judgment, and from an order denying a new trial.

It may be that the defendants have been guilty of a trespass, and have damaged the plaintiff by a diversion of water, or that they did something they ought not to have done, but the evidence is clearly insufficient to justify a judgment for plaintiff in an action of ejectment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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101 Cal. 379

PEOPLE ex rel. BURNETT v. MORSTADT, Justice of Peace. (No. 15,245.)

(Supreme Court of California. Feb. 24, 1894.)

BAIL TO APPEAR BEFORE EXAMINING MAGISTRATE—WHEN FORFEITED.

Where the argument of a demurrer to a complaint before a justice of the peace, charging defendant with a felony, is commenced an hour before the time set for defendant's examination, and is not concluded within the hour, the justice properly refused to have defendant called during the progress of such argument, after the time set for the examination had passed, and enter on his docket the failure of defendant to appear, and declare his bond forfeited.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Petition by the people of the state of California, on relation of Albert G. Burnett, for a writ of mandate to J. Morstadt, justice of the peace, to compel him to enter in his docket the failure of one Berta to appear at the time fixed for his examination on a charge of felony, and to declare his bond forfeited. From an order granting the writ, respondent appeals. Reversed.

J. P. Rodgers, (Rutledge & Pressley, of counsel,) for appellant. A. G. Burnett, Emmet Seawell, Dist. Atty., and J. R. Leppo, Asst. Dist. Atty., for respondent.

GAROUTTE, J. This is an appeal from an order of the superior court directing the issuance of a writ of mandate to the appellant, a justice of the peace of Sonoma county, requiring him to enter in his docket the failure of one Berta to appear for examination on November 10, 1891, at 11 a. m., and also commanding said justice to declare a certain undertaking of bail, given by defendant prior to that time, forfeited. Berta was charged with the offense of embezzlement, and upon his arrest gave a bond in the sum of $1,000, wth two sureties, conditional that he would appear and answer the charge when ordered by the court. By consent of attorneys, the examination was set for November 10th, at 11 a. m. In the mean time a demurrer was filed to the complaint, upon the ground that it stated no cause of action, and the argument of this demurrer was taken up on the 10th of November, at 10 a. m. This argument continued until 11:25 a. m., when the following occurred, as appears by the evidence of the justice of the peace: "Now when it was 11:25 a. m., Mr. Leppo, [deputy district attorney,] in the midst of his argument of the demurrer, pulled out his watch and says: 'I ask now the court to send the constable in front of the courthouse, and call H. Berta three times, and, if he shall not answer, to declare his bond forfeited.' I told him I could not do anything of the kind, because, if I sustained the demurrer, we don't want him. The very question of the demurrer is whether it shall be we want Berta or not." It thus appears that the justice declined to grant the request of the district attorney, and the subsequent history of the litigation, as evidenced by the record, discloses that his argument bearing upon the legal question raised by the demurrer was not convincing, for the demurrer was sustained, and, no amended complaint being filed, Berta was not "wanted," and the proceeding terminated.

We think the judgment should be reversed and the proceeding dismissed. As to whether the filing of a demurrer to a complaint charging a defendant with felony is an authorized practice, we are not called upon at the present time to decide. Neither are we justified in reviewing the legal soundness of the court's views, as indicated by its order in sustaining the demurrer to the complaint. The condition of the defendant's bail bond was, substantially, that he would hold himself amenable to the orders of the court; and when the court took up the consideration of the demurrer to the complaint, at 10 a. m., and the argument thereon was still in progress, at and after 11 a. m., the hour set for the examination, we think the further hearing of that matter by the magistrate was, in effect, a continuance of the examination until the argument of the demurrer was concluded. There is no doubt but that the magistrate had the power to continue the examination even in the absence of the defendant. Notwithstanding the examination was set for the 10th of November, if the magistrate had sustained a demurrer to the complaint on the 9th, and thereupon dismissed the proceedings, it is unquestioned that the defendant would not have been in default if he had failed to present himself before the court upon the 10th. If at 10 o'clock upon the 10th, when the demurrer was taken up for consideration, the court had, in terms, continued the examination until the disposition of the demurrer, the presence of the defendant would not have been required, nor could he have been declared in default until the demurrer was disposed of, or a further order of the court made. We think the conduct of the case, as to the hearing of the demurrer, was, in effect, a continuance of the examination until that hearing was concluded. For these reasons, it is ordered that the judgment be reversed, and the cause remanded, with direction to dismiss the proceeding.

We concur: PATERSON, J.; HARRISON, J.

101 Cal. 396

BALDWIN v. TEMPLE. (No. 19,278.)

(Supreme Court of California. Feb. 24, 1894.)

ADVERSE POSSESSION—PAYMENT OF TAXES—EVIDENCE.

1. Where an assessment for a certain year covered the whole of a certain ranch, describing it by boundaries, one claiming a part thereof by adverse possession, who did not pay taxes for such year, has the burden of showing that the part claimed by him was not within the assessment.

2. The fact that the number of acres which the assessment named as being within the ranch, together with the acres in the part so claimed by adverse possession, was less than the number of acres stated in the patent, did not show that such part was not covered by the assessment.

3. The fact that one in possession without title accepts a lease from the owner of the paper title is strong evidence that he did not claim adversely to the latter.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by E. J. Baldwin against John H. Temple. From a judgment for defendant, plaintiff appeals. Reversed.

Wells, Monroe & Lee, for appellant. Brousseau & Hatch, for respondent.

McFARLAND, J. The plaintiff brought ejectment. The defendant answered, and also filed a cross complaint to quiet title to the demanded premises, and plaintiff answered the cross complaint. The cause was tried by the court without a jury. The findings were in favor of defendant, and judgment was entered thereon. Plaintiff moved for a new trial, which was denied, and this appeal is from the judgment, and from the order denying a new trial.

No question is made but that the plaintiff has the legal title, unless the defendant has acquired title by adverse possession; nor is there any question but that the defendant was in the exclusive possession of the demanded premises a sufficient length of time to give him title. The question controverted, touching the adverse possession of defendant, is as to whether taxes were levied and assessed upon the demanded premises for the year 1878. Upon this point, the finding of the court is as follows: "That said property was not assessed for taxes for the year 1878." A general statement of the facts of the case is necessary to a clear understanding of the question above indicated. In 1874, F. P. F. Temple was the owner of the undivided one-half of the Rancho La Merced and the Rancho Potrero De Felipe Lugo, which adjoin each other, the Merced lying on the westerly side of the last-named ranch. The defendant is the son of F. P. F. Temple. The father, it is found, made a survey of a tract of land containing about 75 acres, lying partly in each of the said ranchos, which 75-acre tract embraces the lands in controversy in this action. January, 1874, F. P. F Temple made a parol gift of the 75-acre tract to the defendant. That part of the tract which is in controversy here is a small parcel, the quantity of which does not clearly appear, but containing probably from three to five acres, belonging to the Merced grant, and lying on the westerly side of the line separating the two grants.

It is contended by appellant that the finding above quoted is not justified by the evidence, but that, on the contrary, the evidence shows that it was included in the levy and assessment of taxes upon the Rancho Merced for the year 1878 and each subsequent year. The finding, of course, concedes that the defendant did not pay the taxes upon the lands in controversy for that year, none being assessed; so that the question is as to whether they were in fact assessed. The defendant offered no evidence tending to show whether or not taxes were assessed upon the demanded premises for that year. The plaintiff, however, gave evidence tending to prove that these premises were assessed as a part of the Rancho La Merced for each year from 1876 down to and including the year 1887. The only ground upon which respondent controverts this statement is based upon the various statements as to the number of acres contained in said rancho. This ranch was patented by the United States to F. P. F. Temple and Juan M. Sanchez in 1872, and is there stated to contain 2,363.75 acres. On December 2, 1875, Temple, Sanchez, and Workman mortgaged this rancho, with other property, to the plaintiff, the mortgage describing it as containing the same number of acres mentioned in the patent. This mortgage was afterwards foreclosed, and in all the proceedings for foreclosure and sale the same number of acres is stated. Defendant was not a party to the foreclosure proceedings. In 1876, F. P. F. Temple failed and made an assignment to Freeman and Spence, and that year an undivided one-half of the ranch was assessed to Sanchez, and the other half to Freeman and Spence, the number of acres in the ranch being put down as 2,324. In 1877 the same number of acres appears in the assessment. In 1878 it was assessed as follows: "Geo. E. Long, assignee of F. P. F. Temple, an undivided one-half interest in 2,324 acres of the Rancho La Merced, situate in the county of Los Angeles, and bounded north by Rancho Potrero Grande, east by Potrero De Felipe Lugo, south by San Gabriel river, west by Rancho San Antonio, being 1,162 acres." "Paid." And for the same year to "Juan M. Sanchez, 1,152 acres of land, being an undivided one-fourth interest of the Rancho La Merced, county of Los Angeles, bounded north by Rancho Potrero Grande, east by Potrero De Felipe Lugo and San Gabriel river, west by Repetto." "Paid." The ranch was similarly described in the assessment for each year up to 1880. In 1880 it was described by sections and fractional sections in the different townships, the number of acres being set down to each description, and the whole stated to be 2,385 acres; and was assessed to Richard Garvey, receiver. In 1881 it was assessed to E. J. Baldwin, the plaintiff, as follows: "Also, 2,335 acres of land in Rancho La Merced, being the whole of said rancho, (except 50 acres sold by Wm. Alvord to Mrs. A. M. W. De Temple, as per deed recorded,)" etc.; following with a particular description by sections and fractional sections, with the quantity in each description. All the subsequent assessments follow the description given in the assessment of 1881. The tract, containing about 75 acres, claimed by defendant, is designated in the record as the "John Temple Homestead." No description of the homestead, as assessed for taxation, appears in the record, nor is there any evidence that the homestead was assessed by any description in 1878, while the finding is that the part in dispute was not assessed. The discrepancy in the number of acres appearing in different assessments and that stated in the patent is not material, in view of the description given of the ranch by its boundaries, no part of it being excepted until after the conveyance of the 50 acres to Mrs. Temple. Besides, there was evidence tending to prove that no part of the Merced ranch had ever been assessed to the defendant except 12¼ acres assessed, in 1884, to John H. Temple, "as guardian of Maggie B."

In Reynolds v. Williard, 80 Cal. 605, 22 Pac. 262, it was held that, when the plaintiff in an action of ejectment proves a paper title, his case is made out; and, if the defendant relies upon adverse possession under the statute of limitations, he must prove either that no taxes were levied and assessed upon the land, or that he paid all taxes which were levied and assessed thereon. See, also, concurring opinion in McGrath v. Wallace, 85 Cal. 629, 24 Pac. 793. If that decision is followed, the burden was upon defendant of proving that the land was not assessed. He offered no evidence tending to prove that fact, nor is there any evidence in the record which in any manner conflicts with that offered by plaintiff from the records, showing the assessment of the Merced ranch for each year, and the payment of the tax assessed thereon. It is contended by respondent that the discrepancy between the quantity of land contained in the Merced ranch, as shown by the patent, and the quantity as stated in the assessment of 1878, tends to show that it was not assessed. The evidence, however, shows that the parcel of land in controversy here is the only part of the Merced ranch claimed to be owned by defendant; and this part contains but a small quantity of land, variously stated at from two to five acres, which would not at all account for the difference between the quantity stated in the patent and that stated in the assessment to the assignees of Temple. Besides, the description in the assessment to the assignee of Temple purporting to include the whole ranch, it rested upon defendant to show that that assessment did not include the four or five acres in controversy. The assessment did not refer to the fence which cut a few acres off from the remainder of the ranch, but referred to the line between the two ranches. The case is, therefore, within McDonald v. Drew, 97 Cal. 266, 32 Pac. 173. The land assessed, being bounded on the east by the Potrero De Felipe Lugo grant, necessarily included the land in controversy. Even if it be conceded that the whole of the Merced ranch was not assessed, there is nothing to indicate that this particular part was omitted. But the whole ranch was assessed. The quantity of land expressed in acres is mere description, and does not control the more certain description by boundaries, but must yield to boundaries where they do not agree. Stanley v. Green, 12 Cal. 164, 165; De Arguello v. Greer, 26 Cal. 632; Tappendorff v. Downing, 76 Cal. 170, 18 Pac. 247. There is no claim that defendant paid the taxes since 1878, or at all, upon any part of the Merced ranch by that description, but, on the contrary, it is shown that the land was assessed, and the taxes paid by others, every year down to the commencement of this action. As counsel for respondent suggests, the payment of the taxes by the plaintiff added nothing to his title, but it excludes any presumption that it was assessed to or paid by defendant. The finding in question is not justified by the evidence.

Other questions are presented by the record which will probably be presented upon a new trial, and which will, therefore, be briefly noticed. On the 8th of February, 1881, the plaintiff called the attention of the defendant to the fact that a portion of the land he had inclosed belonged to the Merced grant. The defendant replied that he did not wish to have any trouble about it, and thereupon the plaintiff executed to the defendant a lease of the premises in question for the period of one year for the annual rental of one dollar, which lease the defendant accepted. At the expiration of this lease, the defendant refused to accept another lease, saying that he did not desire to lease his own property. It is quite true that, where the owner of land accepts a lease from another, it does not destroy his title to the land. Where, however, the lessee is in possession without title, it is a pregnant admission of the fact, and may be used as evidence tending to show that he did not claim to hold the land adversely to the party from whom he accepted the lease. Respondent, however, is right in his contention that, being in possession at the time the lease was made, his right to maintain an action without first surrendering the possession is not affected by the lease; his prior possession not having been obtained from the lessor. Whether defendant paid the rent is immaterial.

Any question arising upon the fact that defendant's possession was based upon a parol gift is not important to be considered, inasmuch as the gift, though invalid as against the mortgagee, was nevertheless a sufficient basis for the acquisition of a right by adverse possession, so that defendant's right is unaffected by the making of the mortgage and plaintiff's title under it, if the defendant had acquired title by adverse possession. We advise that the judgment and order appealed from be reversed, and a new trial granted.

We concur: VANCLIEF, C; BELCHER, C.

DE HAVEN and FITZGERALD, JJ. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and a new trial granted.

McFARLAND, J. I concur in the judgment. The question does not arise here whether one relying on adverse possession must prove, negatively, that no taxes were levied on the land in contest. It was held that he must do so in Reynolds v. Williard, 80 Cal. 605, 22 Pac. 262, by a divided court; but I do not consider that one case as establishing the doctrine. If we are to stand by the decisions, why, they are the other way. In the opinion of the majority of the court in Reynolds v. Williard, the case of Ross v. Evans, 65 Cal. 439, is referred to, and treated as not necessarily determining the point, but the two later cases of Heilbron v. Ditch Co., 75 Cal. 123, 17 Pac. 65, and Oneto v. Restano, 78 Cal. 374, 20 Pac. 743, are not in any way referred to or mentioned; yet in these two last-named cases, both in bank, the point was squarely decided the other way. In Ross v. Evans, while the point was, perhaps, not clearly involved, still the opinion of the department, delivered by Mr. Justice Thornton, states views inconsistent with those afterwards expressed in Reynolds v. Williard. However, in Heilbron v. Ditch Co. the point was necessarily involved, and the court held that the point of nonpayment of taxes was "sufficiently answered by the fact that it does not appear that any taxes were ever levied or assessed upon" the property there involved; and there was no dissent in the court in bank upon the point, although Mr. Justice Paterson dissented upon another point. But in Oneto v. Restano, supra, the court in bank, without any dissent, took occasion to express its views fully on the subject, and said: "It is argued for the plaintiff that, in order to recover upon this ground, the defendant must show that he paid all the taxes which have been assessed. It has been held, however, that, if no taxes are found to have been assessed, it need not be found that the party claiming by adverse possession has paid taxes. Heilbron v. Ditch Co., 75 Cal. 117, 17 Pac. 65. In other words, the requirement as to the payment of taxes does not apply when none have been assessed to anybody. And the inference is that the burden of showing that none have been assessed is not upon the claimant by possession. That is a negative which he is not required to prove. If there has been an assessment, it is for the other party to show the fact. This is the rule which convenience requires, for it is an easy matter to show that an assessment has been levied, but a difficult one to show that none have been levied for a series of years." This case was not in any way called to the attention of the four justices who rendered the decision in the subsequent case of Reynolds v. Williard; and under these circumstances I adhere to the decisions, and not to the one isolated case last above mentioned.

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4 Cal. Unrep. 479

DOOLEY v. SEVENTEEN THOUSAND AND FIVE HUNDRED HEAD OF SHEEP. (No. 19,298.)

(Supreme Court of California. Feb. 28, 1894.)

ANIMALS—TRESPASS—LIABILITY—DAMAGES — EVIDENCE.

1. Where a trespass is committed by the animals of several persons, those of one person cannot be sold to pay the damages caused by animals of others, he not having any control over them, and not having contributed to the cause of their trespassing, and no authority for such sale being given by Act March 7, 1878, concerning trespassing of animals.

2. A finding that 7,000 sheep, marked with certain brands, trod down and depastured all of plaintiff's lands, being 9,460 acres, comprising 10 whole and 20 fractional sections, is not supported by evidence only that they were seen on five different days and on three sections of the land; there being evidence that other sheep were seen on the lands, and it not being shown that 7,000 other sheep did not trespass on the lands as alleged in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Hiram A. Dooley against 17,500 head of sheep. Judgment for plaintiff. Gracian Solaberry appeals. Reversed.

Alvin Fay and Wilcoxon & Bouldin, for appellant. Ruffin & Ruffin, Graves & Graves, and L. Lamy, for respondent.

VANCLIEF, C. This action in rem was brought to recover $7,500 damages, alleged to have been suffered by plaintiff in consequence of trespasses of the defendant sheep upon 9,460 acres of uninclosed lands of the plaintiff, situate in the county of San Luis Obispo; and is based upon an "Act concerning trespassing of animals upon private land in certain counties," approved March 7, 1878, (St. 1878, p. 176.) It is alleged in the complaint that the defendant sheep are marked or branded as follows: 3,500 of them, J H; 3,500, J O; 3,500, A A; 3,500 P; and 3,500, △,—and that the owners of the defendant sheep are unknown to plaintiff. The trespasses are alleged to have been committed at divers times between December 1, 1892, and March 6, 1893.

The action was commenced March 13, 1893, and on the same day a writ of attachment was issued to the sheriff of Kern county, (which is not one of the counties to which the act applies) commanding that sheriff to attach all the sheep above described, "or so much thereof as may be sufficient to satisfy the plaintiff's demand as above mentioned," unless the owners give security, etc. A summons directed to the defendant animals was also issued, and served by posting a copy thereof on the courthouse door from March 13th until March 24th. On March 24th the sheriff of Kern county attached 3,000 of the defendant sheep, 1,500 of which were marked J O, and 1,500 marked △, by seizing them and placing them in the hands of a keeper. On March 29, 1893, the owner of the sheep attached appeared by attorney, and demurred to the complaint; and, the demurrer being overruled, the defendant answered, denying all the material averments of the complaint. The court found the alleged trespasses to have been committed by the following sheep: "About 2,500 sheep branded A A, and about 2,000 head of sheep branded J O, and about 2,500 sheep branded △, (triangle,) by treading down and depasturing all of said lands, and the grass and herbage thereon growing. That the value of said grass and herbage so destroyed was and is 20 cents per acre for each and every acre of said land, and the plaintiff was thereby damaged by the said destruction of said grass and herbage in said sum of $1,892." And also found that Gracian Solaberry was the owner of about 2,000 of the sheep branded J O, and about 2,500 of those branded △, (triangle,) including the 3,000 attached by the sheriff of Kern county. At the close of the evidence, upon motion of plaintiff, the action was dismissed as against the 3,500 sheep branded P, and the 3,500 branded J H. It was thereupon "ordered and adjudged that there is due the plaintiff, as found by the court, the sum of $1,892 damages, and costs of suit," and "further ordered and adjudged that the defendant sheep levied on and held in attachment in this case, to wit, about 1,500 head branded J O, and about 1,500 head branded △, (triangle,) be sold according to law, in the usual course of sales of property under execution; that the proceeds of sale be applied to the payment of the expenses of sale and the amount due the plaintiff, with his costs and accruing interest; and, if any surplus remains after said payments, the same to be paid to Gracian Solaberry, the owner of said brands of sheep. If said sales do not produce enough to satisfy the amount due plaintiff, that then those certain sheep defendants, about 2,500 head, (owner unknown,) branded A A, be sold to pay the balance due plaintiff, and expenses of sale. If any surplus arises upon said last sale, the same shall be paid into court for the unknown owner of said sheep branded A A." From this judgment, and from an order denying his motion for a new trial, Gracian Solaberry appeals.

1. On the appeal from the judgment, it is contended by appellant that the findings of fact do not warrant the conclusions of law, nor support the judgment. It is found as a fact that the trespasses, for which damages in the sum of $1,892 are found to have been suffered by plaintiff, were committed by 4,500 sheep, the property of appellant, Solaberry, and 2,500 sheep marked A A, of which Solaberry was not the owner, and whose owner was unknown, and of which the court had acquired no jurisdiction by attachment or distraint; yet the judgment is that the 3,000 of Solaberry's sheep which were attached be sold, and that the proceeds of such sale be applied to the payment of all the damages and costs, if sufficient to pay all. I think this was not warranted by the facts found. The act of the legislature under which this action is prosecuted, however unique in some respects, does not expressly, nor by necessary implication, authorize the taking or sale of one man's animals to pay the damages caused by trespasses of animals owned by others, over which animals he had no control. It does not appear that Solaberry had any control of the sheep marked A A, nor that in any way or degree he contributed to the cause of their trespassing upon plaintiff's land. Therefore Solaberry was only severally liable for the damages caused by his sheep, and such damages should have been distinctly found.

2. Appellant contends that the evidence is insufficient to justify the finding that the damage caused by the trespasses of 2,500 sheep branded A A, 2,000 branded J O, and 2,500 branded △, "was 20 cents per acre for each and every acre" of the land described in the complaint, (9,460 acres,) or the finding that plaintiff was thereby damaged in the sum of $1,892 by the trespasses of the sheep last above mentioned. I think this point well taken. None of these sheep were seen on any part of plaintiff's lands, except on five different days, and only on three different sections of it; and no two of the bands differently branded were ever seen together on said land. Plaintiff testified that he first saw about 2,500 of the sheep branded A A on section 18, Feb. 16, 1893, and on the same day saw about 2,500 branded J O on section 12. About five days thereafter he saw about 2,500 of the triangle band on section 12; and that these were all the times he saw the sheep on his land. Swain testified that on January 22d or 23d he saw about 2,000 sheep, branded J O, on section 18, and on March 3d saw about 2,500, branded △, on section 34. Abbott testified that on March 3d or 4th he saw the triangle sheep on plaintiff's land, but did not know what section they were on; about the same time he saw two or three other bands of 2,000 to 2,500 each, but did not see the brands of these. The sheep he saw at different times were three miles apart. On March 3d, Morris saw about 2,000 triangle brand on the land near the line of Kern county, in care of a herder, who drove them across the line into Kern county. The evidence as to damage consisted of the testimony of the witnesses above named, who testified as experts as to the damage done to the pasturage on the whole of plaintiff's land, without regard to the animals by which the damage had been caused, except as above stated. They rode over and examined all the land, between the 1st and 10th days of March, 1893, and testified that all the grass and herbage had been eaten, and the land trodden, apparently by sheep, in consequence of which they estimated the damage at 20 cents per acre of all the land; but there was no evidence, except that above stated, that the damage was caused by appellant's sheep, or by the sheep branded A A. On the contrary, other bands of sheep had been seen on the lands by some of the same witnesses. Plaintiff's land (9,460 acres) is composed of 10 whole sections and about 20 subdivisions of other sections, all situate in townships 31 and 32, and amounts to nearly 15 sections, which, if located in a square form, would be

nearly 4 miles square; but they are not so located, and the descriptions given in the complaint show that in some directions they must extend at least 6 miles.

It is alleged in the complaint that the damage was done by five different bands of sheep, two of which were branded, respectively, J H and P; and there is nothing in the evidence tending to prove that these two bands of 3,500 each did not trespass upon plaintiff's lands at the times and in the manner alleged. The evidence that appellant's sheep and the A A sheep were seen on small portions of the land, on four or five different days, is perfectly consistent with this allegation of the complaint, and is obviously insufficient to justify the finding that appellant's sheep and the sheep branded A A damaged "each and every acre" of plaintiff's lands to the extent of 20 cents, even though each and every acre had been so damaged by sheep. I think the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

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101 Cal. 442

RIEHL v. CITY OF SAN JOSE et al. (No. 15,257.)

(Supreme Court of California. Feb. 28, 1894.)

CITIES—CONTRACTS—LOWEST BID.

In the absence of fraud, or any statute requiring lighting contracts to be let to the lowest responsible bidder, a taxpayer and competing bidder cannot sue to vacate the contract made on a bid higher than his own, where such bid offered services not included in his.

Department 1. Appeal from superior court, San Jose county; E. F. Fitzpatrick, Judge.

Action by Adam Riehl against the city of San Jose and the San Jose Improvement Company to vacate a contract. Judgment for defendants. Plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. W. B. Hardy and John E. Richards, for respondents.

GAROUTTE, J. This is an action brought by the plaintiff, a citizen and taxpayer of San Jose, and also the president of the San Jose Light & Power Company, against the city of San Jose, its mayor and common council, and the Electric Improvement Company, of San Jose, to set aside a contract entered into between the city, through its said mayor and common council, and the said Electric Improvement Company, of San Jose, for the lighting of the streets with arc electric lights for a period of five years from and after October 1, 1890. Judgment went for the respondents, and this appeal is from the order denying a motion for a new trial.

After notice given, competing bidders came before the council of the city of San Jose to secure the contract of lighting the streets of the city, and such contract was subsequently awarded to the respondent the Electric Improvement Company, of San Jose. The charter of the city does not contain any provision requiring contracts of the present character to be let to the lowest bidder; but appellant insists that, even in the absence of such a provision of the law, the city has no authority, in justice to its taxpaying citizens, to arbitrarily let a contract to a party for a sum largely in excess of the amount for which an equally responsible competing bidder offers to do the same work and furnish the same character of material. It is claimed that the foregoing conditions are present in this case, and that, by the contract of which complaint is here made, the city has bound itself to pay $11,800 more money during the five years which compose the life of the contract than the service could have been rendered for by other parties. The facts of the case do not bear out appellant's claims in this regard, for the findings, supported by evidence, disclose a wide variance between the terms of the contract entered into by the city with the San Jose Electric Improvement Company and the proposition submitted to the city by the competing company. This substantial difference is set forth in the following finding of the court: "This last bid of said light and power company did not contain or refer to the changes suggested by the majority report of the finance committee as to the rearrangement of the lights without expense to the city, nor as to the lighting of the city upon dark and stormy nights, outside of the 'moonlight schedule,' without charge, but the said bid expressly provided that the said light and power company should receive extra compensation for all lighting done outside of the 'moonlight schedule.'" The services to be rendered and the material furnished by the opposing bidders not covering the same ground, a great portion of appellant's argument necessarily falls, for it is based upon the assumption of the existence of a contrary state of facts.

It is also insisted that the contract is tainted with fraud, and that it is not the result of a fair and honest exercise of the discretion and judgment of the city council. If such be the fact, it is the duty of a court of equity to set it aside, but appellant's contention has no support in the findings, and but little in the evidence. If it has no support in the findings, we will not disturb the judgment, unless those findings are clearly opposed to the evidence. Among other matters, the court found, as a fact, that said contract was a fair and reasonable one; that there was no fraud or collusion practiced; and that the members of the common council, in all of the proceedings connected with the awarding of the contract, acted as honest men, and exercised their honest discretion for the best interests of the city of San Jose. In these findings of fact there is ample support for the judgment, and we find nothing in the evidence to justify a successful attack on the findings of the court as to the honesty and fair dealing exercised by the council in the letting of this contract. There is nothing disclosed by the record demanding a new trial. The order appealed from is affirmed.

We concur: HARRISON, J.; PATERSON, J.

RIEHL v. CITY OF SAN JOSE et al. (No. 15,258.)

(Supreme Court of California. Feb. 28, 1894.)

Department 1. Appeal from superior court, San Jose county; E. F. Fitzpatrick, Judge.

Action by Adam Riehl against the city of San Jose and the San Jose Improvement Company to vacate a contract. Judgment for defendants. Plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. W. B. Hardy and John E. Richards, for respondents.

PER CURIAM. In many respects, this case is similar to Riehl v. City of San Jose, (No. 15,257, decision filed this day,) 35 Pac. 1013. Appellant's counsel admits that the findings substantially state the facts of the case, but complains of the conclusions of law drawn therefrom. We think such complaint not well founded. The material findings upon which the judgment rests are similar to those made in the aforesaid case, numbered 15,257, and in that case we held the findings sufficient to support the judgment. Upon the authority of the decision there rendered, the order here appealed from is affirmed.

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4 Cal. Unrep. 483

BOEHM v. GIBSON. (No. 19,285.)

(Supreme Court of California. Feb. 28, 1894.)

Trial—Absence of Party's Attorney—Appeal Taken for Delay—Damages.

1. The court waited several hours for plaintiff's attorney to conclude the trial of another case, in another department of the same court, with the understanding that the trial of the case against defendant would then proceed. At the conclusion of such trial, such attorney did not appear, but engaged in the trial of habeas corpus proceedings, which he commenced two days before, and treated a notice by defendant that the trial of his case would proceed with profane contempt. *Held*, that a trial of such case in the absence of such attorney was proper, plaintiff being present, and offered an opportunity to introduce his evidence.

2. Where, in an action to recover personal property, it appears that an appeal by plaintiff is without merit, and was taken for delay, and that defendant has been deprived of the use of such property for more than a year, the latter will be awarded $200 damages, in addition to his costs.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by William Boehm against E. D. Gibson to recover possession of certain personal property. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

H. H. Appel and G. D. Blake, for appellant. James Burdett and W. E. Arthur, for respondent.

VANCLIEF, C. Action to recover the possession of specific articles of personal property, or the value thereof, alleged to have been wrongfully taken and withheld from the plaintiff by the defendant. The defendant is sheriff of Los Angeles county, and justifies the taking under a writ of attachment against one William Shoulderer. The judgment of the court was in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff has appealed. Appellant makes no point on the appeal from the judgment; and the only grounds upon which a new trial is asked are (1) irregularity in the proceedings of the court; and (2) accident and surprise which ordinary prudence could not have guarded against. The affidavits upon which the motion was made and opposed occupy 34 pages of the printed transcript, and, without much conflict, are to the following effect: The case was first set for trial on December 9, 1892, when defendant, with his counsel and witnesses, was in attendance and ready for trial; but, on account of other business having precedence, the trial was postponed from day to day until December 15th, when it was called for trial, defendant, with his witnesses and counsel, then being present in court and ready for trial, but neither plaintiff nor his counsel was present. After waiting about an hour, it was ascertained that plaintiff's attorney was engaged in the trial of another case in another department of the court; whereupon defendant's attorney reluctantly consented that the trial should be postponed, and, by agreement of counsel, the case was reset for trial on January 13, 1893, at 10 o'clock a. m., at which hour the defendant, with his witnesses and counsel, again appeared and was ready for trial, when the attorney for plaintiff stated to the court that he was then engaged in the trial of another case in another department (No. 5) of the same court, which trial had been commenced on January 12th, but that such trial would probably be closed by 12 o'clock m. Thereupon the court, with consent of defendant's counsel, appointed 2 o'clock p. m. as the time for the commencement of the trial, at which time the defendant was again present and ready for trial; but, plaintiff's counsel failing to appear, the court, after waiting about half an hour, dispatched a messenger to department No. 5 (in the same building) to ascertain whether plaintiff's attorney was still engaged in that department. Shortly afterwards plaintiff's attorney appeared, and said he was still engaged in department No. 5, but would probably be through by 3 o'clock p. m., when he would immediately proceed with the trial of this case. Shortly thereafter defendant's attorney, (Mr. Burdett,) as stated in his affidavit, went to department No. 5, and there awaited the termination of the trial in which plaintiff's attorney (Mr. Appel) was engaged; and when it terminated, about 3 o'clock p. m., and department No. 5 had adjourned, Mr. Burdett requested Mr. Appel to commence the trial of this case, and was then, for the first time, told by Mr. Appel that he was about to enter upon the argument of a habeas corpus case in department No. 2, for the purpose of obtaining the discharge of one of his clients from imprisonment for contempt of court, and that he did not know how long he would be thus engaged. Thereupon Mr. Burdett returned to department No. 3, in which this case was pending, and reported to the court that the trial of the case in department No 5, in which Mr. Appel had been engaged, had been closed, and what Mr. Appel had said about engaging in the habeas corpus proceeding, and asked the court (No. 3) to proceed with the trial of this case; but the court refused to proceed immediately, saying it would wait a few minutes longer. Mr. Burdett then went to department No. 2, where he found Mr. Appel's partner (Mr. Kinley) arguing the habeas corpus case, and Mr. Appel in his seat listening to the argument. Mr. Burdett then again requested Mr. Appel to go to department No. 3, and proceed with the trial of this case, and notified him that, unless he did so, Mr. Burdett would insist that the court proceed with the trial, to which Mr. Appel answered that "he did not care what was done; that he would not leave that case," (the habeas corpus case.) While Mr. Appel, in his affidavit, does not deny having said "he did not care what was done," he states that he "never consented to the judgment being entered, or said anything indicating that said Burdett should go on with the trial," but admits that he said to Mr. Burdett: "Don't bother me. You be d——d,"—which language is not stated in Mr. Burdett's affidavit. Immediately after this conversation in department No. 2, Mr. Burdett returned to department No. 3, and informed the judge thereof of what Mr. Appel said, and what he was doing in the habeas corpus case, and insisted that the court proceed with the trial of this case; and thereupon the court ordered the parties to proceed with the trial of this case, the plaintiff then being present in court. No doubt Mr. Appel was immediately informed of this order, as he was then in the same building, and not more than 150 feet distant from the court room in which the order was made; yet neither he nor any one for him appeared therein, or objected to the trial in his absence. Nor does it appear that plaintiff objected, though present. The court then informed plaintiff that it would hear any evidence he desired to offer, and that he was at liberty to testify in his own behalf, but he declined to testify or to offer any evidence whatever. The evidence on the part of defendant was then introduced, but no evidence was offered by plaintiff in rebuttal. Thereupon judgment was rendered for defendant.

Counsel for appellant contends that the trial of this case was commenced in his absence, contrary to an agreement and understanding between him and counsel for defendant, assented to by the court, to the effect that the trial was not to be commenced until the close of the trial in which he was engaged in department No. 5, and further contends that the trial of the habeas corpus case in department No. 2 was a continuation of the trial in which he had been engaged in department No. 5. But the affidavits do not support either of these contentions. He had said nothing about the habeas corpus proceeding to defendant's attorney, or to the court, (department 3,) until after the close of the trial of the civil action, when he first spoke of it to Mr. Burdett, as above stated. Indeed, he had petitioned for the writ of habeas corpus after the agreement to proceed with the trial of this case as soon as the trial of the civil case should be closed, though his client had been imprisoned the day before, while his partner was trying the civil case in his absence. Surely the habeas corpus proceeding which he commenced in the afternoon of that day (January 13th) was no part of the civil case on account of which the delay of the trial of this case had been consented to at his request. Considering all the circumstances, I think the conduct of plaintiff's attorney not only manifested a want of proper respect for the court, but plainly indicated his intention to subordinate the business of the court and the rights of suitors therein to his own business and convenience. If, upon the close of the trial of his civil case, he deemed it of great importance to himself or client to enter upon the trial of the habeas corpus case, a proper respect for the court, that had been waiting for him several hours at his request, and solely for his accommodation, should have induced him to go to that court, and render his excuse, and ask for such further delay as he desired, or for a continuance; but he did nothing of the kind. Nor did he even ask opposing counsel for further time, but, according to his own affidavit, did ask him to "be d——d." There is no evidence of accident or surprise nor of irregularity in the proceedings of the court to the prejudice of appellant. Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed; and as the appeal was evidently taken for delay, and is without merit, and by reason thereof the respondent has been deprived of the use of the property sued for for more than a year, the sum of $200 damages is awarded to the respondent, in addition to his costs upon appeal.

101 Cal. 438

WOODWARD v. McADAM et al. (No. 19,257.)

(Supreme Court of California. Feb. 28, 1894.)

MORTGAGE TO PARTNERSHIP—VALIDITY.

A mortgage of real estate to "S., B. & Co.," a partnership, is not void, as given to a fictitious person, since the names of two of the partners appear in the firm name, and it will be regarded as a mortgage to the individual members named.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Woodward against McAdam and others to foreclose a real-estate mortgage. From a judgment for plaintiff, defendant Jackson appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. Cormac & Donohue and F. A. Dorn, for respondent.

PATERSON, J. This is an action on a negotiable promissory note secured by a mortgage, given by the defendant McAdam to Shoobert, Beale & Co., and by the latter assigned to this plaintiff. The court below granted a decree of foreclosure, as prayed for, and from such decree the defendant Jackson, who is a grantee for value, by deed from McAdam given subsequent to the mortgage, has appealed.

The point made is that the mortgagee is a fictitious person; that the mortgage, having been made to a partnership doing business under a fictitious name, creates, at most, only an equity, and, as against a subsequent grantee, for value, of the mortgagor, establishes no lien. There is no doubt that a partnership is not a person, either natural or artificial, and it cannot, at law, be the grantee in a deed, or hold real estate. Legal title must vest in some person, but, if the title be made to all the partners by name, they hold the legal title as tenants in common. In equity, however, a different rule prevails. There the real purpose for which the property was acquired is considered, and, under the principles of trusts, the court will regard real estate held for partnership purposes as personal property, so far as such holding may be necessary to settle the equities between a firm and creditors, or between the partners themselves. None of the latter principles is involved in this action, however. If the name of the grantee were purely fictitious, that is, if no person were named, it may be that the mortgage would be void, although there is respectable authority for holding that a mortgage may be enforced in the firm name. Foster v. Johnson, 39 Minn. 380, 40 N. W. 255. In the case at bar the names of two of the partners appear in the firm name. There is an important distinction to be drawn between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable of different applications. "To correct the one is, in effect, to add new terms to the instrument, while to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and perfect description of the grantee—that which gives his Christian and sur names, and the town in which he lives—may prove to be imperfect, as others bearing both those names may be living in the same town. And, if the Christian name or place of residence be omitted, the description is only rendered the more imperfect. It is less certain than it might be, and usually is, made. But a grantee is still designated, though imperfectly; and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases a resort to extraneous facts and circumstances may become necessary, in order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should, in either case, affect the validity of the deed." Morse v. Carpenter, 19 Vt. 616. In Moreau v. Saffarans, 3 Sneed, 599, it was held that real estate purchased by partners is to be regarded, in respect to the legal title, as an estate held by them as tenants in common, but subject to a trust for the benefit of the partnership until the partnership accounts are settled, and that a conveyance to "J. L. Saffarans & Co." would operate to invest John L. Saffarans, individually, with the entire legal title, but that in equity he would be treated as holding the legal title in trust for the benefit of the partnership. In Menage v. Burke, 43 Minn. 212, 45 N. W. 155, the court sustained a mortgage of real estate to "Farnham & Lovejoy" as legally sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, it appearing that said persons constituted the firm of Farnham & Lovejoy. In Foster v. Johnson, supra, the court explained Tidd v. Rines, 26 Minn. 201, 2 N. W. 497, cited by appellant, and held that, in an action to foreclose a mortgage, it was no objection that the mortgage ran to a partnership, in its firm name. In Holmes v. Jarrett, 7 Heisk. 506, the court held that where the deed was made to Jarrett, Moon & Co., and it did not appear whether the firm was composed of Jarrett, Moon, and others, or Jarrett Moon and others, the title would vest in Jarrett and Moon, or in Jarrett Moon, in trust for the partnership, and that the uncertainty arising from the omission of the Christian names of the grantees could be removed by parol proof. See, also, Brunson v. Morgan, 76 Ala. 594. In Winter v. Stock, 29 Cal. 407, it was held that a conveyance of land to L. B. & Co. vests the legal title of the same in L. B. alone, and that his deed would give to his grantee a good and valid title. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

4 Cal. Unrep. 488

DECKER v. PERRY. (No. 19,266.)

(Supreme Court of California. Feb. 28, 1894.)

IRRIGATION—INCORPORATED DISTRICTS—ASSESSMENTS—DURESS.

1. A complaint against an irrigation district officer alleged that such proceedings had been had before the board of supervisors that said board declared the district duly organized. *Held*, no averment that the district was incorporated, as provided by Act March 7, 1887, since it did not show the jurisdiction of the board, or an election held, or that its declaration "was duly given or made," or that a copy of the order had been filed for record.

2. A complaint to recover money paid on a public assessment must show the nature of the proceedings to collect it, the threat of which constituted the compulsion.

3. Where 33 days must have elapsed, after plaintiff paid the assessment, before the three weeks' advertisement of sale of his land therefor could have begun, (St. 1891, p. 245,) and he does not allege that any sale had been already advertised or otherwise threatened when he paid, he fails to show any intention to sell it such as would make his payment involuntary.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Uri Decker against Wesley Perry for money had and received. Demurrer to complaint overruled, and judgment for plaintiff. Defendant appeals. Reversed.

C. H. Rippey, for appellant. D. L. Murdock, for respondent.

VANCLIEF, C. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, upon failure of defendant to answer, judgment was rendered in favor of the plaintiff. This appeal is from the judgment on the judgment-roll, and presents the question whether or not the demurrer was properly overruled.

The object of the action is to recover from the defendant $5.02, alleged to have been unlawfully assessed to plaintiff on his land by the "Otay Irrigation District," and paid by plaintiff to defendant under protest, to prevent plaintiff's land from being sold by the defendant as collector of said district. It is averred in the complaint "that, on December 7, 1891, such proceedings were had before the board of supervisors of San Diego county, state of California, that the said board of supervisors declared the Otay Irrigation District duly organized under the name and style of 'Otay Irrigation District,' and declared" five persons—Funk, Modie, Jordan, Spence, and Merriam—elected as directors of said district, and since that time said persons have been acting as such directors; and that Charles Sanborn is acting as secretary of said board, and the defendant, Wesley Perry, is acting as collector of said Otay Irrigation District. That said board of directors have voted to themselves salaries and fees amounting to about $2,600, and claim to have contracted indebtedness against said district for other purposes, amounting to nearly $3,500. That on October 4, 1892, said board passed a resolution declaring that it was necessary, for the purpose of defraying the expenses of the organization of the district, including salaries of officers and employes, to raise the sum of $9,179.62; and, by a further resolution, ordered an assessment levied on the assessable property of said district of $9,179.62; and, by a further resolution, fixed the rate of assessment at 90 cents upon $100 valuation of the assessable property of said district. That said board never submitted to the electors of said district, at any election, the question as to whether or not an assessment of $9,179.62 should be levied, nor did said electors ever vote for any bonds, or to incur any indebtedness upon said district. That, after the levying of said assessment, the defendant, as collector of said district, received from the secretary of the board the assessment books of said district, in which were entered said assessment against the property within said district, among which was five acres of land, the property of plaintiff, on which was assessed the sum of $4.78; and thereafter the defendant caused to be published in a newspaper published in said district a notice stating "that said assessment was due and payable, and would become delinquent at six o'clock, p. m., on the last Monday of December, 1892, and that, unless paid prior thereto, five per cent. would be added." That, on December 29th, (after the last Monday in December,) "the plaintiff, to prevent his above-described property from being sold by the defendant as collector of said district, paid to the defendant said assessment of $4.78, together with 25 cents penalty, which sum was paid under protest made in writing and delivered to defendant at the time of such payment." A copy of the protest, with the defendant's acknowledgment of the receipt thereof, dated December 29, 1892, is attached to the complaint as an exhibit. The only ground of the protest is that no election had been called or had at which the question whether the assessment should be levied was, or could have been, submitted to the electors of the district.

It is contended for appellant that the payment of the assessment by the plaintiff was voluntary, and not induced by duress or coercion, and, therefore, that he is not entitled to recover it back; and the record seems to support this view. "The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." Brumagim v. Tillinghast, 18 Cal. 266; Garrison v. Tillinghast, Id. 407. The complaint shows that the assessment was paid to defendant while acting as the agent or officer (collector) of an undefined association under the name and style of "Otay Irrigation District," operating through five directors, a secretary, and collector, but the kind or nature of whose business is not stated. Respondent's counsel claims in his brief, however, that the Otay Irrigation District is a corporation organized under the act of the legislature entitled, "An act to provide for the organization and government of irrigation districts," etc., approved March 7, 1887, known as the "Wright Act" (St. 1887, p. 29,) and amendments thereof; but this fact is not averred in the complaint. The bare averment that "said board of supervisors declared the Otay Irrigation District duly organized" is not an averment of the facts or acts required by said act of the legislature to confer jurisdiction on the board of supervisors, or to constitute an organization of an irrigation district under that act. Nor is it an averment that an order, resolution, or "declaration" of the board to that effect had been "duly given or made," as required by section 456 of the Code of Civil Procedure. Judah v. Fredericks, 57 Cal. 391. The averment that the board declared the district "duly organized" is substantially and essentially different from an averment that the board duly declared the district organized. But, even if the averment had been that the board duly declared the district organized, it would not have shown a completed organization. The law requires, as a prerequisite to a complete organization, that an election be held at which two-thirds of the votes cast shall be in favor of organizing the district; and section 3 of the act provides: "The said board of supervisors shall meet on the second Monday succeeding such election and proceed to canvass the votes cast thereat; and if upon such canvass it appear that at least two-thirds of all the votes cast are 'Irrigation District—Yes,' the said board shall, by order entered on their minutes, declare such territory duly organized as an irrigation district under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such offices. Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder, * * * and from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices." There being no averment that the board, duly or otherwise, caused a copy of its order declaring the district organized to be filed for record, the complaint fails to show that the organization of the district as a corporation was ever completed. Then, again, the complaint fails to show that the defendant threatened or intended to sell plaintiff's land, or any land within the alleged district. All that is alleged is that defendant published a notice "that said assessment was due and payable, and would become delinquent at six o'clock p. m. on the last Monday (26th) of Dec., 1892, and that, unless paid prior thereto, five per cent. would be added." No demand for payment, other than such as may be implied in that notice, appears to have been made. The compulsion or coercion which is sufficient to render a payment involuntary "must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power possessed, or supposed to be possessed, by him over the person or property of the party making the payment." Garrison v. Tillinghast, 18 Cal. 407. The complaint fails to show that the defendant to whom the assessment was paid possessed any power over the person or property of the plaintiff, or any reason for supposing he possessed such power; nor is it pretended that defendant had, or was supposed to have, any power over the person of the plaintiff, it being claimed only that defendant, as collector of the Otay Irrigation District, whatever that may be, had, or was supposed to have, power to sell plaintiff's land to pay assessments levied thereon by the directors of said irrigation district. But, since the complaint fails to show that the Otay Irrigation District was ever organized as a corporation according to any law, it fails to show any reason for the alleged supposition that the officers or agents of that district had power either to levy assessments on, or to sell, plaintiff's land. It is suggested, however, by counsel for appellant that the Otay Irrigation District is shown at least to be a de facto corporation, but this suggestion finds no support in the complaint; there being no averment that it or its officers ever claimed to be a corporation, or acted as such, or that plaintiff ever dealt with or recognized it as a corporation. All of the alleged acts of its officers or agents may have been lawfully done by an unincorporated association having no power to enforce payment of assessments by the sale of property of its members. But conceding, for the sake of argument, that the Otay Irrigation District was duly organized according to the Wright act, yet it does not appear that such pressure for payment was put upon plaintiff as would constitute duress or coercion in the legal sense. No sale of his land had been advertised or otherwise threatened before he paid the assessment; and 33 days must have elapsed, after he paid, before a notice of sale of his land could have been published, and no sale could have been made until after three weeks' publication of such notice. See sections 24 and 25, the act as amended, St. 1891, p. 245. For aught that appears in the complaint, there may have been no intention to sell his land.

Counsel have cited no case in this state, and I have found none, in which the money paid on an alleged tax or assessment has been recovered back when no seizure of property of the plaintiff had been made, and no sale thereof advertised or otherwise threatened. In addition to the cases above cited the following are more or less in point: De Baker v. Carillo, 52 Cal. 473; Bank v. Chalfant, Id. 170; Bank v. Webber, Id. 73; Bank v. Chalfant, 51 Cal. 369; De Fremery v. Austin, 53 Cal. 381; Meek v. McClure, 49 Cal. 623; Guy v. Washburn, 23 Cal. 111; Dear v. Varnum, 80 Cal. 87, 22 Pac. 76.

For all purposes of this appeal, it is assumed, without deciding, that the assessment may have been illegal because not authorized by vote of the electors of the district, as held in Tregea v. Owens, 94 Cal. 317, 29 Pac. 643, which case authoritatively construes the act of March 7, 1887, as originally passed, in relation to the power of the directors to levy assessments of the nature of that in question here, and is applicable to this case, unless that act has been changed, in respect to such powers of the directors, by the amendments thereof in 1891. I think the judgment should be reversed, and the court below directed to sustain the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to sustain the demurrer.

(101 Cal. 405)

BLAISDELL v. LEACH et ux. (No. 18,181.)

(Supreme Court of California. Feb. 27, 1894.)

ESTOPPEL — ACKNOWLEDGMENT BY WIFE OF FORGED SIGNATURE—NEGLIGENCE.

In foreclosure of a mortgage executed by a married man to secure a loan on land which the record showed had been conveyed to him by his wife, it appeared that her signature to the deed to her husband was forged; that she signed a lease of the land, and gave it to her husband; that he substituted for it the forged deed; and that, when the deed was presented to her by a notary for acknowledgment, she negligently admitted that the signature to it was hers. *Held*, that the wife was estopped from disputing her signature, as against plaintiff, a purchaser in good faith.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Blaisdell against Bailey K. Leach and Mattie A. Leach, his wife, to foreclose a mortgage. From a judgment for plaintiff, defendant Mattie A. Leach appeals. Affirmed.

J. B. Campbell and C. C. Merriam, for appellant. J. P. Strother and Mr. Webb, for respondent.

HARRISON, J. The defendant Bailey K. Leach borrowed $1,000 from the plaintiff July 18, 1891, and, to secure the payment thereof, executed to him a mortgage upon certain lands which appeared by the record to have been conveyed to him by his wife, Mattie A. Leach. This action was brought to foreclose the mortgage, against husband and wife; the plaintiff alleging in his complaint that the wife claims some interest in the mortgaged lands, but that her claim was subject to the lien of his mortgage. Mattie A. Leach filed a separate answer, alleging that she was the sole owner of the lands, and that her husband had never had any interest therein. Upon the trial of these issues, the court found that the wife's signature to the deed under which the husband claimed title was a forgery, but that she had acknowledged its execution to the notary public, and that the conveyance had been placed on record, with the notary's certificate of her acknowledgment indorsed thereon. No question was made of the good faith of the plaintiff in loaning the money, and the court held that he was entitled to rely upon the record evidence of title, and rendered judgment for the foreclosure of the mortgage. From this judgment the defendant Mattie A. Leach has appealed.

The record discloses the following facts connected with the appellant's acknowledgment of the conveyance: It appears that on the morning of the 16th of July the appellant had signed a lease of certain property, and given it to her husband, and that in the afternoon of that day her husband handed the deed in question to the notary, with his wife's name already signed thereto, and requested him to go with him to his house and take her acknowledgment. The notary testified that, when he and the husband reached the house, he explained to Mrs. Leach the object of his visit, and "got up from my chair, and walked over to her with the deed in my hand, passed it to her, and took my seat again; and, as I suppose, she read it. I don't know. She peered over it. I don't know whether she read it or not. I got up then, and asked her if it was her signature, and she acknowledged the execution of that instrument. She said she did, and I placed my seal to it, and handed it to Mr. Leach." Mrs. Leach contradicts the notary in some details, but the findings of the court must be accepted as determinative of the facts that her signature had been placed to the instrument without her knowledge or consent, and that the facts stated in the notary's certificate are correct. Mrs. Leach does not, in her testimony, say that she then questioned the genuineness of her signature, but that the instrument did not appear to her to be the same one as that upon which she had placed it. Taking the most favorable view for the appellant, it will appear that after she had signed the lease, and given it to her husband, he substituted for it the deed to himself, with her name affixed thereto, and that she paid but slight attention to the instrument when it was presented to her for her acknowledgment, and admitted to the notary that it was her signature.

The Civil Code, § 1091, requires that a grant of real property shall be subscribed by the grantor, in order that the title may be transferred thereby, but it is not necessary that the signature of the grantor be affixed by himself. It may be so affixed by another, if done in his presence and by his own direction. Gardner v. Gardner, 5 Cush. 483. And he may also adopt and ratify a signature made by another without any previous authority. Bartlett v. Drake, 100 Mass. 174. And the adoption of a forgery has been held to be binding upon the maker of a promissory note. Forsyth v. Day, 46 Me. 176; Bank v. Crafts, 4 Allen, 447. The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery, such estoppel may not arise; but if, with knowledge of the forgery, he should declare to an innocent person that the signature was his own, and that he had executed the instrument, and thereby induce him to purchase the property, he could not afterwards claim the property upon the ground that the instrument was a forgery. When the instrument in question was presented to Mrs. Leach for her acknowledgment, it was competent for her to adopt the signature of her name, that had been placed there without her knowledge or authority, and by such adoption give it the same validity as if placed there by herself. She must be presumed to know her own handwriting, and her statement to the notary that she had executed the instrument to which it was affixed prevents her from questioning the correctness of that statement, as against one who, in reliance thereon, has parted with his property. The statute has designated a notary public as one of the officers to whom a grantor may make a formal acknowledgment of his execution of an instrument, for the purpose of establishing the fact of such execution and having a public record made thereof; and, when such acknowledgment is made by the grantor and certified by the notary, it is a public declaration of that fact to all persons who may in good faith act thereon, which the grantor is estopped from denying. If the notary is himself deceived, as, for instance, if another person should personate the grantor and acknowledge the signature, the title of the true owner would not be affected; but when the person named in the instrument appears in person before the officer, and makes such acknowledgment, he is estopped from afterwards denying his declaration, as well as the fact of his signature, against any one who, without any other notice or knowledge than is conveyed by the instrument, parts with his property upon the strength thereof.

Although the court does not find that Mrs. Leach, in terms, adopted the signature to the deed, yet its finding that she was so negligent in acknowledging its execution as to estop her from disputing the plaintiff's claim is fully sustained by the evidence. By her own testimony, she did not, at the time of her acknowledgment, deny the genuineness of her signature, and, although she says that she then thought the instrument was not the one she had signed in the morning, she failed to give it such an examination as to convince her of that fact; and the testimony of the notary that he handed the instrument to her for her examination, and that she appeared to examine it, shows that she had every opportunity for determining whether or not it was her deed. Having this opportunity for repudiating or adopting the signature, her acknowledgment of its validity estops her from questioning that fact, as against the plaintiff, who in good faith has parted with his money to the one in whose favor she made the acknowledgment. If afterwards she ascertained that she had been deceived, and had acknowledged the validity of a deed which was in fact a forgery, the loss would be her own, as against an innocent party who had relied upon such acknowledgment. If she neglected to give the instrument such an examination as would inform her, either that another instrument had been substituted for the one which she had signed, or that the signature thereto was not her own, the consequences of such neglect should fall upon herself, rather than upon one who, by her own positive declaration of its genuineness, had been induced to part with his property. "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, the deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." Hunter v. Walters, 7 Ch. App. 88. See, also, Goodell v. Bates, 14 R. I. 65; State v. Matthews, 44 Kan. 596, 25 Pac. 36; Tunison v. Chamblin, 88 Ill. 378; Shirts v. Overjohn, 60 Mo. 305; Chapman v. Rose, 56 N. Y. 137. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

101 Cal. 425

GROOME et al. v. ALMSTEAD. (No. 19,185.)

(Supreme Court of California. Feb. 27, 1894.)

REPLEVIN—WHEN MAINTAINED—TENANT AT WILL—WHAT CONSTITUTES — APPEAL — JUDGMENT—REVERSAL.

1. The owner of land, after recovery thereof from one in possession under a claim of an interest therein, cannot replevin the crops grown and harvested by defendant while in such adverse possession. Page v. Fowler, 37 Cal. 100, 39 Cal. 412, followed.

2. G., a member of a firm, obtained a patent to land under a void contract with the firm, whereby he agreed to procure it for its benefit. After G.'s death, A., one of the surviving partners, entered as the representative of the firm, and raised and harvested crops on the land, against the protest of G.'s heirs and administratrix, who recovered the land by legal proceedings. *Held*, that A., as the representative of such firm, was not a tenant at will while in possession and raising such crops.

3. Where a judgment is correct, it will not be reversed because the court gave a wrong reason for its rendition.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Julia Groome and Nellie E. Groome against L. T. Almstead to recover possession of certain personal property. From a judgment for defendant, and from an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

William Shipsey and F. A. Dorn, for appellants. Wilcoxon & Bouldin, for respondent.

PER CURIAM. Action for the recovery of certain personal property, consisting of wheat and hay, of the alleged value of $1,496, or for the value thereof in case delivery cannot be had, and for $200 damages for detention thereof. Judgment for defendant, from which, and from an order denying their motion for a new trial, plaintiffs have appealed.

The plaintiff Julia Groome is the widow of Thomas B. Groome, who died intestate May 30, 1890, seised of 160 acres of land situate in the county of San Luis Obispo, on which he resided at the time of his death. Nellie E. Groome is the daughter of Thomas B. and Julia Groome, and was 16 years of age when her father died, and the plaintiffs are the only heirs of Thomas B. Groome. Thomas B. Groome obtained a patent for said land in December, 1890, under the circumstances stated in the case entitled "In re Groome," (94 Cal. 69, 29 Pac. 487,) wherein it was decided that by virtue of the patent he acquired and held the absolute title to the land, free from any trust in favor of the defendant herein (Almstead) and one Minturn, who claimed to be the equitable owners of an undivided eleven-sixteenths part thereof. On August 16, 1890, letters of administration on the estate of Thomas B. Groome were issued to plaintiff Julia. In the winter of 1890–91 the defendant entered upon the land, and commenced to plow the same for the purpose of planting a crop of wheat and hay, to be harvested in 1891. Thereupon the plaintiff Julia verbally notified him not to plow the land nor plant any crop, and that the land was the property of the estate of Thomas B. Groome; but he disregarded her notice and protest, and proceeded to plow the land and plant the crop. Again, in May, 1891, when the crop was ripened, she forbade him to harvest the same. This he also disregarded, and harvested and removed the crop. Again, in the winter of 1891–92, defendant plowed and planted the land, and in May and June, 1892, harvested the crops, against like protests of plaintiff Julia. In the mean time, on May 29, 1891, the plaintiff Julia had petitioned the superior court to set apart the whole of the land to the plaintiffs as a homestead. This petition was opposed by the defendant herein, and denied by the court. On appeal to this court the order was reversed, and the cause remanded. In re Groome, 94 Cal. 69, 29 Pac. 487. After reception of the remittitur, on May 24, 1892, the superior court set apart the whole tract of land as a homestead for the plaintiffs. The greater portion of the crops of 1892 was harvested after the setting apart of the homestead. This action was commenced June 7, 1892, to recover the crops of both 1891 and 1892 or their value.

It is conceded in this action that the patent invested Thomas B. Groome with absolute title to the land, and that the plaintiffs are his only heirs; but as a defense to this action it is claimed that, at the times the defendant planted the crops in question he was a tenant at will of the plaintiffs, and that he became such tenant by having been in possession at the time Thomas B. Groome died, under a contract by which the latter had agreed to procure the patent for the use and benefit of a copartnership composed of defendant, Groome, and Minturn, which contract is conceded to have been illegal and utterly void, as was held in Re Groome, supra. It was found by the court that such a copartnership existed, and had the use of the land under said void contract from July, 1886, until Groome died; and that defendant, as surviving partner, represented the concern at the times when he planted and harvested the crops in question. The court also found as a fact that, "about eight months after the death of said Thomas B. Groome, a dispute arose between defendant and said Julia Groome as to the ownership of said 160 acres of land, defendant claiming the same for said partnership, and plaintiff Julia Groome denying said claim. Said dispute has continued to the time of this trial." From the foregoing facts, the court deduced, as conclusions of law, that the defendant, as representative of the dissolved copartnership, was a tenant at will at the time he planted the crops; that his tenancy could not have been terminated otherwise than by 30 days' written notice in accordance with section 789 of the Civil Code; that he was entitled to harvest and remove the crop, as emblements, by authority of section 819 of the Civil Code; and that plaintiffs never had any right of possession except by force of the order of May 24, 1892, setting apart the homestead,—and thereupon rendered judgment to the effect that plaintiffs take nothing by the action.

While we think the court below was clearly in error in holding that, upon the foregoing facts, the defendant was a tenant at will, and entitled to a notice terminating such tenancy, and that plaintiffs had no title to, or right to the possession of, the land upon which the crops in dispute were grown, other than by virtue of the order setting apart the homestead, still we think the facts of the case, as above stated, bring the case within the reason of the rule declared in Page v. Fowler, 37 Cal. 100, 39 Cal. 412, and the judgment should not be reversed by reason of the fact that the superior court gave a wrong reason for its rendition. The facts here are not exactly parallel with those in the cases just cited, still we think the principle declared in those cases govern this, and plaintiffs are only entitled to recover damages for the withholding of the land, measured by the rental value, or the value of the use and occupation, of the land during the period it was occupied by defendant. The plaintiffs have misconceived their remedy. Judgment and order affirmed.

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4 Cal. Unrep. 493

PEOPLE v. CLEMENT. (No. 21.031.)

(Supreme Court of California. Feb. 28, 1894.)

INFORMATION—DUPLICITY—AMENDMENT—MOTION IN ARREST OF JUDGMENT—WAIVER.

1. An information which charges two offenses is demurrable, and cannot be amended after the taking of defendant's plea, without a new arraignment and plea to the amended information.

2. A defendant who has demurred to an information as charging two offenses does not waive his right to move in arrest of judgment by moving for a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

C. H. Clement was convicted of an attempt to commit grand larceny. From an order in arrest of judgment, the people appeal. Affirmed.

H. C. Dillon, Dist. Atty., and Atty. Gen. Hart, for the People. W. T. Williams, for respondent.

HAYNES, C. The people appeal from an order in arrest of judgment. The information contained two counts,—the first, for the larceny of a horse, buggy, and harness, and the second count charging an embezzlement of the same property. The defendant demurred to the information upon the ground that it charged more than one offense. The demurrer was overruled, and a plea of not guilty entered. After all the evidence had been introduced, and during the argument of the case to the jury, the district attorney, with the consent of the court, and without objection from the defendant, withdrew the count charging embezzlement, and the jury found defendant "guilty of attempt to commit grand larceny." The defendant moved for a new trial, and his motion was denied. He then moved in arrest of judgment, upon the ground stated in his demurrer, and, this motion being sustained, the people appeal.

That two distinct offenses are charged in the information has been decided by this court in at least two cases where the facts were the same as here. See People v. De Coursey, 61 Cal. 134, and People v. Quvise, 56 Cal. 396. But appellant contends that the duplicity was cured by withdrawing the count charging embezzlement, and we are cited to authorities to show that the duplicity may be cured (1) by verdict of guilty on one count and not guilty on the other; (2) by a nolle prosequi as to one count; (3) by taking a verdict on one count only; and (4) by election by the prosecuting officer as to which count he will proceed upon. These authorities, however, are under the old procedure, which permitted several counts, and where, upon the face of the indictment, each count charged a distinct offense. But under that procedure the defendant was required to plead to each count, and thus a distinct issue was made upon each, and the jury were required to find on each count as to which there was a plea of not guilty; and, while the district attorney might enter a nolle as to one or more counts, if this were done after the jury was sworn, unless the defendant consented, it was a bar to a further or new prosecution for the offense charged in such count. This, however, did not affect the issues upon other counts; but here the information was framed upon the theory that but one offense was charged, and it was upon that theory that the demurrer was overruled and a single plea of not guilty taken. As the defendant could not be required to plead to two offenses charged in the same information, it cannot be said that issue was joined as to either offense, and withdrawing one of the counts, after the plea, could not cure the defect; for, even if it be conceded that there was a plea to one offense, it could not be said that it applied to one of the offenses rather than the other. If the demurrer had been sustained, as it should have been, and the district attorney had then taken leave to amend by striking out the second count, and the plea had been taken as to the first, the defect would have been cured. The information being bad, under the statute, it could not be amended after the defendant's plea was taken, without a new arraignment and plea to the amended information.

It is further contended by appellant that, by moving for a new trial, the defendant waived his right to move in arrest of judgment. This contention cannot be sustained. At common law, it was matter of right, and might be made at any time after conviction and before sentence. 1 Bish. Cr. Proc. §§ 1283, 1284. Our Penal Code makes but one restriction. If the defendant failed to demur to the information he waived his right to move in arrest upon any of the grounds mentioned in section 1004. See Pen. Code, § 1185. Like a complaint in a civil case, which states no cause of action, a fatal defect in an indictment may be taken advantage of at any stage of the proceeding, unless the right to do so is restricted by the Penal Code. The Code, as well as the common law, permits this motion after a plea of guilty, and even authorizes the court to arrest the judgment on its own view of any of the defects specified in the Code without motion. Id. § 1186. We know of no case which sustains appellant's contention. 12 Am. & Eng. Enc. Law, p. 147i, cited by appellant, expressly states that "the motion may be made after the decision of a motion for a new trial," though the two cases cited by the author to this proposition were civil cases. The motion in arrest of judgment was properly sustained, and the order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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101 Cal. 455

SHEA et al. v. ROBINSON et al. (No. 18,232.)

(Supreme Court of California. Feb. 28, 1894.)

ATTACHMENT LIEN—PRIORITY—FALSE STATEMENT IN AFFIDAVIT—PLEADING.

In a suit to have a subsequent attachment decreed a prior lien on attached personalty, because the affidavit of the prior attachment falsely stated that the claim sued on was not secured by a lien on the personalty, the complaint averred that the prior attachment was for rent, that the tenant owned the attached personalty, and had it on the leased premises, and that the prior attaching creditor did "retain a lien" thereon for the payment of the rent. *Held*, that the complaint was insufficient, since it failed to aver facts from which the court could see that some particular kind of lien existed.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by James Shea and others against R. B. Robinson and others to have an attachment on personalty, though subsequent in time, decreed to be a prior lien to another attachment on the same personalty. Defendants demurred. From a judgment for defendants, plaintiffs appeal. Affirmed.

L. L. Cory, for appellants. E. W. Risley, for respondents.

McFARLAND, J. A demurrer to the complaint was sustained, and, plaintiffs electing not to amend, judgment was entered for defendants. Plaintiffs appeal from the judgment.

It is averred in the complaint that defendant Johnson brought an action against defendant Zetz to recover money alleged to be due from the latter to the former, and in said action caused certain described personal property of Zetz to be attached; and that afterwards plaintiffs brought an action against said Zetz, and caused the same property to be attached. The purpose of the present action is to have it decreed that the attachment of plaintiffs, though subsequent in time, is a prior lien to the attachment of Johnson. There is no averment that the money sued for by Johnson was not justly due and owing to him from Zetz, or that the alleged cause of action in Johnson v. Zetz was in any way false or fraudulent; nor is there any averment that the attachment proceedings in that action were on their face in any way invalid. It is averred, however, that the statement in the affidavit of attachment that "the claim sued upon had not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property," was false; that Johnson has leased certain real property to Zetz; that his suit against Zetz was for rent due upon the lease; and that Johnson did "retain a lien" upon said personal property mentioned in the complaint, for the payment of said rent. (It seems that the personal property was owned by, and in the possession of, Zetz, and was on the leased premises.) There is no other attack in the complaint on the validity of the said attachment proceedings.

We think that the demurrer was properly sustained. In the first place, as plaintiffs do not attack the justness and validity, either in whole or in part, of Johnson's cause of action against Zetz, it is doubtful if they could avail themselves of the falsity of the affidavit as to the nonexistence of the lien, even if that falsity were sufficiently averred. We have been referred to no case in which a junior attachment has been given precedence over a prior one, where the good faith of the debt for which the first attachment issued was admitted. The general rule is that where the claim of the prior attaching creditor is for a bona fide debt, without tinge of fraud, such an objection to the attachment proceeding as that insisted on in the case at bar can be successfully made only by the defendant in the attachment suit. Fridenberg v. Pierson, 18 Cal. 152; Patrick v. Montader, 13 Cal. 435; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Drake, Attachm. § 771. But if it be admitted that the falsity referred to rendered the Johnson attachment wholly void, so that a stranger could successfully assail it, still there is no sufficient averment of such falsity. The only averment on the subject is that Johnson did "retain a lien" on the said personal property. If there could be any circumstances under which a mere general averment that a person retained a lien, without any intimation of its nature or character, could be considered as a statement of a fact, within the meaning of the law of pleading, such circumstances do not appear on the face of the complaint in the case at bar. Indeed, it is hard to imagine what kind of a lien a man could "retain" on personal property out of his possession. He might, perhaps, acquire some sort of a lien on such property; but where the purpose of a pleader is to aver the falsity of a statement that there was no lien, and to thereby overthrow an attachment, he certainly should aver some facts from which the court could see that some particular kind of lien did exist.

There are some additional averments in the complaint that said Zetz, before plaintiffs' attachment issued, confessed judgment to Johnson, upon which an execution was issued and levied upon the property in question, and also gave a bill of sale of said personal property to Johnson, without change of possession; and these averments are somewhat insisted on in the briefs. We cannot see, however, how plaintiffs were injured by the things thus averred. The amount of the judgment confessed is not stated, and there is no averment that it was for more than was justly and legally due. The bill of sale seems to have been of little consequence, and it does not appear that the value of the property was greater than the just claim of Johnson. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

101 Cal. 411

DOMICO v. CASSASSA. (No. 15,422.)

(Supreme Court of California. Feb. 27, 1894.)

REVIEW ON APPEAL—GRANT OF NEW TRIAL—CONFLICTING EVIDENCE.

Where the evidence bearing on oppression, fraud, or malice justifying a verdict for exemplary damages is conflicting, the court's action, in granting a new trial to defendant unless plaintiff remit all of the verdict in excess of that allowed as actual damages, is an exercise of discretion, and not reviewable.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by one Domico against one Cassassa. From an order granting a new trial to defendant, on certain conditions, plaintiff appeals. Affirmed.

A. B. Ware and Rutledge & Pressley, for appellant. Barham & Bolton, for respondent.

HARRISON, J. Action to recover damages for personal injuries sustained by the plaintiff at the hands of the defendant. The jury rendered a verdict in favor of the plaintiff for $750. Upon a motion for a new trial by the defendant, on the ground, among others, of insufficiency of the evidence to justify the verdict, the court made an order granting the motion, unless the plaintiff should, within 20 days, remit all of the verdict above $300 and costs, and, if such remission be made, that a new trial be denied. The plaintiff declined to remit, and has appealed from the order.

The evidence in the record fails to show that the actual damage sustained by the plaintiff was as great as the amount of the verdict, and the jury were not authorized to give exemplary damages, unless there was some evidence of oppression, fraud, or malice. Civ. Code, § 3294. The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion; and it is immaterial whether the evidence is insufficient to sustain all, or only a portion of, the issues on which the judgment must depend. Whether the acts of the defendant were accompanied by oppression, fraud, or malice, so as to authorize the giving of exemplary damages, was a fact to be determined by the jury from the evidence before it, and upon this point there was a substantial conflict of evidence. The order of the judge granting a new trial shows that in his opinion the evidence was insufficient to show that there had been any fraud, oppression, or malice on the part of the defendant. The cases cited by the appellant, in which this court has refused to interfere with the verdict of a jury, were cases in which the trial court had itself refused to grant a new trial, or to reduce the verdict. The same principle which precludes an interference by this court in such cases applies when the trial court has granted a new trial, either absolutely or conditionally. If there is no evidence upon an issue which is essential to the judgment, a verdict or finding upon such issue is an error of law, which may be reviewed by this court. Mason v. Lord, 40 N. Y. 484; Conely v. McDonald, 40 Mich. 150. But, if the verdict or finding is made upon a conflict of evidence, the sufficiency of the evidence therefor is a question of fact, which the trial court is authorized to review; and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to set it aside. Dickey v. Davis, 39 Cal. 569; Sherman v. Mitchell, 46 Cal. 577; Irving v. Cunningham, 58 Cal. 306; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Bjorman v. Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591. Its action in so doing is the exercise of a legal discretion, but is not an error of law which can be reviewed by this court. Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(101 Cal. 415)

LONDON, PARIS & AMERICAN BANK, Limited, et al. v. SMITH et al. (No. 15,363.)

(Supreme Court of California. Feb. 27, 1894.)

PARTNERSHIP — MORTGAGE BY ONE PARTNER TO SECURE FIRM DEBT—EFFECT—LIABILITY OF SURVIVING PARTNER—ACTION TO FORECLOSE MORTGAGE—PARTIES.

1. A mortgage to secure a firm debt by a partner, in the absence of a personal covenant to pay the firm debt, creates in him no personal obligation, (Civ. Code, § 2928,) but renders him liable as surety.

2. On the death of a partner who became surety for a firm indebtedness by mortgaging his land, the mortgagee may enforce the mortgage without first exhausting his remedies against the surviving partner.

3. There being no partnership assets within the state, and the surviving partner being a nonresident, he is not a necessary party to such proceeding.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by the London, Paris & American Bank, Limited, and others, against Mary C. Smith, executrix of the will of Andrew Smith, deceased, and others, to foreclose a mortgage. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

W. G. Witter and Edw. F. Fitzpatrick, for appellants. Stanly & Hayes, for respondents.

HAYNES, C. The complaint alleges, in substance, that on the 24th day of August, 1885, Andrew Smith applied to the London, Paris & American Bank, Limited, to extend a credit accommodation to the firm of Harrington & Smith, a copartnership which then, and until the death of Andrew Smith in January, 1892, existed and carried on business at Seattle, in the present state of Washington, and, to secure the same, executed to the plaintiff David Cahn a deed conveying to him certain lands situate in the county of San Mateo, in this state; and at the same time, and as part of said transaction, the said grantor and grantee entered into an agreement, reciting among other things, "that said conveyance is intended to secure the payment to the London, Paris and American Bank, Limited, of all sums of money which are now, or may hereafter become, due from the party of the first part, or the firm of Harrington and Smith, of Seattle, Washington Territory, with interest, and all costs and charges incurred by said party of the second part, together with interest on all said indebtedness at the rate of eight per cent. per annum. And it is agreed that so long as the said party of the first part, or the said firm of Harrington and Smith, shall be, or continue to be, indebted to the said London, Paris and American Bank, Limited, from any cause or on any account, that the said party of the second part shall hold the title to said property as security therefor; and that in the event of the failure or refusal of the said Andrew Smith, or of the said firm of Harrington and Smith, at any time, to pay to the London, Paris and American Bank, Limited, any sum or sums of money which may be due or payable to it, an action may be brought by the said David Cahn to enforce the payment thereof by a sale of the said premises, and the application of the proceeds to the payment of such indebtedness, together with interest at the rate of eight per cent. (8%) per annum, and all costs and charges incurred in respect to such property, growing out of the preservation thereof and the enforcement of said lien, with interest, including a reasonable counsel fee." The complaint sets out several promissory notes alleged to have been made by Harrington & Smith to said bank, the earliest of which bears the date July 5, 1889, and admits certain payments thereon; and also alleges that, at various times during the year 1891, said bank loaned to Harrington & Smith various other sums, amounting in the aggregate to $937.23; that after the appointment and qualification of the defendant Mary C. Smith as executrix, the said claims of the bank, amounting to $70,937.23, and interest thereon, were duly presented for allowance, and were rejected, and this action was brought to subject the land to the payment of said claims under the lien created by said deed and contract, and to secure a judgment against the executrix for any deficiency, to be paid in due course of administration. Mary C. Smith is the widow, and the minor defendants the children, of Andrew Smith, deceased. To this complaint the defendants demurred, upon the ground that it did not state facts sufficient to constitute a cause of action against them, and also for defect of parties defendant, in that W. A. Harrington, the surviving partner of Harrington & Smith, was a necessary party defendant, and upon the further ground that plaintiffs had not exhausted their remedies against the copartnership, nor presented their claim to the surviving partner. Other technical grounds of demurrer were afterwards cured by amendments to the complaint, and are not urged here. The demurrer was overruled, and the defendants answered, and among other defenses alleged that the claims mentioned in the complaint had not been established as an indebtedness of the firm of Harrington & Smith in any action brought against the partnership or the surviving partner; that plaintiff should first have recourse against the partnership property, before proceeding upon the mortgage deed given by Andrew Smith, and that it was not alleged that the copartnership was insolvent. Findings were filed, and a decree entered as prayed for in the complaint, except as to a deficiency judgment, which was waived, and defendants appeal from the judgment and an order denying their motion for a new trial. Several exceptions were taken to the admission of evidence, raising substantially the same questions which were presented by the demurrer. The only findings necessary to be noticed are to the effect that the business of the firm was conducted at Seattle, in the state of Washington, where Harrington resides; that neither Harrington nor the firm had any assets in the state of California; "and that there is due, owing, and unpaid from the late firm of Harrington & Smith to the plaintiff, the London, Paris & American Bank, Limited, the full sum of $55,021.98, for which said mortgaged premises are bound." Appellants' argument is directed to two propositions: (1) That plaintiff is required first to exhaust the liability of the surviving partner; and (2) that the surviving partner is a necessary party to this action, even if it can be maintained without first proceeding against the surviving partner.

The first proposition presents no serious difficulty. The deed and contract constitute a mortgage, and we will so call it. This mortgage contained no personal covenant for the payment of the liabilities of the firm. The mortgagor was liable therefor as a partner, but he assumed no new personal obligation. "A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect." Civ. Code, § 2928. By executing the mortgage, he hypothecated or pledged the land as security for the indebtedness of the firm. If he had given his personal obligation for the payment of the debts of the firm, it would be readily understood that he occupied the position of a surety for the firm. "A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." Civ. Code, § 2831; Hassey v. Wilke, 55 Cal. 528. Here the obligation of the surety is several. The mortgage created no new obligation against the firm or the surviving partner. The firm was bound by its promissory notes; the suretyship was created by a separate instrument. "Persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff." Code Civ. Proc. § 383. "It is well settled in this state, as elsewhere, that mere delay of the creditor to proceed against the principal will not discharge the surety." Bull v. Coe, 77 Cal. 60, 18 Pac. 808, and cases cited. It is therefore clear that the surety may not only be sued separately, but that it is not required that the creditor shall first proceed against, or exhaust his remedies against, the principal debtor, unless some special circumstance requires a departure from the general rule as to necessary parties.

The circumstances relied upon to sustain the proposition that the surviving partner is a necessary party are that the mortgage was not given to secure a promissory note or other obligation of the firm set out or described in the mortgage, or a specified sum then admitted by the mortgagor to be due, nor for a specified sum then or thereafter to be advanced or loaned by the mortgagee, but "of all sums of money which are now, or may hereafter become, due from the party of the first part, or the firm of Harrington and Smith, of Seattle, Washington Territory, with interest, and all costs and charges," etc. No part of the indebtedness described in the complaint was incurred for nearly four years after the mortgage was given, and no part of it was the individual indebtedness of Andrew Smith. If the decree herein is paid by appellants in exoneration of the land, or the land is sold under the decree, they will have the right to proceed against Harrington, the surviving partner, for reimbursement or contribution; but in an action for that purpose the surviving partner would not be bound by this decree, and it could not be used in evidence against him, to establish the amount of his indebtedness to the bank. The result, therefore, would be, not only that appellants in such action would be obliged to establish the amount of the partnership liability to the bank, but, if the amount so established should be less than they had paid to the bank, they would lose the difference; nor could they have recourse against the bank, as they are bound by the decree, while the fact might be that the true amount due the bank was less than the decree, but more than their judgment against the surviving partner. These considerations show, at least, that the surviving partner would be a proper party to the action, and this much is not disputed by respondents. But the question is whether he is a necessary or indispensable party. In Shields v. Barrow, 17 How. 130, the court pointed out three classes of parties to a bill in equity, viz.: "(1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on the rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such condition that its final termination may be wholly inconsistent with equity and good conscience." See, also, Cassidy v. Shimmin, 122 Mass. 411.

It is clear that the surviving partner is not a necessary party in the sense that he is or would be prejudiced by the decree, since it cannot be enforced against him, and he would not be concluded by it in an action brought by appellants for contribution or reimbursement; but he comes within a class of necessary parties, not because of his interest, nor that of the plaintiffs, but where his presence as a party is necessary to the full protection of the defendants before the court. In speaking of the subject of necessary parties, Story, in his work on Equity Pleading, (at section 138,) says: "In the next place, an interest of the absent parties in the subject matter, ex directo, which may be injuriously affected, is not indispensable to the operation of this rule; for, if the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive and direct than if the absent parties were before the court, that of itself will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties." So Chancellor Wallworth, in Bailey v. Inglee, 2 Paige, 279, said: "Persons are necessary parties, * * * where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties." The complaint, however, alleges the nonresidence of the surviving partner, and that there are no assets of the partnership within this state, and respondents rely upon these averments, which are not denied, as an excuse for not making him a party. I think this brings the case within well-recognized exceptions to the general rule. "The first exception to the rule, which we shall notice, is the utter impracticability of making the new or necessary parties. This occurs, of course, when such new parties are without the jurisdiction of the court, and when, consequently, they cannot be reached by the process of the court. In such a case, to require such persons to be made parties would be equivalent to a dismissal of the suit, and amount to a denial of justice. Hence, it is a common rule of the court that, when a person who ought to be a party is out of the jurisdiction of the court, if the fact is stated in the bill and admitted by the answer, or proved (if denied) at the hearing, that of itself constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him." Story, Eq. Pl. § 78. The author in the same section applies it to a bill against a partnership, but adds the qualification "that it can be done without manifest injustice to the absent partner." See, also, Cockburn v. Thompson, 16 Ves. 326; Towle v. Pierce, 12 Metc. (Mass.) 329; Milligan v. Milledge, 3 Cranch, 220; West v. Randall, 2 Mason, 181-190, Fed. Cas. No. 17,424. But this case is more clearly within the exception than most of the cases above cited, for the reason that this action is not upon an engagement of the partnership, but to foreclose a mortgage made by Andrew Smith, one of the partners, upon real estate situated here, and which could only be foreclosed in an action brought in the county where the land is situated, and in which the surviving partner has no interest. The mortgage might have contained a condition that the indebtedness should first be ascertained by an action against the firm, or an admission of the amount by the firm, or that a liability under the mortgage should only be for such amount as should remain unpaid after exhausting the partnership liability. In the absence of some restriction of the character indicated, it would be unreasonable to require that plaintiffs should go to another state, and exhaust their remedies against the surviving partner, or even ascertain by judgment the amount of the debt due to it, before proceeding against the surety, who had imposed no such condition.

It is not necessary to review the numerous cases cited by counsel for appellants. They apply to actions upon the partnership obligation alone against the estate of a deceased partner, and not, as here, to a several obligation created against the individual property of the deceased partner, whereby he became a surety for the firm. If plaintiffs had insisted upon a deficiency judgment against the estate of Andrew Smith, to be paid in due course of administration, these authorities would apply, for, as the mortgagor did not covenant that he would pay the debt of the firm, no personal liability was created by the mortgage, and, as to any deficiency after exhausting the mortgaged property, the liability could only rest upon the legal liability of the deceased as a partner, and not as a surety. It is said in appellants' reply brief that jurisdiction of Harrington's person could have been obtained, but it is not shown how. The record discloses no fact justifying the statement. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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101 Cal. 511

DIXON v. PLUNS. (No. 14,429.)

(Supreme Court of California. March 2, 1894.)

NEW TRIAL—MISCONDUCT OF JURY—CHANCE VERDICT—EVIDENCE.

Where the fact that one or more jurors were induced to assent to a verdict "by a resort to the determination of chance" may be proved by affidavits of jurors, (Code Civ. Proc. § 657, subd. 2,) and there is a finding of the trial court, supported by the evidence on a motion for a new trial because of such misconduct, that the verdict was not arrived at by a resort to chance, an order refusing to grant a new trial will not be disturbed, though one of the jurors made affidavit that it was so arrived at, and that he was induced thereby to assent to it.

In bank. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

Action by Kate E. Dixon against J. F. W. Pluns for personal injuries. Plaintiff had judgment, and, from an order denying his motion for a new trial, defendant appeals. Affirmed.

H. C. Firebaugh, for appellant. Nagle & Nagle, for respondent.

GAROUTTE, J. This case has previously been before the court. See 98 Cal. 384, 33 Pac. 268. At that time the appeal from the judgment was not passed upon, but the appeal from the order denying a new trial was sustained, and the cause remanded, with directions to the trial court to hear evidence upon the manner in which the jury arrived at their verdict, and thereupon to pass upon the motion for a new trial. This course was followed by the lower court, and thereafter the motion was denied, and this appeal taken from the order denying the same. The application for a new trial was based solely upon the ground that the jury had been guilty of misconduct, in this: that the verdict was arrived at by a resort to chance; and evidence, both oral and by affidavit, was presented to the trial court for its enlightenment upon that question. The court found that the verdict was not arrived at by a resort to the determination of chance, that the jury was not guilty of misconduct, and denied the motion for a new trial.

Section 657, subd. 2, Code Civ. Proc., provides, substantially, that whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such fact may be proven by the affidavits of jurors. In the present case, one Koster made affidavit that the verdict was arrived at by resorting to the determination of chance, and that he was induced to assent thereto in that manner. It is now insisted that his affidavit must be taken as true, as far as his own conduct is concerned, and that, he being so induced to assent, the verdict must be set aside. Koster's affidavit appears to consist of two portions—First, the verdict was a chance verdict; second, he was induced to consent to it by reason of that fact. But the rock upon which his contention is shattered is located in the finding of the court that the verdict was not a chance verdict. If it was not a chance verdict, he could not have been induced to assent to it for the reason that it was such a verdict; and the second portion of his affidavit, ex necessitate, falls with the first. As is said in Dixon v. Pluns, supra, "Courts are not inclined to set aside verdicts for the reasons here urged;" and the evidence in this case greatly preponderates in favor of the finding of the court. Appellant's counsel rely upon the late case of Gordon v. Trevarthan, 34 Pac. 185, from the supreme court of the state of Montana. Upon the facts of that case, we think the trial court should not have set aside the verdict, but its action appears to have been sustained by the appellate court by invoking the well-recognized rule that the decision of the trial court upon a matter involving a substantial conflict in the evidence will not be disturbed. By affirming the action of the trial court in the present case upon a matter of conflicting evidence, we are only doing as was done by the court in Gordon v. Trevarthan. If that case be construed as taking broader grounds upon this question, it trespasses upon the views we entertain. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; McFARLAND, J.; FITZGERALD, J.

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103 Cal. 264

In re McDOWELL'S ESTATE. (No. 18,227.)

(Supreme Court of California. March 2, 1894.)

HOMESTEAD.

A building used primarily as an hotel cannot be regarded as a homestead, though the owner and his wife reside there for the purpose of carrying on the business.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

In the matter of the estate of J. E. McDowell, an insolvent debtor. From an order refusing to set apart to him an hotel as homestead, he appeals. Affirmed.

Warren & Taylor, (T. M. Osmont, of counsel,) for appellant. L. F. Coburn, for respondent.

BELCHER, C. This is an appeal by J. E. McDowell, an insolvent debtor, from an order refusing to set apart to him certain real property as a homestead. The appellant was adjudged to be an insolvent debtor on the 21st day of January, 1893, by the superior court of Siskiyou county. At that time he was the owner of the property in question, which consisted of certain land and the building thereon in the town of Sisson. Ten days later he filed a petition asking to have the property set apart to him as a homestead. The application was opposed by some of his creditors, and, after a hearing, was denied by the court. The findings of the court were, in substance, as follows: During the year 1886, appellant was engaged in conducting an hotel and boarding house at McCloud, and in the spring of 1887, at the request of friends, he erected the said building at Sisson for the special purpose of boarding and lodging railroad men and the public generally. As first constructed, the building consisted of a barroom, office, dining room, and eight sleeping rooms, but during the year it was enlarged somewhat. A large sign was placed upon it, designating it as the El Monte Hotel, and by that name it was advertised in the newspapers and by cards. From the time of its completion, in the spring of 1887, until June 12, 1890, appellant used the said building primarily as an hotel. For the purpose of conducting the same as an hotel, he employed chambermaids, cooks, and waiters, and his wife superintended the chamber work and dining room, and he had a general supervision and conducted a bar in the house. His wife died in August, 1889, at the city of Los Angeles, leaving a female child, who was subsequently taken to Sisson, and kept in the El Monte for about two months, and then returned to Los Angeles. On November 20, 1889, appellant made and filed for record a declaration of homestead upon the said premises, and the same was duly recorded in the office of the county recorder. On June 12, 1890, appellant leased the whole of the said premises as an hotel for the term of one year, and did not, in the lease, reserve any portion thereof for his own use. The court further found "that said hotel, ever since its construction in 1887, has been used primarily as an hotel, and not as a home of the said James E. McDowell; that the residence of said James E. McDowell therein has been for the purpose of managing and conducting the business of an hotel, and for no other purpose;" and, as conclusions of law, "that the said James E. McDowell, at the time he filed for record his aforesaid declaration of homestead, was not entitled, under the law, to file said declaration upon said real estate," and "that he is not now entitled to have the said property set apart to him as a homestead."

The only specifications found in the bill of exceptions, and the only grounds urged for a reversal of the order, are that the last two findings which we have quoted were not justified by the evidence, and that the conclusions of law were not supported by the facts found. It is objected for respondents that the findings not assailed are sufficient to uphold the order appealed from; but, waiving that point, the order cannot, in our opinion, be disturbed upon either of the grounds urged for its reversal. The evidence clearly tended to show that the building was constructed to be used, and that from the time of its construction it was used, primarily and principally as an hotel for the accommodation of the public, and it was being so used by appellant at the time he filed his declaration of homestead. This being so, the case is plainly within the rule declared in Laughlin v. Wright, 63 Cal. 113. In that case it was said: "The use of the property is an important element to be considered;" and it was held that, when the property is primarily and chiefly used as an hotel for the accommodation of the public, it would be doing violence to the statute to regard it as a homestead, although the owner may reside there with his family for the purpose of carrying on the business. What was said in that case upon this subject was not obiter dictum, and the decision has never been overruled. In Heathman v. Holmes, 94 Cal. 296, 29 Pac. 404, the case is referred to and distinguished from the one then under consideration, but the correctness of the decision is not questioned when limited to the facts involved in it. Upon the authority of Laughlin v. Wright, supra, the order appealed from here should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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101 Cal. 432

CLEMENS v. LUCE et al. (No. 19,234.)

(Supreme Court of California. Feb. 28, 1894.)

Mortgages—Foreclosure—Deferred Payments of Interest—Security for Attorney's Fees—Demand.

1. The interest on a note was payable quarterly, and, if not so paid, was to become a part of the principal, and bear interest at a like rate till paid; and the note was secured by a mortgage which recited that principal and interest should be due, and the mortgagee might foreclose, on default of an interest payment. *Held*, that the mortgagee could foreclose on default of an interest payment, as the mortgagor had no option to allow an interest installment to become a part of the principal.

2. Demand for payment was not necessary before suit to foreclose, where the mortgagor made default of an interest payment.

3. Where the mortgage secured the payment of principal and interest only, attorney's fees, for which the note provided, could not be made a lien on foreclosure.

4. On foreclosure for default of an interest payment on the note, judgment could not include the attorney's fees without proof that the mortgagee gave notice of his option to claim the whole amount due on the note, and demanded payment.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Jere Clemens against M. A. Luce and Henry W. Magee to foreclose mortgages. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. J. B. Mannix, for respondent.

GAROUTTE, J. This is an action of foreclosure of two certain mortgages, the note and mortgages being executed by appellant Luce in favor of respondent Clemens. The note was payable two years after date, interest payable quarterly, and, if not so paid, then to become a part of the principal, and to bear a like rate of interest till paid. The note also contained the following provision: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of five per centum in like gold coin upon the amount of the principal and interest hereof, accrued at the time of the entry of such judgment; or, if paid before judgment, and after action commenced, then on the amount at the date of payment." The mortgages recited that if default be made in the payment of the interest, or any part thereof, according to the tenor of said note, then the whole sum of principal and interest shall become immediately due, and the mortgagee may proceed with suit of foreclosure, and sell the mortgaged premises in the manner provided by law. The mortgages also contained the following recitals: That they are given "as security for the payment to said mortgagee of the sum of $16,000, in gold coin of the United States of America, with interest thereon according to the terms of a certain promissory note, of date September 22, 1891, in words and figures," etc.

It is insisted that a general demurrer to the complaint should have been sustained, upon the ground that nothing was due upon the note at the time the action was brought. Two of the quarterly installments of interest had not been paid when the complaint was filed, but it is charged that such payments were not due, inasmuch as the maker of the note had the privilege of allowing the installments of interest to become a part of the principal. There is no strength in appellants' position. The mortgages are attached to and made a part of the complaint, and there is not the slightest conflict between the terms of the note and the terms of the mortgage, when we consider them together. This identical question was before the court in Brickell v. Batchelder, 62 Cal. 623, and it was there said: "The right to dispose of the interest due and unpaid in the mode prescribed in the note was given to the plaintiff mortgagee, not to the mortgagors. A failure to so dispose might arise from the concession of the plaintiff, and not from any default of the mortgagors, except by default in paying the interest monthly. The language of the note and mortgage gave to the mortgagee the right on default to proceed to foreclosure. He might delay it or waive it, but a delay in exercising this right could not be construed as depriving him of it." The same principle is also recognized and approved in Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838.

The judgment upon the pleadings was properly ordered. The answer created no issue. The denial that the plaintiff was the owner and holder of the note and mortgages amounts to nothing. Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514; Poorman v. Mills, 35 Cal. 118; Bank v. Boyd, (Cal.) 34 Pac. 337. Neither is there a conflict between the provisions of the note and the terms of the mortgage as to when the note is to become due; and, consequently, the fact that certain provisions of one were printed and certain provisions of the other written becomes entirely immaterial. Again, no demand for payment was necessary prior to the commencement of the action, for the mortgagor was guilty of a breach of contract when he defaulted in payment of interest, and the cause of action immediately accrued. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755, is not in point. The mortgages in this case were given as security for the payment of $16,000 in gold coin, with interest thereon as specified in a certain note. This was the contract of the parties. It nowhere appears in either of said mortgages that they were given to secure the payment of any attorney's fee whatever. Indeed, the matter of attorney's fee is not mentioned in either instrument. As to what these mortgages were given to secure was a matter of pure contract between the parties. They could have been given to secure the principal of the note alone, or the interest alone, or both principal and interest, as was actually done, or they could have been given to secure future advances and attorney's fees in case of foreclosure. It follows that security for an attorney's fee is not provided for in either mortgage, and consequently such fee cannot be made a lien upon the land, and the judgment of the court in that regard is erroneous. We are authorized to go a step further, and hold that plaintiff, as to the foreclosure of the securities, was not entitled to any attorney's fee whatever, for there was no stipulation to that effect in the mortgage. This has always been the law in this state. Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514.

As the obligation for the payment of attorney's fees, although not secured by the mortgage, was included in the instrument by which the secured debt was evidenced, and provided that judgment might be entered for counsel fees in such suit, it was properly included in the same action; but the right to a judgment for such fees was the same as it would have been in an action upon a promissory note with such a clause, of which no part was secured by mortgage. In such a case it is held that, when the note is payable on demand, it is necessary to allege and prove an actual demand before there can be such a breach of the contract as will authorize a recovery of this special demand for attorney's fees. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755. Although by the terms of this agreement the maker renders himself liable to an action by his mere default prior to the maturity of his obligation, (Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423,) yet if his liability for additional damage is not so established, but is merely consequent upon another liability, which depends upon the option of the holder of the instrument, and cannot exist until after that option shall have been exercised, it is only just that the holder of the obligation should inform him of this option, in order that he may avoid the additional damage by making payment of the note. The right to bring an action after his default, without any demand of payment, is limited to the purposes for which the action is to be brought, viz. the foreclosure of the mortgage, and it does not include the attorney's fees. As the note in the present case does not give to the holder the right to bring an action before its maturity, that right being created by the mortgage alone, and limited to a foreclosure of the mortgage, if the holder would claim the attorney's fees provided for in the note, he should be required to give notice of his option to claim the whole amount to be due, as much as though the action was upon the note alone. For this reason the judgment for the amount of attorney's fees was erroneous.

It is ordered that the cause be remanded, with direction to the trial court to modify the judgment by striking therefrom the amount of the attorney's fee allowed; and in all other respects it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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4 Cal. Unrep. 496

SAINSEVAIN v. LUCE et al. (No. 19,274.)

(Supreme Court of California. Feb. 28, 1894.)

ACTION ON NOTE TO "GUARDIAN"—PLEADING—DESCRIPTIO PERSONAE—CONSTRUCTION OF MORTGAGE—ATTORNEY'S FEES.

1. Though the Code provides that a guardian must sue in the name of his ward, a payee of a note who is described as "guardian" may sue in his own name, in the absence of evidence of a ward or trust estate.

2. Where a mortgage secures in terms only the principal and interest of a note, a lien cannot be had for attorney's fees, though the note provides for them.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Paul Sainsevain against M. A. Luce, C. S. Luce, and Olive B. Montania to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Modified.

Luce & McDonald, for appellants. Sweet, Sloane & Kirby, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The suit is to foreclose a mortgage, which is fully set out in the complaint. It recites that the mortgage is given to secure the payment of $2,000, with interest, according to the terms of a promissory note, "in the words and figures following." The note is then set out, and is as follows: "2,000. San Diego, Cal., Aug. 19, 1890. Two years after date, without grace, for value received, I promise to pay to the order of Paul Sainsevain, guardian, the sum of two thousand dollars, with interest thereon from this date until payment, at the rate of eleven per cent. per annum, payable quarterly; and, if not so paid, then to become part of the principal of this note, and to bear like rate of interest till paid; both principal and interest to be paid in United States gold coin. And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum, in like gold coin, upon the amount of the principal and interest thereof accrued at the time of the entry of such judgment; or, if paid before judgment and after action commenced, then on the amount at date of payment. [Signed] M. A. Luce." The mortgage then contains a covenant that, in case of default in payment of interest, the whole sum of principal and interest shall become due. This, with a description of the property mortgaged, constitutes the entire mortgage.

Appellant first contends that the plaintiff cannot maintain this action because the note is payable to him as guardian, and, under our Code, a guardian cannot maintain an action in his own name, but suit must be in the name of the ward. But the description of the payee as guardian, in the absence of any showing that there was a ward or a trust estate, does not show that the money did not belong to plaintiff. There is nothing in the mortgage or complaint which would justify a finding that the plaintiff is not the proper party to bring suit. If the defendant had answered averring that the note belonged to a ward of plaintiff, the description would have materially contributed to strengthen any proofs he may have had, but, standing alone, it is of no consequence.

It is next objected that the mortgage was not given to secure an attorney's fee, and that it was error to give plaintiff a lien for that. In this respect I think the decree is erroneous, and must be modified. A mortgage is but a contract for a lien, and is whatever the parties make it. This mortgage in terms only secures the payment of $2,000, and interest, and cannot, by implication or otherwise, be construed to give a lien for the attorney's fee. Clemens v. Luce, (No. 19,234; filed Feb. 28, 1894,) 35 Pac. 1032.

Respondent does not claim that he is at least entitled to a personal judgment in case he is denied a lien for the attorney's fee. It is therefore not necessary to determine whether such relief might be obtained in this suit. I think the decree should be modified by deducting therefrom the amount of the attorney's fee allowed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the decree be modified by deducting therefrom the sum of $200, the amount of the attorney's fee therein allowed, and, as so modified, the judgment appealed from is affirmed.

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4 Cal. Unrep. 498

LEE v. McCARTHY et al. (No. 19,302.)

(Supreme Court of California. Feb. 28, 1894.)

Mortgages — Foreclosure — Security for Attorney's Fees—Pleading—Direct Averments.

1. A lien for attorney's fees cannot be obtained in a suit to foreclose a mortgage which contains a provision that, should suit be commenced, or an attorney employed, the mortgagors agree to pay an additional sum of 10 per cent. on principal and accrued interest as attorney's fees, since the mortgage does not purport to secure such fees.

2. Attorney's fees cannot be recovered where the agreement to pay them is not directly averred in the complaint, but is merely inferable from an exhibit annexed thereto.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Lee against McCarthy and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. A. E. Nutt, for respondent.

PER CURIAM. This case is not distinguishable in principle from Clemens v. Luce, (No. 19,234; this day decided,) 35 Pac. 1032. The agreement providing for attorney's fees in case of suit is contained in the mortgage instead of the bond, and is as follows: "Should suit be commenced, or an attorney employed, to collect the said promissory bond, or any of said interest coupons, the mortgagors agree to pay an additional sum of ten per cent. on principal and accrued interest as attorney's fees." The mortgage does not purport to be given to secure these attorney's fees, and the agreement can have no greater force than if it were contained in the bond, or in a separate instrument. It may be added that this agreement to pay attorney's fees is not directly averred in the complaint, but is merely inferred from being contained in an exhibit annexed thereto; and it is a well-established rule in pleading that "whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." Burkett v. Griffith, 90 Cal. 542, 27 Pac. 527.

The cause is remanded, with directions to the court below to modify the judgment by striking therefrom the amount of the attorney's fees allowed; in all other respects the judgment and order appealed from to be affirmed.

CHASE v. HIGH et al. (No. 19,249.)

(Supreme Court of California. Feb. 28, 1894.)

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Levi Chase against W. E. High and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. James E. Wadham, for respondent.

PER CURIAM. On the authority of Clemens v. Luce, (No. 19,234; this day decided,) 35 Pac. 1032, it is ordered that the judgment appealed from in this case be modified by deducting therefrom the amount of the attorney's fee allowed.

4 Cal. Unrep. 500

CASTRO et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,029.)

(Supreme Court of California. March 2, 1894.)

DISMISSAL OF SUIT—DELAY IN PROSECUTION.

It is within the sound discretion of the lower court to dismiss an action for inexcusable delay in failing, for two years after the commencement of the action, to serve defendant with process.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Castro and others against the city and county of San Francisco, one Barkley, and others. From an order dismissing the action on motion of defendant Barkley, plaintiffs appeal. Affirmed.

D. L. Smoot, for appellants. John Lord Love, for respondent.

PATERSON, J. This is an action against the city and county of San Francisco and a large number of individuals to declare that the city and county of San Francisco, and those claiming under it, are trustees of the plaintiffs as to the property described in the complaint, and for an accounting of the rents, issues, and profits of the same. The appeal is from an order of the superior court dismissing the action. The ground of the motion for a dismissal was want of ordinary diligence in prosecuting the action. The affidavit of the defendant Barkley showed that the action was commenced on the 19th day of June, 1889, but that he was never served with process until the 17th day of November, 1891; that no diligence had been exercised to serve him prior to said 17th day of November; that he had for several years prior thereto continuously resided on the premises described in the schedule, and had for two years been employed as a bookkeeper for the Pacific Bridge Company, at No. 4 California street, in the city and county of San Francisco, where he could have been found at any time during business hours. The affidavit further stated that plaintiffs' claim was a "shadowy cloud in the minds of some persons when property within the boundaries of the premises embraced in said complaint are sold or mortgaged;" and that it was not the intention of the plaintiffs to bring the cause on for trial "so long as they can get one dollar a front foot from persons who happen to want to sell or mortgage, and desire the cloud removed." The plaintiffs filed a counter affidavit, denying the statement that they did not intend to bring the cause on for trial, or that they had failed to prosecute their action with reasonable diligence; and alleging that the pendency of the action had been widely advertised in the public print, and that the delay had been caused by reason of the great number of defendants and expense of serving them with process; that a large number of defendants had been promptly served with the summons, but a motion to quash the same for clerical misprision had been granted, which caused delay; that the defense set up by the city and county and other defendants would test the merits of plaintiffs' case, and, if the former should prove successful, the benefit would fall to all of the defendants, whether served with process or not.

It is claimed by appellant that the court had no power to dismiss as to respondent Barkley, because he was served with process within three years after the complaint was filed, and section 581, subd. 7, Code Civ. Proc., as amended by the act of March 19, 1889, is cited in support of the contention; but in Kreiss v. Hotaling, 33 Pac. 1125, we said, speaking of that amendment: "The discretion of the court to determine whether there has been an inexcusable delay within the term of three years still remains, and each case must be determined upon its own peculiar circumstances." See, also, Murray v. Gleeson, 35 Pac. 88. Upon the showing made in this case, we cannot say that the court below abused its discretion in granting the motion to dismiss. The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

101 Cal. 445

HABER v. BROWN et al. (No. 19,233.)

(Supreme Court of California. Feb. 28, 1894.)

NONNEGOTIABLE NOTE—TRANSFER AS SECURITY—ACTION AGAINST INDORSER—NECESSITY OF DEMAND.

1. A demand on the maker of a nonnegotiable note, indorsed in blank by the payee, is necessary to entitle the immediate indorsee to recover against the payee if the words written over the blank indorsement show that such indorsee treated the indorsement as if it were an indorsement of a negotiable note.

2. In an action against the indorser of a note not payable at any particular place, a complaint

which shows on its face that no demand was made on the maker, and which offers, as the only excuse for failure so to do, that he could not be found in the city in which the note was executed, is insufficient.

3. The payee of a nonnegotiable note, secured by mortgage, who transfers the note and mortgage as collateral security for a debt, is not liable to the transferee for any deficiency arising on foreclosure of the mortgaged premises.

4. One who transfers a note and mortgage on condition, inter alia, that the transferee pay him the interest then accrued, "when the same should be collected on said note and mortgage," is entitled, on foreclosure, to have the proceeds thereof first applied to such interest.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Joseph Haber against Martha L. Brown and Caroline G. Carter. Judgment for plaintiff. Defendant Carter appeals. Modified.

David L. Withington and E. E. Carter, for appellant. Hunsaker, Britt & Goodrich, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by defendant Brown upon certain lots of land situate in the city of San Diego, to secure her promissory note for $4,000, dated, "San Diego, Cal., Sept. 10, 1887," and payable one year after date, to the order of Caroline G. Carter, the appellant. The note contained a provision for the payment of counsel fees of 5 per cent. on the amount recovered in case of suit. The complaint contains two counts. The first alleges the indorsement of the note before maturity by Caroline G. Carter to the order of Dinkelspiel & Co., a firm consisting of Dinkelspiel, Josephi, and plaintiff, and a subsequent assignment by Dinkelspiel and Josephi of all their interest in the note to the plaintiff; and avers "that, at the maturity of said note, due search and inquiry were made for the maker thereof, the said Martha L. Brown, at the city of San Diego, in order that the same might be presented to her for payment, but she could not be found, and the said note was not paid;" that thereupon the said note was duly protested for nonpayment, and notice of protest and nonpayment was given to said Caroline G. Carter. The second count omits the allegations of indorsement, protest, and notice of nonpayment, and alleges, "that after the execution of said promissory note and mortgage, and before the maturity of said note, the said Caroline G. Carter assigned said note and mortgage to S. B. Dinkelspiel & Co., and in and by such assignment guarantied the payment of said note to the said Dinkelspiel & Co." The defendant Caroline G. Carter demurred to each count of the complaint generally, and specially demurred to the second count. Both demurrers were overruled. In her answer she denied the allegations of the complaint as to the efforts to present the note to Martha L. Brown for payment, and the allegation that she guarantied the payment of the note; and alleged that the note was indorsed by her in blank, and delivered to Dinkelspiel & Co., as security for an antecedent indebtedness of her husband, John H. Carter, to Dinkelspiel & Co., and without other consideration; and that in December, 1888, after maturity of the note, she assigned the mortgage, and released all her interest in the note, to Dinkelspiel & Co., in consideration of which they agreed to pay her $260 arrearage of interest due upon the note to December 10, 1888, out of the first moneys to be collected upon the mortgage. The court found that the note was indorsed by the defendant, simply by the writing of her name, "Caroline G. Carter," and, so indorsed, was delivered to Dinkelspiel & Co., as security for said antecedent indebtedness of John H. Carter, her husband, to Dinkelspiel & Co., and in consideration of an extension of time for payment of that indebtedness, and of the advancement of the sum of $1,000 to John H. Carter. The evidence shows that this advance of $1,000 was made prior to the delivery of the note to Dinkelspiel & Co., for the purpose of enabling John H. Carter to obtain the note from the California National Bank, where it had been deposited as security for a note made by the firm of Carter & Baker to that bank, for the sum of $1,000. The court found that Caroline G. Carter did not guaranty the payment of the note otherwise than by her blank indorsement thereof. It further found, in the language of the complaint, the alleged search and inquiry at San Diego for Martha L. Brown, that she could not be found, the protest for nonpayment, and notice of protest and nonpayment to Mrs. Carter. It further found that in December, 1888, Mrs. Carter absolutely assigned and transferred the note and mortgage to Dinkelspiel & Co., in consideration of a credit of $4,000 to John H. Carter upon his indebtedness to them, and of their agreement to pay to her, when collected, the interest which had then accrued on the note, (the first year's interest,) but found that there was no agreement to pay such interest from the first moneys collected. The court also found that it was understood between the parties at the time of the absolute assignment that Mrs. Carter was responsible upon her indorsement of the note, and liable to pay the same, less the interest thereon to December 10, 1888. The judgment was in favor of plaintiff, ordering a sale of the mortgaged property, and application of the proceeds (1) to payment of costs of suit and expenses of sale; (2) to the payment to plaintiff of the principal and interest, less the first year's interest, found due on the note; and (3) to payment to Mrs. Carter of the first year's interest and the compound interest thereon; and further ordering that, in case the proceeds of the sale should be insufficient to make the first two of the above mentioned payments, a judgment for the deficiency be entered against Mrs. Carter. Mrs. Carter appeals from the judgment on the judgment roll and a settled statement used on her motion for new trial, the appeal having been taken within six months after the rendition of the judgment. Appellant contends that the court erred in ordering a personal judgment against her, and in postponing the payment to her of the first year's interest to that of the full amount due plaintiff.

1. The note is nonnegotiable, on account of the contingent provision for attorney's fees therein contained. Adams v. Seaman, 82 Cal. 636, 23 Pac. 53. In the case of Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866, it was held that, "in respect to the immediate indorsee of the payee of a nonnegotiable promissory note, the indorsement will ordinarily create the same liabilities and obligations as the indorsement of a negotiable note." If this rule, as stated, be strictly applied, the obligations of the payee, as an indorser, to the immediate indorsee, must depend upon demand upon the maker at maturity or sufficient excuse for its absence, and notice of nonpayment to the indorser, both of which are essential. In a number of cases which enforce the rule as stated, such conditional liability of the indorser is recognized, (Jones v. Fales, 4 Mass. 245, 254; White v. Low, 7 Barb. 204; Aldis v. Johnson, 1 Vt. 136; Parker v. Riddle, 11 Ohio, 102,) though in other cases it is held that the payee who indorses a nonnegotiable note in blank may be held liable to his immediate indorsee as an absolute guarantor, and that his indorsee may write a guaranty, or absolute promise to pay the note, over the indorsement, and that the indorser cannot require demand and notice of nonpayment, (Ford v. Mitchell, 15 Wis. 334; Billingham v. Bryan, 10 Iowa, 317; Seymour v. Van Slyck, 8 Wend. 404; Cromwell v. Hewitt, 40 N. Y. 491.) In the present case it appears that Dinkelspiel & Co. wrote no guaranty over the blank indorsement, but, instead thereof, wrote the words, "Pay to the order of S. B. Dinkelspiel & Co.," and themselves indorsed the note to the order of the London, Paris & American Bank, Limited, which in turn indorsed it to the order of the Consolidated National Bank for collection, which latter bank caused the note to be protested for nonpayment, and notice thereof to be given to each and all of the prior indorsers. The court has expressly found that there was no other guaranty of the note than by the indorsement thereof in blank. Dinkelspiel & Co., as immediate indorsees, having elected to treat the indorsement to them as if it was an indorsement of negotiable paper, and not a guaranty, ought not to be allowed to alter the terms of the writing which they themselves placed above the blank indorsement. It is unnecessary to decide in this case whether demand and notice of nonpayment of a nonnegotiable note indorsed in blank by the payee is required to be given in every case of a transfer of such note, in order to entitle the immediate indorsee of the payee to recover thereon against the payee; but such demand and notice ought to be required where the words written over the blank indorsement show that the signature was considered and treated by the indorsee as if it were an indorsement of negotiable paper. Applying this rule to the present case, the complaint is insufficient to charge the appellant as an indorser. It expressly shows upon its face that the note was not in fact presented at maturity to the maker, but presentment is sought to be excused merely upon the ground that the maker could not be found in San Diego, the place at which the note was dated. But the note was not by its terms payable in San Diego, though dated there; and, under the law merchant, a note not payable at any particular place is payable, and should be presented for payment, at the residence or place of business of the maker, or wherever he may be found, at the option of the presentor; and it is only where the maker has no place of business or residence within the state, or where his place of business or residence cannot be ascertained with reasonable diligence, that presentment for payment is excused. The complaint is insufficient, because it states no facts respecting the knowledge or ignorance of Dinkelspiel & Co. and their indorsees or agent as to the actual place of residence or business of the maker of the note, and does not allege what was her last known place of residence or business, or that any inquiry or presentment was made thereat. Merely looking for the payor at the place where the instrument is dated is not of itself due diligence, but presentment must be shown to have been made at the promisor's last known place of residence or business; and if his removal from the place of date, and the acquisition of a new domicile in the same state, were previously known to the indorsee, demand must be made at his new place of residence. Wheeler v. Field, 6 Metc. (Mass.) 290; Anderson v. Drake, 14 Johns. 114; Bank v. Green, 11 Iowa, 476. The allegation "that thereupon the note was duly protested for nonpayment," being directly coupled with the previous allegations, showing nonpresentment of the note to the maker, cannot be presumed to imply a presentment of it in fact, or to imply any other excuse for not presenting it to the maker than that previously alleged, which is insufficient for the reasons stated. No waiver of protest is alleged in the complaint, or found to exist; and the finding that, at the time of the assignment and release of the pledged note and mortgage, it was understood between the parties that the plaintiff was responsible upon her indorsement, is not only outside of the issues made by pleadings, but is not sustained by the evidence. The evidence discloses an un-

derstanding between Dinkelspiel & Co. and John H. Carter and Caroline G. Carter that any extension of time granted to the vendees of the mortgaged property should "in no way affect any obligation" of either of them to said S. B. Dinkelspiel & Co., and further discloses that Dinkelspiel & Co.. at the time of the assignment, requested them to sign an absolute guaranty of "full and exact payment" of the note and mortgage, and to indemnify Dinkelspiel & Co. for all loss sustained by reason of its nonpayment, which Caroline G. Carter expressly refused to execute, and no extension of time was in fact granted.

2. The case has been discussed thus far upon the theory of the complaint, that the original transfer of the note in suit to Dinkelspiel & Co. was an absolute transfer thereof by indorsement, in the ordinary course of business; but the answer, proofs, and findings show that the transfer was by way of pledge, or collateral security, to secure the indebtedness of John H. Carter and of the firm of Carter & Barker to Dinkelspiel & Co. The Civil Code expressly provides that, "notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." Civ. Code, § 2888. It is settled in this state that, as between the pledgor and pledgee, the general property in a pledge remains in the pledgor, notwithstanding an apparent transfer of legal title to the pledgee. Cross v. Canal Co., 73 Cal. 306, 14 Pac. 885, and cases cited. The pledgee is but a trustee for the pledgor, (Wheeler v. Neubould, 16 N. Y. 398; Hawks v. Hinchcliff, 17 Barb. 492,) and is accountable to the pledgor for any surplus realized above the amount of indebtedness existing at the date of the enforcement of the pledge, (Civ. Code, § 3008.) The transfer of a pledged note and mortgage to the pledgee does not transfer the title any further than to enable the pledgee to collect the note and mortgage from the maker thereof. Ponce v. McElvoy, 47 Cal. 159. In no event, even under the law merchant, could an indorsement of negotiable paper by way of collateral security authorize any recovery against the pledgor beyond the amount remaining due upon the principal debt. Williams v. Smith, 2 Hill, 301. It is unnecessary to decide whether, under the Code rule respecting the retention of title in the creator of any lien, regardless of the form of the transaction, the indorser of negotiable paper by way of pledge is liable to the pledgee as an indorser under the law merchant; but it seems clear, in view of the Code provision, that a mere indorsement of nonnegotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name, as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected. It could not operate as an assignment of the general title so long as the pledge subsists, and could only operate as such in case of an agreement that the pledge should be extinguished, and the amount of the collateral security applied as a payment upon the debt secured, or in case of a transfer of the collateral security by the pledgee to third parties. The Civil Code declares that "the lien of a pledge is dependent on possession,"(Civ. Code, § 2988;) and it is a rule applicable to collateral securities generally that if the pledgee transfers pledged paper to third persons, without authority of the pledgor, he will be deemed, at the election of the pledgor, to have taken it at its face value, in satisfaction of the debt for which it was pledged to him, and may be regarded as having pledged to his assignee his own personal responsibility, and not that of his pledgor, and no subsequent reassignment of such paper to himself will restore him to his original rights, (Hawks v. Hinchcliff, 17 Barb. 502;) and surely this must be true where the paper pledged is not negotiable. It follows, I think, from the foregoing considerations, that plaintiff is not entitled to judgment against Mrs. Carter for any deficiency.

3. I think the proceeds of the sale of the mortgaged property, after payment of costs and expenses of sale, should have been applied next to the payment of the first year's interest and the compound interest thereon to Mrs. Carter, in preference to any payment to the plaintiff. The question of preference is to be resolved solely by the contract between Mrs. Carter and Dinkelspiel & Co. The finding of the court that Dinkelspiel & Co. did not agree to pay that interest "out of the first money collected upon the said mortgage" was merely the court's construction of the contract, and therefore not the finding of a fact, but merely a conclusion of law. While it is true that the contract does not expressly say it shall be paid out of the first money collected, neither does the contract say it shall be paid out of the residue after payment in full to Dinkelspiel & Co. The language of the contract, as found, is that Dinkelspiel & Co. agreed to pay said sum to Caroline G. Carter, "when the same should be collected on said note and mortgage," without any other qualification than such as may be inferred from the circumstances and the consideration for the promise, all of which tend to show the intention of the parties to have been in accord with the ordinary meaning of the language used; namely, that the sum should be paid "when [as soon as] the same [that sum, not the whole amount due on the note] should be collected." The whole transaction was this: Mrs. Carter made an absolute assignment of a note and mortgage for $4,000, drawing interest at the rate of 13 per cent. per annum, compounded quarterly, on which one year's unpaid interest had accrued to Dinkelspiel & Co., in consideration of which Dinkelspiel & Co. credited to her

husband's debt to them $4,000, and agreed to pay her the amount of the then accrued interest when they should collect it. Had the maker of the note voluntarily paid $4,000 on the note without suit, the law would have applied it, first, to the payment of interest, in the absence of any agreement for a different application; and the same rule applies where the payment is enforced by sale of property on foreclosure of a mortgage, and should have been adhered to in this case, even conceding that the contract is silent as to the order in which the payment to Mrs. Carter should be made. A new trial, however, is not necessary, since the only finding of fact not justified by the evidence is outside of the issues. I think the cause should be remanded, with instructions to the lower court to modify the judgment in conformity with this opinion.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the cause be remanded, with instructions to the lower court to modify the judgment in conformity with this opinion.

101 Cal. 495

KENNEDY v. CALIFORNIA SAV. BANK et al. (No. 19,226.)

(Supreme Court of California. March 1, 1894.)

ESTOPPEL — NATIONAL BANK AS STOCKHOLDER IN SAVINGS BANK—LIABILITY—DEFENSE OF ULTRA VIRES

Where a national bank holds stock in a savings bank, and receives dividends thereon, it is estopped, in an action against it to enforce its liability as such stockholder to a depositor in the savings bank, from claiming that it is ultra vires for it to hold such stock, in the absence of a statute expressly prohibiting it.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by one Kennedy against the California Savings Bank, the California National Bank, and others, to recover money deposited by plaintiff in such savings bank, of which the other defendants are stockholders. From a judgment for plaintiff, defendant California National Bank appeals. Affirmed.

James E. Wadham, for appellant. Works & Works and W. H. Fuller, for respondent.

HARRISON, J. During the year 1891 the plaintiff deposited with the California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of deposit, amounting, in the aggregate, to $45,000. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and, upon its refusal, brought this action, making the other defendants parties to the action, for the purpose of recovering from them their proportion of said indebtedness—as stockholders in the California Savings Bank. Judgment was recovered against the savings bank for the full amount of the claim, and against the other defendants for their respective proportions thereof, as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far ultra vires that it cannot be made liable for any portion of the indebtedness of the corporation. The California Savings Bank was organized January 13, 1890. September 10, 1890, 990 shares of its capital stock were issued to J. W. Collins, cashier of the California National Bank, and on January 2, 1891, the certificates representing these shares were canceled, and one certificate therefor was issued to the California National Bank, and was thereafter held by it until after the commencement of this action. During this period, two dividends upon this stock were paid by the savings bank to the appellant. The defense of ultra vires is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed, merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation. In Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089, an action was brought against the stockholders of the California Fruit & Meat Shipping Company to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice Company, another corporation, which held a thousand shares of the capital stock of the corporation debtor; and, to its objection that it was ultra vires for it to hold stock in another corporation, it was held that, as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances, or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defense could not be maintained. There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corporation; and, while it may be conceded that its subscription to the shares of another corporation would be so far in excess of the powers conferred by the statute under which it is organized that its executory contract therefor would not be enforced, it by no means follows that, if such contract is executed, and it has been registered as such stockholder, it is not entitled to a voice in its corporate management, or to its share of the corporate earnings, while the corporation is in existence, or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and, if the loan is not paid, it may become the owner of those shares, and have them registered in its name upon the books of that corporation; and in such a case it is subject to the same liabilities as any other stockholder. In Bank v. Case, 99 U. S. 628, the bank had become a stockholder in another corporation under such circumstances, and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability. As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law. "Strangers are presumed to know the law of the land, and they are bound, when dealing with corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose; but they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duty, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law; and, upon this presumption, strangers, having no notice in fact of the unlawful purpose, are entitled to rely." Ditch Co. v. Zellerbach, 37 Cal. 587. The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be owner of it, and to share in all the earnings and assets of the corporation. During the period that it has claimed to be such owner, it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate property which otherwise might have been appropriated in satisfaction of the plaintiff's claim. See Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110. Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability which is correlative to such benefit and fruits, and dependent thereon. See Morse, Banks, § 735. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

101 Cal. 462

QUIGLEY et al. v. GILLETT et al. (No. 18,209.)

(Supreme Court of California. March 1, 1894.)

MINES AND MINING — RELOCATION — BURDEN OF PROOF.

1. In an action to try the right of possession to a mining claim, the sufficiency of plaintiff's protest against defendant's relocation filed in the land office is immaterial, and its admission in evidence cannot harm defendant.

2. The validity of a prior location being admitted, the burden is on the relocator to show that defendant failed to do his assessment work.

Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Louis T. Quigley and others against Charles E. Gillett and others to try right of possession to a mining claim. Judgment for plaintiffs. Defendants appeal. Reversed.

Goodwin & Goodwin and C. N. Harris, for appellants. P. O. Hundley and C. E. McLaughlin, for respondents.

PER CURIAM. This action was brought to determine the adverse claims of the parties to the right of possession of certain placer mining land in the county of Plumas. The complaint alleged, in substance, that on the 21st day of March, 1891, the land in controversy "was, ever since has been, and now is, gold-bearing, public mineral land of the United States," and that, on the day named, four of the plaintiffs and three other persons, the grantors of one of the plaintiffs, all of whom were then citizens of the United States, entered upon, took possession of, and located the same as a placer mining claim, which they designated and called the "Fortuna Placer Mining Claim," and that they and their successors in interest have ever since remained, and are entitled to remain, in the possession thereof; that on the 4th day of November, 1891, the defendants filed, in the proper United States land office, their application for a patent for the Diana placer mine, and included within their application the whole of the land and premises located as aforesaid by the plaintiffs and their grantors, and that defendants claim the whole of the said land adversely to the plaintiffs, and to be entitled to the exclusive possession thereof; that the register of the land office duly posted and published a notice of the said application, and that on January 2, 1892, within the time allowed by law and the said notice, plaintiffs filed with the said register their adverse claims for the said lands, and their protest against the issuance of a patent to the defendants, or either of them, for the same; that the claim of defendants is without right, and that they are not, nor is either of them, entitled to the possession of the said land, or any part thereof, adversely to the plaintiffs. The answer denied, among other things, that on the 21st of March, 1891, the lands described in the complaint, or any part thereof, were, or ever since have been, or now are, gold-bearing, public mineral lands of the United States, and alleged that, long prior to the time stated, the assignors of the defendant Charles E. Gillett entered upon the said lands, which were at that time free and open to exploration and purchase by citizens of the United States and those who had declared their intention to become such, and under regulations prescribed by law, and according to the local customs of miners, proceeded to and did locate the same as a mining claim, and at the time of such location were citizens of the United States; that afterwards they entered into the possession and occupation of the said lands and every part thereof, and remained in such possession and occupation, in accordance with the laws of the United States governing the holding of mining claims, until they conveyed the same to this defendant, since which time he has occupied and held the same in conformity with such laws; denied that on the 2d day of January, 1892, or at any other time, plaintiffs filed with the register of the land office any sufficient adverse claim for the premises in controversy, or protest against the issuance of a patent therefor to the defendant; and alleged that neither the plaintiffs, nor either or any of them, have, or ever had, any right, title, interest, or estate in and to the said premises. The case was tried by the court without a jury, and the findings were that on the 21st day of March, 1891, the lands described in the complaint were gold-bearing, public mineral lands of the United States, and were located by the plaintiffs and their grantors in every respect as required by law and the local customs, rules, and regulations of miners, as a placer mining claim, under the name of the "Fortuna Placer Claim," and that, on the day named, the locators were citizens of the United States, and ever since have been, and now are, the owners of, in the possession of, and entitled to the possession of, the said lands, and every part thereof; that on the 7th day of August, 1889, the grantors of the defendant Charles E. Gillett entered upon and located, in all respects as required by law and the local customs, rules, and regulations of miners, the lands and premises described in the complaint, under the name of the "Diana Placer Mining Claim," and each of them was then a citizen of the United States; that, during the year 1890, neither the defendants nor their predecessors in interest did or performed, or caused to be performed, any work or labor upon said Diana placer claim, in the development thereof, or otherwise, or at all. Judgment was accordingly entered that the plaintiffs were the owners, and in the possession, and entitled to the possession, of all the lands and premises described as the Fortuna placer mining claim, and that the defendants were not entitled to the exclusive or any possession of said lands adversely to plaintiffs. From this judgment the defendants have appealed, and the case is brought here for review on a bill of exceptions, which contains specifications to the effect that each of the findings above referred to, except that as to the location made August 7, 1889, was not justified by the evidence.

1. The protest filed by plaintiffs in the land office was headed: "In the matter of the application of Thomas B. Ludlum, as the attorney in fact of Chas. E. Gillett, for a United States patent for the Diana placer mine or mining claim, and the land and premises appertaining to said mine, situated in an unorganized mining district in Plumas county, state of California;" and it is claimed by appellants that the paper did not constitute a sufficient protest, and therefore the court erred in admitting it in evidence over their objection. We see no prejudicial error in the ruling complained of. The action was brought "to determine the question of the right of possession" of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency.

2. The defendants offered to prove that the lands in controversy were located as a reservoir site in May, 1881, by a corporation, but did not offer to show that any of the parties to this action, or their grantors, were connected with, or interested in, the said reservoir site or the said corporation. The offered evidence was objected to by the plaintiffs as irrelevant and immaterial, and was properly excluded by the court. The reservoir claimants, if any there were, were not before the court, and it had no power to determine as to their rights.

3. The statute provides that "on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after

failure, and before such location;" and "provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim." Rev. St. U. S. § 2324, as amended January 22, 1880. The bill of exceptions states that "no competent evidence was offered by the defendants showing, or tending to show, that any assessment work required by the act of congress or the local laws of the mining district, or that any work of any character for developing the Diana placer mining claim, had been done or performed on the said claim by the defendants, or any one else for them, between the 7th day of August, 1889, the time of its location, and the 8th day of September, 1891, or at any time prior to the location of the Fortuna placer mining claim, or that the defendants had resumed work prior to the 8th day of September, 1891." The record is silent as to whether any evidence was offered by the plaintiffs showing that no work was done on the claim between the dates above named, and, in view of the specifications, it must be presumed that none was offered; the presumption on appeal being that the statement or bill of exceptions contains all pertinent evidence upon points specified, although the record does not show affirmatively that such is the case. It must be assumed, therefore, that the findings of the court that no work was done by the defendants or their predecessors in interest during the year 1890, and that the said lands were public mineral lands of the United States in March, 1891, were based upon the theory that the burden was on defendants to show that sufficient work was done to meet the requirements of the statute, and that, in the absence of such showing, the findings must be against them. The question then arises, was this theory correct, and were the findings referred to justified? The evidence shows, and the court found, that the location of August 7, 1889, was a valid location, made in all respects as required by law. This being so, the ground located became the property of the locators, and could not be relocated until they lost, abandoned, or forfeited their rights to it. As said in Belk v. Meagher, 104 U. S. 284, 285: "A mining claim perfected under the law is 'property' in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. * * * The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. * * * The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done."

The question as to which side has the burden of proof in a case like this, where it is claimed that a prior valid location has been lost or forfeited by a failure to do the necessary work, arose directly, and was passed upon, in Hammer v. Mining & Milling Co., 130 U. S. 292, 9 Sup. Ct. 548. That was a suit to quiet the plaintiff's title to a lode mining claim in Montana. The complaint alleged that the plaintiff was a corporation duly organized, etc., that it was the owner of a certain quartz lode, known as the Garfield lode or mining claim, and that it and its predecessors in interest had been in the possession of, and entitled to, the lode ever since its discovery and location; that, notwithstanding its right to the possession, the defendant Hammer, on or about the 1st of January, 1883, assumed to enter upon the premises and relocate the same, and that he pretended to claim an interest or estate therein adversely to the plaintiff, and had made application to the local United States land office for a patent therefor, and that the plaintiff had duly filed in that office its adverse claim to the premises. The answer of Hammer denied that the plaintiff was the owner of the lode described, or of any part thereof, or that it was then, or had been for a long time, in possession thereof; and it set up that on the 1st day of January, 1893, one Wolf entered upon the premises described, the same being then vacant mineral land of the United States, and discovered thereon a vein or lode of quartz-bearing silver and other precious metals, which he located in accordance with the requirements of the law; that afterwards the defendant became the purchaser of the premises from Wolf, and had ever since been the owner and entitled to the possession thereof; and that whatever claim the plaintiff ever had to them became forfeited before the 1st of January, 1883, since which time it had not had any estate, title, or interest therein or possession thereof. The court, Mr. Justice Field delivering the opinion, said: "The answer does not distinctly put in issue the validity of the original location; it confines its traverse to the existing right and ownership of the plaintiff in the whole of the mining claim, to its long possession of the premises, and to the possession of the plaintiff and its predecessors since the discovery and location of the mining claim, and then sets up the alleged forfeiture of the claim by the plaintiff and the defendant's relocation of it. * * * As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law each year, was not done on the claim in 1882. * * * A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed, or improvements made, to the amount required by law." That decision is decisive of the question in hand, and must be followed, since the court rendering it has jurisdiction to review all cases like this when the amount in controversy is sufficient. Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428. It follows that the theory on which the court below acted was not correct, and the findings complained of were not justified by the evidence. The judgment must therefore be reversed, and the cause remanded. So ordered.

101 Cal. 471

PEOPLE v. CHRISTIAN. (No. 21,061.)

(Supreme Court of California. March 1, 1894.)

ASSAULT—INFORMATION—VARIANCE—NAME.

One complained against for an assault with a deadly weapon on the person of one George Magin cannot be informed against and tried for such an assault on one George Massino.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Harry Christian, convicted of assault with a deadly weapon, appeals. Reversed.

E. W. Wilson, for appellant. W. H. H. Hart, Atty. Gen., and T. H. Selvage, Dist. Atty., for the People.

GAROUTTE, J. The defendant, Christian, was convicted of the crime of assault with a deadly weapon upon the person of one George Massino, and now appeals from the judgment and order denying his motion for a new trial. Upon being called to plead to the information, he moved to set it aside upon the ground that he had never been legally committed by a magistrate; and we think the proper disposition of that motion demands a reversal of the judgment. The inception of the present prosecution is founded in a complaint laid before a magistrate upon the oath of one Nick. Savage. In that complaint John Doe, alias, is charged with an assault with a deadly weapon upon the person of one George Magin. At the conclusion of the preliminary examination the magistrate entered his order of commitment upon the back of the complaint, reciting that, "it appearing to me that the offense of an assault with a deadly weapon, to wit, a pistol, has been committed, and that there is sufficient cause to believe that the within-named Harry Christian, arrested under the name of John Doe, guilty thereof, I order that he be held to answer to the same," etc. The district attorney thereupon filed an information against the defendant, Christian, charging him with the crime of assault with a deadly weapon upon the person of one George Massino, and upon that information he has been tried and convicted. The defendant was not charged by the complaint before the magistrate with assaulting one George Massino; neither does the commitment indicate that he was held to answer before the superior court upon that character of charge. There is a wide difference between the offense of an assault with a deadly weapon upon John Doe and that of assault with a deadly weapon upon Richard Roe. The name of the party assaulted is a material element of the offense, and common justice to the defendant demands that he be notified of the particular offense for which he stands committed. In the present case he had no such notice. If the record gave him any information upon the subject, it would be an inference, at least, that he was to be tried for the assaulting of one Magin, the party named in the complaint; but it was only when he was called upon to plead that he for the first time became aware of the nature of the offense for which he was to be put to trial. Again, this party was arrested and brought before a magistrate to defend himself against a charge of assaulting one Magin. Under those circumstances, and under a complaint charging that offense, he could not be called upon to defend himself for assaulting one Massino, for there was no complaint on file upon which to base an examination of that character. The commitment furnishes the material matters upon which the district attorney should frame his information. If the defendant is committed for trial for the offense charged in the complaint, it is sufficient to so declare in the commitment; but, if he be held for some other offense, the commitment should state its general nature,—in other words, describe it with reasonable certainty. The district attorney, in framing his information, must confine himself to the record. He is not justified in placing therein any element of the offense, the information of which he has obtained from outside sources. This principle is declared in People v. Parker, 91 Cal. 91, 27 Pac. 537, and again affirmed in People v. Wallace, 94 Cal. 497, 29 Pac. 950. Assuming the complaint in this case to have been made a part of the commitment, we then have the defendant committed for an assault upon one Magin, and we have an information filed against him for an assault upon one Massino. This is a variance as fatal as though it arose upon the trial of the case.

The information not being based upon the commitment, can it be supported upon the theory that the evidence taken at the preliminary examination disclosed that the defendant committed an assault upon George Massino, and that, therefore, the district attorney was authorized in filing an information upon material furnished by that evidence? In the case of People v. Vierra, 67 Cal. 231, 7 Pac. 640, the defendant, by complaint, was charged with the crime of murder, and upon examination was committed for manslaughter. Notwithstanding such commitment, the district attorney filed an information against him charging murder, and this court upheld that procedure. The same principle also arose in People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859, where the defendant was charged with an assault with intent to commit robbery, and committed for the offense of an attempt to commit robbery. The information was framed in line with the complaint, and alleged an assault with intent to commit robbery. While we have recognized the difference between the offense of assault with intent to commit a felony and the offense of an attempt to commit the same felony, (People v. Lee Kong, 95 Cal. 667, 30 Pac. 800,) yet the distinction is not a broad one, and they are so closely related that the evidence of one is usually sufficient to prove the other. Indeed, the attempt to commit a felony is always included in the assault with intent to commit the felony. In both of these cases the information charged the defendant with the offense alleged in the complaint upon which the preliminary examination was based, and there is no question but that they properly declare the law in that regard. There is also some general language found in People v. Staples, 91 Cal. 23, 27 Pac. 523, in line with the earlier cases we have quoted; but in that case the offense charged in the complaint and in the information was the same, and the opinion so states; consequently, the language used was obiter dicta. In People v. Wheeler, 73 Cal. 252, 14 Pac. 796, the defendant was charged with robbery, and committed for the crime of false imprisonment; and this case is the only one we find directly opposed to the views we entertain upon this question. The principle there declared is unsound, and must be cast out as no authority for future guidance. It is not law that a person may be charged by complaint with larceny, and held for trial for rape, even though the evidence taken at the preliminary examination indicates, to a certainty, that the defendant committed that offense. The case cited appears to go to the length of the illustration made, and cannot be sustained. It is violative of that provision of the constitution which does not allow a prosecution by information unless the defendant has previously had a preliminary examination upon the offense for which he is prosecuted. It is not only the right, but the legal duty, of the magistrate, to commit the defendant for a lower degree of the offense charged in the complaint whenever the evidence indicates his guilt of such lower degree; and, while it is properly held in the Vierra Case that the district attorney may file an information for murder against a defendant committed for manslaughter, yet, if the complaint upon which the defendant had been preliminarily examined had charged any other offense than that of murder, the action of the district attorney in filing the information would have been beyond the law. It may be laid down as an unquestioned proposition that the district attorney has no authority to disregard the commitment, and cull from the evidence taken at the preliminary examination some real or imaginary offense, not included in the complaint upon which the defendant was charged and examined.

In the case of People v. Giancoli, 74 Cal. 646, 16 Pac. 510, a case where the district attorney filed his information from data taken from the evidence at the examination, this court held that, if there was any evidence whatever in the record indicating the commission of the offense charged in the information, the district attorney's action in the premises was beyond review and conclusive. For this reason, among others, we are not disposed to expand the doctrine declared in the Vierra and Lee Chuck Cases. The language found there may be broader than the facts of those cases; but any language which might be construed as holding that a defendant may be informed against for any offense shown by the evidence, regardless of the charge upon which he was examined, is too broad, and we do not desire it crystallized into a principle of law. The district attorney is not only required to file the information for some offense included in the allegations of the complaint, but the magistrate, likewise, only has the power to commit for some offense included therein. If such were not the true rule, the whole procedure as to preliminary examinations would be absurd, and, as to the defendant, a mockery. Where a defendant is brought before a magistrate, charged with having committed a public offense, he must be informed of the charge against him, and advised as to his right to the aid of counsel in every stage of the proceeding. He is entitled to a certain time to prepare his defense. These provisions of the statute clearly contemplate that he shall be required to defend himself against the crime with which he is charged, and no other crime. He has not been notified of any other charge, and consequently is not prepared to defend himself against another charge. There is no provision of the statute by which a defendant may take advantage of the admission of immaterial or incompetent evidence by the magistrate. Hence, all manner of crimes may be proven against him, and thus the district attorney would have the privilege of selecting the most heinous upon which to frame his information. Such is not the law, and whenever a defendant is informed against for an offense different from that charged in the complaint upon which he was examined, or not included therein, he has had no examination for that offense, and is entitled to have the information set aside upon the ground that he has not been legally committed. In Ex parte Nicholas, 91 Cal. 640, 28 Pac. 47, the general language found in the Vierra Case as to the right of the district attorney to file an information for any offense disclosed by the evidence is reiterated; but the matter there before the court was purely a question of jurisdiction, involving the right to a writ of habeas corpus, and whatever may have been said upon these lines was not demanded upon a disposition of the merits of the question under discussion. We also refer to the views of Mr. Justice Paterson, as expressed in his concurring opinion in Ex parte Nicholas, as being in entire accord with what we deem the law to be upon the matter under discussion. It follows that the offense charged in this information is not the offense for which the defendant was examined, neither is it an offense included therein, and consequently not one upon which the district attorney was justified in filing an information based upon data found in the evidence taken upon the preliminary examination of the defendant. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: PATERSON, J.; HARRISON, J.

(103 Cal. 357)

DULIN v. PACIFIC WOOD & COAL CO. et al. (No. 19,251.)[1]

(Supreme Court of California. Feb. 27, 1894.)

CORPORATIONS—AGREEMENT AMONG STOCKHOLDERS—ENFORCEMENT.

Since Civ. Code, §§ 307, 312, provide that in a corporation election every stockholder must vote his shares in person, or by proxy, in writing, a president of a corporation cannot enforce a verbal agreement by the other stockholders that he shall continue as president for two years longer, the agreement providing no way for its accomplishment.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county, W. L. Pierce, Judge.

Action by E. G. Dulin against the Pacific Wood & Coal Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

D. L. Withington and Works & Works, for appellants. V. E. Shaw and Conklin & Hughes, for respondent.

HAYNES, C. Plaintiff had judgment, and the defendants appeal therefrom upon the judgment roll. This proceeding was brought under section 315 of the Civil Code, to set aside the election of B. D. Clugston, one of the defendants, as a director of the defendant corporation, and to confirm the election of plaintiff as such director. Clugston answered, and also filed a cross complaint, to which plaintiff filed an answer. The findings cover eight or nine pages of the transcript, but may be summarized as follows: The Pacific Wood & Coal Company is a corporation, having a capital stock of $10,000, divided into 100 shares, of $100 each. G. A. Garretson and the members of his family owned 69 shares of said stock, all of which he controlled. Defendant B. D. Clugston owned 25 shares, J. S. Akerman 4 shares, and plaintiff 2 shares. That on June 17, 1892, defendant B. D. Clugston agreed verbally with G. A. Garretson to purchase the 69 shares owned and controlled by him, and to pay therefor $140 per share, which agreement, if carried out, would have given Clugston all of the stock except 6 shares. That on the following day, and before this sale was consummated, a verbal agreement was made between the defendant Clugston, George G. Garretson, the son of G. A. Garretson, J. S. Akerman, and the plaintiff, with the consent of all the stockholders of the corporation, that defendant Clugston should retain 21 shares of the stock agreed to be purchased, making him the owner of 46 shares; that George G. Garretson and the plaintiff should each take and pay for enough of said stock to give each 25 shares; and that Akerman should retain the 4 shares then owned by him. It was further agreed that defendant Clugston should lend to George Garretson $2,400, to be used to pay in part for his stock, to secure which loan he gave his note, and pledged 10 shares of his stock; and it was also agreed that the corporation should mortgage its property, and thereby raise the sum of $4,000, for the benefit of George G. Garretson and the plaintiff, to be used to pay for the stock purchased by them,—$2,000 to each,—and for which they gave their several notes. The defendant Clugston agreed to this division of the stock, loaned the $2,400 to George G. Garretson, and consented to the mortgaging of the property of the corporation, upon the verbal agreement of all the stockholders that defendant Clugston was to be president of the company for two years, at the expiration of which time the mortgage notes were to become due, and to receive a salary of $125 per month while he retained an interest in the corporation, the plaintiff to be treasurer at the same salary, and that Akerman should use his four shares to protect defendant Clugston; and on the same day the notes were executed, the stock delivered, and the salaries fixed as above stated, defendant Clugston being then president. The election for directors here in question was held on November 17, 1892. Prior to this election, B. D. Clugston transferred to his daughter, L. Clugston, and to James Wells, each, one share of his stock The board consisted of 5 directors, and 6 candidates were nominated, viz. the plaintiff, Dulin, the defendant B. D. Clugston, L. Clugston, Wells, Akerman, and Garretson. The plaintiff cumulated his votes for 3 candidates, viz. Akerman, Dulin, and Garretson, giving each 41⅔ votes. Garretson cumulated his votes for the same candidates, giving each 41⅔ votes. Akerman voted his 4 shares for 5 candidates, the 3 above named and Wells and L. Clugston, giving each 4 votes. Wells voted his 1 share cumulated for 3 candidates, viz. B. D. Clugston, L. Clugston, and himself, giving each 1⅔ votes. L. Clugston voted her share for the same candidates, and gave each 1⅔ votes. B. D. Clugston's 44 shares were cumulated, and gave himself 73½, to L. Clugston 73½, and to Wells 73 votes. If these votes had been counted as cast, Dulin, Akerman and Garretson would each have had 87⅓ votes, B. D. Clugston 76 5-6 votes, L. Clugston 80 5-6, and Wells 80⅔ votes. The defendant B. D. Clugston, the president of the corporation, presided at the election, and L. Clugston was appointed teller. The president objected to counting the 10 shares belonging to Garretson, which were pledged to him. These 10 shares, cumulated, gave 50 votes, and were tendered in equal proportions to the 3 candidates Dulin, Akerman, and Garretson, amounting to 16⅔ votes each, and, if thrown out as cast, would have left these 3 candidates each 70⅔ votes, and the result would have been the election of B. D. Clugston, L. Clugston, and James Wells, and the remaining 3 candidates tied. But, in counting the votes, the 50 votes, being the cumulation of the 10 shares of Garretson's stock pledged to B. D. Clugston, were not counted; 8⅓ votes thereof being deducted from Akerman, and 41⅔ from Dulin, thus defeating Dulin, and electing Akerman and Garretson. Clugston, the pledgee of said 10 shares, did not claim the right to vote them, nor is it claimed or found that Garretson had agreed in any manner not to vote them; and if counted as they were cast, it is found by the court, Dulin would have been elected, and Clugston defeated. The cross petition of B. D. Clugston, however, sets up the verbal agreement hereinbefore stated, to the effect that Clugston should be president for two years, and should receive a salary of $125 per month so long as he should retain an interest in the corporation, and that but for this agreement he would not have consented to part with a controlling interest in the stock, nor to the mortgage upon the company's property to aid Dulin and Garretson to purchase their stock, nor have loaned Garretson the $2,400, and charges a conspiracy to defeat his election, and prays that it be adjudged and decreed that he and the said L. Clugston, James Wells, George G. Garretson, and J. S. Akerman were duly elected directors, and that he is entitled to be elected president. The court also found that said agreement was not reduced to writing; that it was material, important, and necessary to the protection of Clugston's interests; but that neither Dulin, Garretson, nor Akerman at any time agreed in express terms to elect Clugston as a director. As conclusions of law, the court found that said agreement was void, because not to be performed within a year, and not in writing, and that the votes cast for the plaintiff, including the 10 shares of pledged stock, should have been counted, and that Dulin was duly elected a director. No different conclusion of law could possibly be reached, unless the verbal agreement found by the court to have been made can be specifically enforced, and this cannot be done.

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[1] Rehearing granted.

The Code provides how elections shall be held; declares that every stockholder shall have the right to vote in person or by proxy "the number of shares standing in his name;" that votes may be cumulated, and given to one or more or all the candidates, not exceeding the number to be elected, and the candidates receiving the highest number of votes shall be declared elected; and these votes must be cast by the owner of the shares in person, or by proxy, in writing, and only a member of the corporation can be a proxy. Civ. Code, §§ 307, 308, 312. No proxy was given to the appellant to vote any of the stock held by Dulin, Garretson, or Akerman, nor was any required by the agreement to be given. The agreement provided no means for the accomplishment of the end or purpose to be accomplished. It does not seem to be questioned that Dulin and those co-operating with him had the right to vote their stock, but only that it should have been so voted as to elect appellant. But appellant had in his own hands enough stock to have elected himself and one other director, in the face of any combination that could have been made; and the court has no power to relieve him from his own error, or do that for him which he had the power to do for himself. If the objects sought to be accomplished by the agreement were lawful and proper,—a point not considered,—no means being provided for its accomplishment, the specific performance of it cannot be enforced. No legal obligation rested upon plaintiff to cast his vote for appellant, and, appellant having been defeated, the court cannot declare him elected; nor are the circumstances such as to justify the ordering of a new election. Section 315, Civ. Code, provides that the court may "confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice." It is true, as contended by appellant, that the power given the court by this section is an equitable one; but it is obvious that, if the plaintiff was legally elected, the court can only affirm his election; and if appellant was defeated through his effort to elect his daughter and Wells, as well as himself, the court cannot declare him elected; and, if not elected, neither the board that was elected, nor the court, can make him president, since only a director is eligible to the office of president. But appellant suggests that the purpose of the agreement might have been consummated by waiving an election, and thus continuing the old board of directors with its officers. But that was not done, nor agreed to be done. The election was held without objection, and appellant freely participated, and undertook to carry out the agreement by and through such election, and must be held bound by its results, unless he can show that the election was illegal. The legal right of a stockholder to vote his stock as he pleases cannot be questioned, but he may confer upon another stockholder the right to vote his stock by giving a written proxy for that purpose; but the court cannot compel him to do so, in the absence of an agreement upon or for a valuable consideration that he would give such proxy. But the agreement was one absolutely incapable of enforcement, otherwise than by abstaining from an election, since any board that could be elected must be at liberty to choose its president, and its choice cannot be controlled by the court. It is conceded by counsel for appellant that a director cannot obligate himself to vote in a certain way, and, this being so, the courts must be powerless to direct his vote; nor can we see any ground upon which the holding of an election could be enjoined, even if it had been agreed that none should be held, and, if it could not be enjoined, it cannot be vacated. But counsel say that "this is not an action to enforce the performance of a contract; that it is an effort to uphold an election against the attacks of respondent." But, as we have seen, the result of the election, as declared by appellant, was by the arbitrary exclusion of votes legally cast; and, if it is not an action to enforce the performance of a contract, the allegation of the agreement in the cross complaint and the finding of the fact are wholly immaterial. That appellant loaned $2,400 to Garretson upon his promissory note, secured by a pledge of stock of that value, and that a mortgage was given by the corporation to aid him and respondent in the purchase of their stock, are not made the grounds of complaint because of any insufficiency of the security, but seem to be stated as constituting a consideration for the agreement. The stock sold, however, was not that of appellant. He parted with no stock. He simply took less than he intended to buy, and let the remainder be sold to plaintiff and Garretson. Whether, under these circumstances, there was any valuable consideration for the agreement, such as is necessary to authorize a specific performance, may well be questioned.

The question as to the statute of frauds is unimportant. As we have seen, appellant could not control respondent's stock, or any not owned by himself, otherwise than by a written proxy, (unless transferred to him upon the books,) and this by force of the statute regulating elections by corporations. The alleged performance of the agreement by appellant could not give him the control of stock not held by him, nor authorize him to reject votes based upon it, whether the contract was one that might be wholly performed within a year or not. The court found that the performance of this agreement was necessary for the protection of appellant, but no facts are alleged from which such conclusion could be drawn, unless it be the loss of $125 per month, which seems not to have been based upon services to be rendered, but which was to continue as long as he retained an interest in the corporation. Such agreement is void. It may be that appellant will suffer wrong and injustice, but the mere apprehension of it will not justify the court in granting the relief here demanded, or any other relief under the facts now existing. We cannot assume that plaintiff, and those acting with him upon the board, will not properly conduct the business of the corporation, or injuriously affect the interests of appellant as a stockholder. When they do so, or threaten to do so, a court of equity will hear his complaint. I think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

DE HAVEN, J. I concur in the judgment.

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4 Cal. Unrep. 502

DIXON v. PLUNS. (No. 14,429.)

(Supreme Court of California. March 2, 1894.)

COSTS—ON APPEAL—REVERSAL IN PART.

On appeal from a judgment and order denying a new trial, where the court orders the submission set aside as to the appeal from the judgment, and the hearing thereon continued until further orders, but on the other appeal reverses the order denying new trial, appellant is entitled to his costs.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Katie E. Dixon against William J. F. W. Pluns for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed. See 31 Pac. 931; 33 Pac. 268. On motion to amend remittitur. Denied.

H. C. Firebaugh, for appellant. Nagle & Nagle, for respondent.

PER CURIAM. The appeal in this case was taken from the judgment and order denying a motion for a new trial. After the case was submitted for decision, the court ordered the submission set aside as to the appeal from the judgment, and continued the hearing thereon until the further order of the court. The appeal from the order denying a motion for a new trial was successful, and that order was reversed, with certain directions to the trial court. The remittitur issued upon the judgment of reversal allowed costs of appeal to appellant. A motion is now made to recall the remittitur, and amend or modify the same by striking out that portion giving appellant his costs on appeal. The motion is denied. The order denying the motion for a new trial being reversed, the appellant is entitled to his costs on appeal, under rule 23 of this court.

101 Cal. 483

ANAHEIM UNION WATER CO. et al. v. PARKER et al. (No. 19,247.)

(Supreme Court of California. March 1, 1894.)

Action on Bond—Default by Corporate Officer—Extent of Liability — Evidence — Release of Sureties.

1. The sureties on an official bond are not liable for defaults committed by the principal before the execution of the bond, if this latter is not retrospective in its provisions.

2. A corporation cannot, as against the sureties on the bond of an officer thereof, apply payments made by the officer to the corporation, after the date of the bond, upon his indebtedness to the corporation prior thereto.

3. In an action on the bond of a corporate officer, required by the by-laws to turn in money as soon as collected by him, where it appears that he failed to turn in money collected six months before the execution of the bond, it is a question for the jury whether his default as to that amount did not occur before such execution.

4. Where, in an action on the bond of plaintiff's secretary, the complaint charged that he had a certain sum of money belonging to plaintiff, February 16, 1889, and thereafter, and before September 1, 1889, received from plaintiff certain other sums, of which he paid over a part, leaving due a certain balance on the date last named, evidence as to amounts received and paid in by him after that date were inadmissible.

5. The failure of the officers of plaintiff company to tell defendant sureties that the secretary had failed to pay over funds, though known to them, did not release them from liability on the bond, there being no actual intent to conceal or culpable negligence on their part.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the Anaheim Union Water Company and others against one Parker and others. From a judgment for plaintiffs, defendants appeal. Reversed.

W. T. Kendrick and Victor Montgomery, for appellants. Richard Melrose and Edwin A. Meserve, for respondents.

PATERSON, J. It would be necessary, if we were to state the facts upon which all the points made by appellants are based, practically to copy the statement on motion for a new trial, as there are 92 assignments of error and specifications of insufficiency of the evidence, based upon 65 pages of the record. With the exception of those hereinafter referred to, they are entirely without merit, although sufficiently plausible, as they are stated, to entail upon the court a great deal of unnecessary labor in passing upon them. Briefly stated, this is the case: The defendant Gardiner was secretary of the plaintiff (a corporation) from January 1, 1887, until February, 1891. On the 15th day of February, 1889, the defendants Kraemer and Parker as sureties, and Gardiner as principal, executed and delivered to plaintiff a bond for $1,000, conditioned as follows: "Whereas, the above-bound principal, J. S. Gardiner, was, at a meeting of the board of directors of the Anaheim Union Water Company, a corporation, held on the 2d day of February, 1889, duly elected to the office of secretary of said corporation, now, therefore, the condition of this obligation is such that if the said J. S. Gardiner shall well and faithfully perform all official duties now required of him by the by-laws of such corporation, and shall well and faithfully execute and perform all the duties of such office of secretary, as required by any law to be enacted by such corporation or its board of directors subsequently to the execution of this bond, then this obligation is to be void," etc. It is claimed by the plaintiff that, when this bond was executed, Gardiner held, of the moneys he had collected for the company, the sum of $880.37; that between the date of the execution of the bond and September 1, 1889, he held moneys of the plaintiff amounting to $16,073.52, including said $880.37; and that he paid in, during that period, $14,982.91, leaving a balance due the corporation of $1,091.61. Of this amount there is evidence tending to show that $1,000 was collected by Gardiner in August, 1889, on a note for that amount executed to one Beockman, but no record of the transaction appears in the books, except the order of the board authorizing the issuance of the note. Plaintiff recovered judgment in the court below against the sureties for $1,000 and costs of suit, and from that judgment, and an order denying their motion for a new trial, defendants have appealed.

The court gave to the jury the following instruction: "If you find from the evidence that defendant J. S. Gardiner, on the 16th day of February, 1889, had, or should have had, in his hands as secretary of plaintiff, any moneys of plaintiff, and that the subsequent deposits and payments made by him to plaintiff and the treasurer of plaintiff between said date and the 1st day of September, 1889, (not applied to the payment of other accounts, balances, and receipts,) equaled such amount so found in his hands on said date, then, and in that event, the court instructs you to add the amounts found in his hands February 16, 1889, to the amounts received by him as secretary of plaintiff between said 16th day of February, 1889, and September 1, 1889, and deduct from this total amount the amount of payments made by him to the plaintiff and plaintiff's treasurer, as shown by the evidence. The balance, if any, would be the balance in the hands of said Gardiner as secretary of plaintiff, and would be the amount owing by him to plaintiff on said date, and for which balance of said amount, the court instructs you, you will render a verdict for the plaintiff, unless you also find that the sum has been subsequently paid." This instruction was erroneous. It declared to the jury that the sureties were liable for all moneys collected by Gardiner, and not turned over to the company, prior to February 16, 1889, and assumes that he was not a defaulter in any sum prior to the time of the execution of the bond in suit. In this assumption the learned judge usurped the functions of the jury. It was for the latter to determine, upon all the circumstances of the case, whether Gardiner was a defaulter at the time the bond was executed; and, if he was, the sureties therein were not liable for his dereliction. Where a second bond is executed, the sureties are not liable for money converted by the officer prior to its execution, and the plaintiffs are bound to show a conversion after the execution of the bond sued upon. Williams v. State, 89 Ind. 570; Governor v. Robbins, 7 Ala. 82; Thompson v. Dickerson, 22 Iowa, 360. In the last case cited the court said: "This bond was not retrospective in its terms, and in such a case there can be no ground for claiming that it covered past delinquencies. * * * The money, as far as shown, was not, at the time, in fact in the principal's hands; and measuring the sureties' liability, as we are bound to do, by strict law, we cannot extend or alter the terms of their undertaking so as to cover past delinquencies." In Inhabitants of Rochester v. Randall, 105 Mass. 295, the court said: "The cause of action against him arose in 1862, when he rendered his account. * * * We cannot regard the defendants' bond as applying to it. * * * In Myers v. U. S., 1 McLean, 493, Fed. Cas. No. 9,996, it is said that it would be doing great injustice to a surety to hold him responsible for a default consummated before he became bound; and in Farrar v. U. S., 5 Pet. 373, it is said that the bond should be made retrospective in its language, if it is intended to cover past derelictions; and all the cases cited for the defendants sustain similar views." See, also, Potter v. Trustees, 11 Ill. App. 280; School Dist. v. McDonald, 39 Iowa, 564. In Board of Education v. Fonda, 77 N. Y. 358, the court said: "For any sum paid to a principal before the execution of a bond for official good conduct, there is but one ground on which the sureties can be held to answer, and that is that the principal still held the money in bank or otherwise. If still in his hands, he was, up to that time, bailee to the public; but, if he had become a debtor or defaulter thereto, his offense was already consummated." Farrar v. U. S., 5 Pet. 373. It was said there that, if it was meant to cover past deeds, the bond should have been made retrospective, and that the sureties had not undertaken against his past misconduct. In Vivian v. Otis, 24 Wis. 520, the court said: "For any moneys paid Otis prior to the execution of this bond, and in his hands at the commencement of the second term, the sureties therein became answerable to the county; but, if he had already appropriated to his own use any of those moneys, he had been guilty of a breach of duty; it was a past delinquency or default, for which they never became responsible. How does the fact that Otis was his own successor change the principle of law, or enlarge the liability of the sureties on the second bond? They did not undertake to make good any money which he had already misappropriated." In Buffalo Co. v. Van Sickle, 16 Neb. 363, 20 N. W. 261, the court said: "It is nowhere stated in the petition that the state treasurer, at any time during his said term covered by the bond sued on, had a dollar of the county money in his hands. * * * As I understand it, when it is sought to hold either securities or principal for moneys which the principal made default of within a certain term, although he may have made a report or an official statement which may estop him, either alone or with his sureties, to deny that he was chargeable with the moneys, it must be charged in the pleading directly, as a fact, that he had the money. Clearly, this must be so upon the theory of the above case, because we held that the sureties might deny that their principal had the money at the commencement of the term for which they were security, and that their liability would turn upon the proof of that fact, not upon the fact of their principal having stated, in a report or statement, that he had such an amount of the county's money in his hands; and, if it may be denied, and must be proved to enable the plaintiff to recover, it follows logically that it constitutes the material part of the cause of action to be alleged in the petition." In Paw Paw v. Eggleston, 25 Mich. 39, the court said: "Neither the principles involved in this case nor their proper application are in any way affected by the fact that the treasurer for the second year happened to be the same person who had held the office the year before." It will be found that there is not an entire agreement in the decided cases respecting the liabilities of sureties on second bonds; but the rule stated is deduced from the weight of authority, and is the more rational one.

It is claimed by respondents that it was shown conclusively that, the day after the giving of the bond, Gardiner had in his hands $880.37 belonging to the company; that thereafter $1,000 was paid to him for the company, the receipt of which is not shown on the books; that between February 15, 1889, and September 1, 1889, Gardiner frequently paid into the treasury of the company large sums of money, which must have been collected by him a long time prior thereto, and which was properly applied in payment of the first or oldest debt. It is true the record shows that Gardiner paid to the treasurer $718.78 more than he had received subsequent to February 16, and prior to September 1, 1889, so far as the books showed, but there is nothing to show the source from which these moneys were received. If they were, in fact, moneys collected by him prior to the execution of the bond, as claimed by the respondent, they would, to the extent stated,—$718.78,—have gone to pay off the prior indebtedness; and the same is true if they were taken from the private funds of Gardiner. This, however, would not cure the error of the instruction, which covers the whole amount of the defalcation. If the money referred to was actually collected subsequent to February 16, 1889, we cannot agree with respondent in his contention that the company, at least in the absence of direct instructions from the secretary to apply it to the prior indebtedness, could so appropriate the money, and render the defendant liable for the delinquency. The court, in allowing this, would be robbing Peter to pay Paul. In Porter v. Stanley, 47 Me. 515, it appeared that Stanley was collector of taxes for the years 1854, 1855, and 1856, and gave bonds with different sureties. As collector for the year 1854 he received moneys, and omitted to pay a portion of the same into the treasury. The selectmen appropriated, from moneys received on the assessments for the years 1855 and 1856, sufficient to balance the deficiency for the year 1854, without the request of Stanley, who nevertheless consented thereto. The court said: "The appropriations so made were manifestly inequitable, as respects the sureties, and, by the authorities cited for the plaintiffs, cannot be upheld. It is said in the opinion of the court in the case of U. S. v. January, 7 Cranch, 572: 'It will be generally admitted that moneys arising, due, and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond.'" See, also, Rogers v. State, 99 Ind. 224; Bryant v. Owen, 1 Kelly, 355. In Phipsburg v. Dickinson, 78 Me. 459, 7 Atl. 9, it was claimed that, it appearing that the collector had paid over, during the three years, more than he had collected on the assessment for the first year, the law presumes, in the absence of proof, that he performed his legal duty, and paid over all that he collected for that year. The court said: "But the legal presumption is just as strong as to each of the other years, and, as he could not legally appropriate, as against his sureties, what he received on one assessment in payment of what he received on another, the law will not apply the payments to the oldest debt." Speaking of presumptions in the absence of proof, the supreme court of Illinois, in Trustees v. Smith, 88 Ill. 185, said: "It is insisted that it is the presumption that the amount was then on hand at the expiration of the first term. We do not admit that. The defalcation is established, but the time at which it occurred—whether during the first term or subsequent to the reappointment—does not appear; and we do not see why it may not as well be presumed that the treasurer misappropriated the money during the time of his first term of office as during the time which elapsed after his reappointment." The question as to when the defalcation occurred is one of fact, to be determined by the jury upon all the circumstances of the case. In Bockenstedt v. Perkins, 73 Iowa, 25, 34 N. W. 488, the court held that evidence that a guardian had received money only six days previous to the giving of the bond was admissible, as tending to show, or raise a presumption, that he had it when the bond was executed. In the case at bar there is evidence tending to show that the $880.37 referred to was collected at least six months prior to the time of the execution of the bond. The by-laws required the secretary of the company to "keep an accurate record of the proceedings of such meetings, * * * receive and collect all moneys due or payable to the company, and pay the same to the treasurer forthwith, taking his receipt therefor." The jury might fairly have inferred, from this and all the circumstances, that he had converted the money to his own use prior to the giving of the bond; at least, we cannot say there is no evidence to induce such a conclusion. Cases cited in which the delinquent officers were public officials, and entitled to retain the moneys collected until the end of the term, are not in point. Here it was the duty of the secretary to turn the money over to the treasurer immediately, or within a reasonable time, at least, after he received it. The provision requiring the secretary to turn over the money forthwith was not an idle one, and the sureties had the right to assume that the board would enforce it. If it had been faithfully observed, the question in this case would never have arisen. In Street v. Laurens, 5 Rich. Eq. 251, the court said: "But admitting the construction of the decree of 1836 contended for on behalf of the appellants, and that the master was not ordered to invest this fund by that decree, this court is of the opinion that the master committed a default in not depositing the fund in bank, as required by the act of 1840; and, this default having been committed during those official terms for which Mrs. Laurens was his surety, she becomes, on that account, liable." We do not deem it necessary to indorse this proposition to the extent stated. A failure to pay over money to the treasurer forthwith, or at any other specific time, may be merely a breach of duty, not amounting to a default; but it is certainly an important element, in determining whether there has been a default, that there has been a long delay unaccounted for in the payment of the money, in violation of some statutory provision or by-law.

It is claimed by the appellants that the evidence does not support the verdict, and, as we understand the testimony of the experts and that of the plaintiff's treasurer, the secretary actually turned over to the plaintiff all of the moneys collected by him except $91.61. Assuming that he had in his hands, at the time of the execution of the bond, $880.37, he collected altogether "$15,073.52, and turned over $14.982.91, as shown by the books. This would leave a balance of $90.61, as stated before. But it is claimed that, as there is no record in the books of the Beockman check for $1,000, it is apparent that he failed to turn over $1,091.61. It is the fact, however, and not the condition of the books, which fixes the liability of these defendants. It is in evidence and undisputed, as we understand the record, that the check of Beockman was paid by the Bank of Anaheim, and credited to the account of the plaintiff. There is nothing to show that the secretary ever drew the money out. The $1,000 may still be on deposit in the bank. There is nothing to show the condition of the plaintiff's account at the bank. Furthermore, the secretary himself testified that, of the $1,152.40 receipted for by him on August 10, 1889, this identical $1,000 was a part. The defendants introduced a deposit tag for money deposited in the Bank of Anaheim, "by the Anaheim Union Water Company, per J. S. Gardiner, secretary, August 7, 1889," $1,000; and it was stipulated by counsel "that said tag was the original, showing the deposit of the Beockman check." Thereafter the treasurer was called in rebuttal, and testified, when shown said tag and his receipt for $1,152.40, of August 10th, that the $1,000 mentioned in the tag "was a portion of that receipt," and stated that, at the time the receipt was given, Dr. Gardiner handed him a piece of brown paper containing memoranda showing the several items which went to make up the $1,152.40 mentioned in the receipt. The court erred in admitting testimony as to the amounts actually received and paid in by Gardiner between September 1 and October 5, 1889. The complaint charges that the defendant Gardiner, as secretary, had in his hands $880.37 on the 16th day of February, 1889, the property of the plaintiff, and subsequently thereto, and prior to the 1st day of September, collected and received for plaintiff the sum of $15,193.15, aggregating the sum of $16,073.52, of which sum so received by him prior to said 1st day of September he turned over to plaintiff the total sum of $14,982.91, leaving a balance, on said 1st day of September, of $1,091.61. The inquiry, therefore, should have been confined to the period stated. The entries in the books made subsequent to September 1st might have been admissible in evidence to show how much was collected between the dates named, because the testimony shows that entries were made six months after the transactions; that the books did not balance; that the records were kept on loose papers, one entry of $14,000 having been made on the back of a photograph; and one of the witnesses testified that no one could tell from the books how much was received subsequent to February 16, 1889, and that the correct balance might be $1, or it might be $10,000. The records being in this condition, as stated before, the books may have been admissible as evidence of what had been collected prior to September 1st, but they were not admissible to show what was collected subsequently to that date.

We see no merit in any other exception. The exception to the refusal of the court to give instruction No. 11, which is the only one other than the one above referred to worthy of notice, is not well taken. The officers of the company may have had "reason to know and believe that the said Gardiner had failed in his duty to pay, in that he had failed to pay over the said sum to the treasurer of said company," and failed to communicate the fact to the sureties, yet, unless there was fraud,—an actual intent to conceal, or culpable negligence,—the sureties would not be released from their liability. Assurance Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; Bostwick v. Van Voorhis, 91 N. Y. 357; Roper v. Trustees, 91 Ill. 519; Insurance Co. v. Mabbett, 18 Wis. 667; Railroad Co. v. Gow, 59 Ga. 694. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

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101 Cal. 500

CHAPIN et al. v. BROWN. (No. 18,147.)

(Supreme Court of California. March 1, 1894.)

NOVATION—PARTNERSHIP—EVIDENCE TO ESTABLISH—ACCOUNTING—PARTIES.

1. The fact that a firm, which had contracted with one of its members to deliver him lumber, continued to deliver after such member had assigned part of his interest in the contract, does not show that the firm consented to accept the assignee for part of the assignor's obligation.

2. In an accounting on a contract between a firm and one of its members, one to whom such member had assigned part of his interest in the contract without the consent of the firm is not a necessary party.

3. Evidence that four persons associated themselves together to divide the profits arising from the carrying on of a certain business is sufficient to support a finding of a partnership between them.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. E. Chapin and others against Albert Brown to dissolve a copartnership, and to compel an accounting between its members. From a judgment rendered, and from an order denying his motion for a new trial, defendant appeals. Reversed.

R. P. Davidson, for appellant. J. R. Webb and L. L. Cory, for respondents.

PER CURIAM. On August 15, 1887, the plaintiffs and the defendant were copartners, doing business in the firm name of Sugar

Pine Mill & Lumber Company. Their business was that of manufacturing and selling lumber. They owned 160 acres of timber land, upon or near which they had built a sawmill. On August 15, 1887, a written contract between the copartnership and two of its individual members, namely, Chapin and the defendant, Brown, was executed, by which the copartnership agreed to sell to Chapin and Brown, and the latter agreed to purchase, all the lumber to be sawed from the timber then standing or fallen on the said 160 acres of land, "or that may be sawed in the mill of the said parties of the first part [the copartnership] from other claims before finishing sawing the timber from the above-described claim," (the 160 acres,) at the price of $9 per thousand feet, to be delivered in the mill yard. The parties of the first part further agreed that after the year 1887 they would deliver, as aforesaid, "an annual amount of one million feet or more, at the option of the said second parties." The agreement contains other stipulations not relevant to the issues in this case. On the same day (August 15, 1887) another agreement was executed between the copartnership and two others of its members, namely, T. E. Peckinpagh and Charles Peckinpagh, by which the latter agreed to cut, haul, and saw into lumber all the timber on said 160 acres of land, and to stack the lumber in said mill yard, for which they were to be paid $6 per thousand feet. As to the amount of lumber to be sawed they agreed to be governed by the above-mentioned contract with Chapin and Brown. For the purpose of performing this contract, they were to have the use of said mill, but were to keep it in repair. This contract also contains matters not material to this case. Chapin and Brown assumed to constitute a distinct copartnership, under the firm name of North Fork Lumber Company, and transacted the business under their contract with the Sugar Pine Mill & Lumber Company in that name; but at some time prior to January 1, 1888, Chapin assigned his interest in their contract with the Sugar Pine Mill & Lumber Company to Brown, who agreed with him to perform all its obligations, and withdrew from the North Fork Lumber Company. Brown continued the business under the contract, in the name of North Fork Lumber Company, until January, 1888, when he assigned an interest in the contract to John Bartram, and on May 1, 1888, assigned another interest to B. F. Ellis. After these assignments, Brown, Bartram, and Ellis constituted the North Fork Lumber Company, and conducted the business with the Sugar Pine Mill & Lumber Company under the lumber contract in that name. In the fall of 1888, T. E. and Charles Peckinpagh assigned their contract with the Sugar Pine Mill & Lumber Company, of August 15, 1887, (above set out,) to the North Fork Lumber Company. By the performance of this contract on the part of the Peckinpaghs, the North Fork Lumber Company became entitled to receive from the Sugar Pine Mill & Lumber Company $6 per thousand feet for manufacturing the lumber which they were to purchase from the latter company at the price of $9 per thousand. From and after this assignment by the Peckinpaghs, Charles Peckinpagh was employed by the North Fork Lumber Company, at a salary, to do the sawing, and he continued in that position during the years 1890 and 1891. The object of this action is to dissolve the Sugar Pine Mill & Lumber Company, to compel an accounting between its members, and especially between the copartnership and the defendant, who, it is alleged, owes the concern a balance of $3,090 for lumber delivered to the North Fork Lumber Company during the year 1890, under the contract first above mentioned, called the "purchasing contract." The court found him to be individually responsible on that contract, and that he was indebted on that account to the other members of the company as follows: To Charles Peckinpagh, $427.45; to T. E. Peckinpagh, $471.85; to J. E. Chapin, $483.80,—amounting to $1,383.18; and consequently that he was indebted to the copartnership (of which he was an equal member) in the sum of $1,844.14. The judgment was in accordance with this finding. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. The appellant contends that there was a novation of the purchasing contract by which the assignees of portions thereof were substituted for the original contractors (Brown and Chapin) by consent of the Sugar Pine Mill & Lumber Company, and therefore that appellant is not individually liable, as found by the court. It is not claimed, however, that there was any evidence of such novation, or consent thereto, by the Sugar Pine Mill & Lumber Company, other than the facts that the lumber was delivered to and paid for (so far as payments were made) by the North Fork Lumber Company, as constituted at the time of such delivery and payments. Brown never assigned all his interest in the purchasing contract, but remained a member of the North Fork Lumber Company during all its transactions with the Sugar Pine Mill & Lumber Company. Nor is there any evidence that the latter company ever agreed or consented to discharge him or Chapin from their obligation on that contract, or to accept Bartram or Ellis in their stead for any part of such obligation. No objection on the ground of misjoinder or nonjoinder of parties to the action was made by demurrer or answer, or otherwise, in the court below, nor is any point made here on this ground. All the parties to the purchasing contract, and all the members of the Sugar Pine Mill & Lumber Company, were before the court, and, as there is no novation of that contract, neither Bartram nor Ellis was a necessary party to the accounting. The state of ac-

counts between the members of the North Fork Lumber Company is immaterial for any purpose of this action.

2. The only other point requiring special consideration arises on the following additional facts: During the year 1890, while Charles Peckinpagh was doing the sawing for the North Fork Lumber Company, as aforesaid, he and a Mrs. Bearden sold and delivered to the North Fork Lumber Company a lot of logs cut from other lands than the 160 acres belonging to the Sugar Pine Mill & Lumber Company, and to which the latter company held no title. These logs were sawed by Charles Peckinpagh during 1890, while employed by the North Fork Lumber Company, as aforesaid, and produced 683,923 feet of lumber, which was in the mill yard, and thence removed by the North Fork Lumber Company. The evidence tends to prove that these logs were sawed with the knowledge and consent of the plaintiffs, and with an understanding between plaintiffs and the North Fork Lumber Company that the latter were to pay the former, for the use of their mill in sawing those logs, only 50 cents per thousand. C. M. Peckinpagh testified that he and Mrs. Bearden sold those logs to the North Fork Lumber Company; that he, as an employe of the North Fork Lumber Company, sawed them; that he had a conversation with the North Fork Lumber Company with reference to the use of the mill to saw those logs; that he came to an understanding with them as to the price,—50 cents per thousand, —which was his own proposal, and that he considered 50 cents per thousand a fair price for the use of the mill. Chapin testified that he knew the North Fork Lumber Company were sawing the Bearden logs during the summer of 1890, and made no objection to their sawing those outside logs; and there is no evidence tending to prove that T. E. Peckinpagh did not know and acquiesce in that understanding between his brother and the North Fork Lumber Company, nor any evidence that the use of the mill in sawing those logs was worth more than 50 cents per thousand. Yet it appears that a considerable portion, if not all, of the lumber manufactured from those logs, must have entered into the estimate of the 1,030,000 feet alleged and found to have been sold and delivered to defendant under the purchasing contract of August 15, 1887, and charged to defendant at the rate of $3 per thousand, after deducting $6 per thousand for the sawing which was done by the North Fork Lumber Company. The appellant contends that the lumber produced from those logs purchased by the North Fork Lumber Company from the plaintiff Peckinpagh never was the property of the Sugar Pine Mill & Lumber Company, and therefore could not have been delivered as such to the defendant or the North Fork Lumber Company under the contract of August 15, 1887; and that the Sugar Pine Mill & Lumber Company were entitled to charge only for the use of the mill in sawing the logs so purchased by the North Fork Lumber Company at the rate of 50 cents per thousand, and not $3 per thousand, as per contract of 1887; and in this contention we think the appellant is clearly right.

It was stipulated at the trial that a certain written statement of the accounts between the Sugar Pine Mill & Lumber Company and the North Fork Lumber Company for the years 1890 and 1891 is correct. This account shows the amount of lumber sawed from the logs purchased by the North Fork Lumber Company during the year 1890 to have been 683,923 feet, and that the amount sawed from logs furnished by the Sugar Pine Mill & Lumber Company during 1890 and 1891 was only 735,121 feet, and also shows the amount of money paid by the North Fork Lumber Company to the Sugar Pine Mill & Lumber Company during those two years. The use of the mill in sawing the logs purchased by the North Fork Lumber Company would amount to nearly $342, and the lumber sawed from logs furnished by the Sugar Pine Mill & Lumber Company, at $3 per thousand, would amount to about $2,205.35; so that the whole amount properly chargeable to the North Fork Lumber Company would appear to be $2,547.35, to one-fourth part of which the defendant is entitled as the owner of one-fourth interest in the Sugar Pine Mill & Lumber Company, deducting which, the other partners (the plaintiffs) would be entitled to recover from defendant only $1,190.52. But said statement of accounts shows that during the years 1890 and 1891 the North Fork Lumber Company paid to the plaintiffs $1,313.63, leaving, according to the above calculation, a balance of only $596.89 due them; yet the judgment in their favor against the defendant is for $1,383.18. The statement of accounts, however, contains an interest account not carried into the above, which may change the result in favor of the plaintiffs, perhaps, to the extent of $50. Although it is stipulated that said statement is correct, yet it is not in a perspicuous form, and may not lead to a correct conclusion; but it is quite explicit as to the amount of lumber sawed in 1890 and 1891, and states the whole amount sawed in those two years to have been 1,419,044 feet, of which 683,923 feet were sawed from the logs purchased by the North Fork Lumber Company; and the testimony of the Peckinpaghs is that those logs were sawed in 1890, in which year the court finds that the Sugar Pine Mill & Lumber Company sold and delivered to defendant 1,030,000 feet of lumber "in accordance with and by virtue of said contract," (of August, 1887,) and that, during the year 1891, it sold and delivered to defendant, under said contract, 389,044 feet; thus finding that all the lumber manufactured at the mill during 1890 and 1891, (1,419,044 feet,) including that sawed from the logs of the North Fork Lumber Company, was sold and delivered to defendant under said contract of August 15, 1887, at $9 per thousand, but crediting the North Fork Lumber Company $6 per thousand for cutting the logs and sawing them under the Peckinpagh contract, which had been assigned to the North Fork Lumber Company. It therefore appears, from the stipulated statement of accounts and findings of the court, that the defendant was charged $3 per thousand for all the lumber manufactured from the logs purchased by the North Fork Lumber Company, whereas he should have been charged only for the use of the mill in sawing those logs at the rate of 50 cents per thousand. This is the only error shown by the record. The evidence was sufficient to justify the finding that the Sugar Pine Mill & Lumber Company is a partnership. It shows that company to be an association of four persons for the purpose of carrying on business together, and dividing the profits between them. Civ. Code, § 2395. Moreover, Mr. Chapin, in his testimony, designated the members of the company as partners, and there is no evidence to the contrary. The judgment is reversed, and the cause remanded for a new trial.

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101 Cal. 532

LE MESNAGER et al. v. HAMILTON et ux.

(No. 14,903.)

(Supreme Court of California. March 3, 1894.)

Mortgage by Married Woman—Sufficiency of Acknowledgment—Evidence—Review on Appeal—Objections not Raised Below.

1. Under Civ. Code, § 1187, providing that a married woman's conveyance shall not be valid unless acknowledged on an examination without the hearing of the husband, and section 1093, providing that, unless so acknowledged, no estate in a married woman's lands shall pass, the certificate of acknowledgment is not conclusive, but may be impeached by parol evidence that she never appeared before the officer certifying thereto.

2. In an action to foreclose a mortgage, where the defense is that one of the mortgagors, a married woman, never appeared before the officer who certified to her acknowledgment thereof, she need not prove bad faith on the part of the mortgagee, or that he had notice of the falsity of the certificate.

3. Though the complaint alleged that defendant executed and delivered the mortgage, and the answer denied that she "executed" it, the failure to use the word "delivery" is not a failure to deny the "delivery" alleged; the word "execute," in its ordinary sense, importing delivery, and there being nothing in the answer to indicate that it was used in a restricted sense. Beatty, C. J., and McFarland, J., dissenting.

4. The objection that parol testimony was inadmissible to impeach the certificate of acknowledgment on the ground that the answer failed to deny delivery of the mortgage cannot be raised for the first time on appeal.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Le Mesnager and others against Samuel Hamilton and Adelaide Hamilton, his wife. From a judgment for plaintiff, and an order denying a new trial, defendant Adelaide Hamilton appeals. Reversed.

J. R. Dupuy, E. H. Bentley, and R. Dunnigan, for appellant. R. B. Carpenter, for respondents. Graves, O'Melveny & Shankland, for interveners.

DE HAVEN, J. The defendants, Samuel Hamilton and Adelaide E. Hamilton, were and are husband and wife, and this is an action to foreclose a mortgage alleged to have been executed by them on January 2, 1889, to secure a promissory note, also executed by them on the same day, for the sum of $7,000. The complaint contains a copy of the mortgage and of the certificate of acknowledgment attached thereto. The certificate is that of a notary public, and shows upon its face that the mortgage was duly acknowledged by the defendants upon the day of its date. The defendant Adelaide E. Hamilton filed an answer, in which she avers that the land described in the mortgage was and is her separate property, and in which she also denies that she ever executed or acknowledged the mortgage, and further "alleges that the statement in the certificate of said notary, appended to said pretended mortgage by said notary, reciting and stating that she * * * appeared before, or was in the presence of, said notary, * * * is untrue and false." The case was tried upon the issues thus presented, and resulted in a judgment for plaintiffs, in accordance with the demand of the complaint, and a decree of foreclosure directing the sale of the property mentioned in the mortgage to satisfy the amount adjudged to be due from defendants to plaintiffs on account of the note and mortgage. The defendant Adelaide E. Hamilton appeals.

Upon the trial of the action the appellant offered to prove that she never, in fact, appeared before the notary certifying to the acknowledgment attached to the mortgage, and that she did not acknowledge the mortgage, or know anything about its delivery to the plaintiffs. The plaintiffs objected to this evidence upon the general ground of irrelevancy, and particularly because "it made no difference whether the defendant Adelaide E. Hamilton was present and acknowledged the mortgage or not, as the certificate of said acknowledgment was conclusive." The objection was sustained, and the appellant was not permitted to prove the facts embraced in her offer. This ruling was clearly erroneous. At the date of the mortgage sought to be foreclosed, an acknowledgment was essential to the validity of a conveyance by a married woman. Section 1187 [1] of the Civil Code, as it then read, expressly declared that such a conveyance shall have no validity "until so acknowledged;" and section 1093 of the same Code also provided that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her unless the grant or instrument is acknowledged in the manner prescribed by sections 1186[2] and 1191."[3] Such being the law at the date of the mortgage in question, it is at once seen that the facts offered to be shown were material and relevant, and struck as directly at the existence of the mortgage as would an offer to show that the signatures thereto were forgeries; the acknowledgment of appellant being as necessary a part of the execution of the mortgage by her as her signature. The certificate of acknowledgment was not conclusive evidence of the fact of acknowledgment, and such a certificate may be impeached by parol evidence that the person named therein never, in fact, appeared before the officer certifying to the acknowledgment. In such a case the act of the officer is wholly void, and the certificate is nothing but a fabrication. Johnston v. Wallace, 53 Miss. 331; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932; Donahue v. Mills, 41 Ark. 421; Meyer v. Gossett, 38 Ark. 377; Williamson v. Carskadden, 36 Ohio St. 664; Michener v. Cavender, 38 Pa. St. 334; Borland v. Walrath, 33 Iowa, 130. Of course, when it appears that a married woman has actually appeared before an officer for the purpose of acknowledging a conveyance, and has made some kind of an acknowledgment, the certificate of the officer in relation to the manner and terms, and as to the fact, of the acknowledgment, would be conclusive in favor of a purchaser in good faith, and who has relied upon the truth of the certificate.

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[1] Civ. Code, § 1187, provides that a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; but such conveyance has no validity until so acknowledged.

The difference between such a case and one where the certificate is wholly void is very clearly pointed out by Campbell, J., in Johnston v. Wallace, 53 Miss. 331, in the following language: "When a married woman appears before an officer to acknowledge her deed, it is made, by law, his duty to inquire of her, separately and apart from her husband, as to her freedom from fear, threats, or compulsion of her husband in the execution of the deed; and it is his duty to decide upon this, and to certify the acknowledgment. His decision thus made, and duly certified, imports verity as to all persons acting on the faith of his official certificate in due form of law, and without any knowledge of any wrong or irregularity, or of any circumstance to excite inquiry, and point to such wrong or irregularity. The appearance of the person before him to acknowledge is the occasion for the performance of his duty by the officer; the proposal to acknowledge the deed before him is the circumstance which calls into exercise the legal power to examine as to the execution of the deed, and to decide the sufficiency of the statement made as to that; and then, in certifying, he is declaring his conclusion upon the fact he is called to decide. His official act, thus solemnly performed, must have sanctity, at least to the extent of being a safe reliance for every one who in good faith acts in the belief that it is true, as stated. But where the person never appeared before an officer to acknowledge the deed, but he falsely certifies that she did, his act is wholly without authority of law, and void in toto. All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. Although liable to be deceived and imposed on by such an act, no one can claim that a married woman's estate should be divested by forgery; and when she did not in fact appear before the officer to acknowledge, although he may certify that she did, she may show she did not, for his act is wholly without authority, and she but rights herself, and wrongs no one, in proving the truth of the case, for no one can claim by virtue of a forgery." The cases of Banning v. Banning, 80 Cal. 274, 22 Pac. 210, and De Arnaz v. Escandon, 59 Cal. 486, cited by respondents, are not opposed to the principle declared in the case from which the foregoing quotation is made. In Banning v. Banning the wife acknowledged the deed through a telephone, and afterwards delivered the deed, apparently properly acknowledged, to the grantees, who were not shown to have had any notice of the manner in which the acknowledgment was taken. Under these circumstances, the court held that the certificate was conclusive, and that the married woman could not avoid her deed because of the fact that she did not personally appear in the actual presence of the officer certifying to the acknowledgment. That was all that was decided there, and that case is authority for nothing more. It is true that the court quotes with approval the following portion of section 538 of Jones on Mortgages: "As to statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." This, however, was not necessary to be said in the decision of that case, and the attention of the court was not called to the particular question we are now discussing, and for that reason the language above quoted cannot be construed as an authoritative statement by the court of the law which governs a case like this. In De Arnaz v. Escandon, 59 Cal. 486, the facts were such as to bring it within the rule making the certificate of acknowledgment conclusive in favor of an innocent purchaser. In that case the wife actually appeared before the notary, and acknowledged the deed through an interpreter, and afterwards delivered the deed to the grantee, who had no notice of the matters relied upon to defeat the acknowledgment. The court held that upon that state of facts the certificate of the notary was conclusive of the facts which it recited. The cases of Heeter v. Glasgow, 79 Pa. St. 79; Cover v. Manaway, 115 Pa. St. 338, 8 Atl. 393; Manufacturing Co. v. Rook, 84 Pa. St. 442; and Baldwin v. Snowden, 11 Ohio St. 203,—also cited by plaintiffs,—were all cases in which the married woman had actually appeared before the acknowledging officer, and the attempt in each was to attack the certificate because of some defect in the manner of the acknowledgment; and neither of them can be considered as sustaining the proposition that a certificate cannot be impeached by evidence showing that the officer was entirely without authority to make it by reason of the fact that the person whose acknowledgment is certified never in fact appeared before the officer for that purpose. We think the distinction between the cases last referred to and the one at bar is a very broad one.

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[2] Section 1186 provides that the acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

[3] Section 1191 provides that the certificate of acknowledgment by a married woman must be substantially in the following form: "State of ——, County of —— ss.: On this —— day of ——, in the year ——, before me [here insert the name and quality of the officer] personally appeared ——, known to me [or proved to me on the oath of ——] to be the person whose name is subscribed to the within instrument, described as a married woman; and, upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution."

Nor was it necessary for the appellant to show, or offer to show, any fraud or bad faith upon the part of the mortgagee, or that he had notice of the falsity of the certificate. If the matters offered to be proven in this case are true, the appellant never executed the mortgage, and it has no more validity, as to her, than if her signature was forged thereto; and in such a case, if the wife has done nothing to estop her from showing the attempted fraud upon her rights, it is immaterial whether the persons claiming under the mortgage had notice of the matters affecting its validity or not. Their failure to ascertain that the mortgage was never in fact executed cannot be allowed to defeat the rights of appellant, if she was in fact without fault. The plaintiffs were not obliged to advance any money on the mortgage until after first satisfying themselves of its genuineness, and, if they failed to make the necessary inquiry, the loss is theirs, and not that of appellant. Edgerton v. Jones, 10 Minn. 427, (Gil. 341.)

It is also claimed by respondents that the answer of appellant admits that she delivered the mortgage to plaintiffs, and therefore that the error of the court, if any, in excluding the evidence referred to, is immaterial. The complaint alleges that defendants did "execute under their hands and seals, and deliver," the mortgage in suit; and appellant, in answering this particular allegation, denies that she executed the mortgage referred to, but does not supplement this with the further denial that she delivered it, thus negativing the precise language of the complaint. The plaintiffs contend that the failure to use the word "deliver" in the denial referred to was a failure to deny the delivery alleged; but we do not think so. The word "execute" when applied to a written instrument, unless the context indicates that in was used in a narrower sense, as in sections 1185, 1186, 1189, 1190, and 1191 of the Civil Code, imports the delivery of such instrument. Code Civ. Proc. § 1933; Joseph v. Dougherty, 60 Cal. 358; Clark v. Child, 66 Cal. 87, 4 Pac. 1058; Bagley v. McMickle, 9 Cal. 430. There is nothing in the answer to indicate that the word "execute" was there used in any restricted sense, and it must, therefore, be given its ordinary legal signification. The appellant denied that she executed the mortgage, and this put in issue the fact of the delivery, and every other fact necessary to its execution. The plaintiffs did not, in the language used by them, allege anything more than that the mortgage was executed; and, when this was denied, the allegation of the complaint upon this point, in its entire scope and meaning, was denied, notwithstanding the appellant did not see fit to notice the unnecessary verbiage contained in plaintiffs' complaint upon the subject of the delivery of the mortgage. But a complete answer to the contention of respondents on this point is that the objection to this offered evidence was not rested upon the ground that the answer admitted the delivery of the mortgage by appellant; nor is there anything in the record to suggest that the attention of the appellant was ever in any manner, during the trial in the court below, called to this alleged defect in her answer.

If it be assumed that the general objection to the effect that the offered testimony was "incompetent, irrelevant, and immaterial," if it had stood alone, would have been sufficient to raise such a question,—a point which it is unnecessary to decide at this time,—still, such objection was obviously insufficient for that purpose, when the particular ground upon which it was claimed that such offered evidence was incompetent, irrelevant, and immaterial was stated to be "for the reason that the certificate of the notary was conclusive as to all matters therein contained, and could not be contravened or contradicted by any oral testimony." There is certainly, in this statement, not even the most remote intimation that the offered evidence was then claimed to be inadmissible because of the failure of the answer to deny the delivery of the mortgage sued upon, and the respondents cannot successfully raise such an objection here for the first time. Judgment and order reversed.

We concur: FITZGERALD, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment of reversal, because the objections to the evidence offered by appellant, and sustained by the court, were not based upon any defect in the denials of the answer. The objections, and ruling of the court, were made solely upon the broad ground that a notary's certificate of acknowledgment of a married woman is always, and under all conceivable circumstances, absolutely conclusive. Under this ruling the appellant, although she never appeared before the notary, and never knew that he had made a certificate of her acknowledgment, and although she never delivered the mortgage or knew of its delivery, or received any of the money, and never did any act of ratification whatever, would still be forever estopped by the certificate from showing the truth. This, in my opinion, is not the law. At the same time, I do not think that the delivery of the mortgage is denied in the answer. It is true that, in a general sense, "execution" may be said to include "delivery;" but it is quite frequently used in the limited sense of signing, and, where the law requires it, sealing, stamping, acknowledging, etc., a written instrument, so as to make it complete on its face and ready for delivery; and the sense in which it is used can generally be seen from the context. In the case at bar the complaint avers that the defendants "executed under their hands and seals, and delivered," the mortgage in question. Here "executed" was clearly used in the limited sense, and "delivered" intended as a distinct and additional averment. The answer denies that defendants "executed under their hands and seals," but either inadvertently or intentionally avoids any denial that they "delivered" the mortgage. Now, in answer to such an averment, a married woman might truthfully deny the execution in the sense as used in the complaint, if she believed that the acknowledgment was defective, while she might not be able at all to truthfully deny the delivery. And in the case at bar, as appellant refrained from denying the delivery, I apprehend that she could not be convicted on a prosecution for perjury, however clearly it might be proven that she did deliver the mortgage. But, as said before, the point was not made at the trial. If objection had been made to offered evidence on the ground that the answer did not deny the delivery, appellant would have been allowed to amend her pleading, if she was really prepared to deny such delivery.

BEATTY, C. J. I concur in the opinion of Justice McFARLAND.

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ABBOTT v. 76 LAND & WATER CO. (No. 18,117)

(Supreme Court of California. March 13, 1894.)

REVIEW ON APPEAL — CONFLICTING EVIDENCE — LEASE—OPTION TO BUY—EVIDENCE.

1. Findings will not be disturbed where the evidence is conflicting.

2. Defendant's circulars invited settlers on its lands to cultivate them with or without option to purchase. Its notices specified that the land was for sale or to rent. Its dealing with its tenants showed the practice of executing written leases either with or without option to purchase. *Held* that, there being no evidence of fraud or mistake, a written lease to plaintiff containing no option to purchase must be deemed to embody the final determination of the parties, and that no such option will be implied.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by O. L. Abbott against the 76 Land & Water Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Thompson & Thompson, for appellant. W. S. Goodfellow, for respondent.

SEARLS, C. This is an action for the specific performance of an alleged contract to convey the E. ½ of section 31, in township 15 S. of range 24 E., Mt. D. B. and M., with certain appurtenant water rights, all situate in the county of Fresno. Defendant had judgment upon the findings of the court, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

It seems that five actions were brought by different persons against the same defendant, to enforce contracts for the conveyance of land under circumstances somewhat similar. In four of them the plaintiffs had judgment in the court below, which judgments were affirmed by this court. One of the four other cases was by this same plaintiff against the same defendant, and is reported in 87 Cal., at page 323, 25 Pac. 693. The allegations of the complaint in this case are, in substance, as stated in the report of that case, on pages 324 to 327, 87 Cal., and page 693, 25 Pac., and, being lengthy, will not be repeated here. The answer in the present case denies all the material allegations of the complaint upon which a right in the plaintiff, either legal or equitable, to purchase the land in question could be based. The court found that, on the 1st day of October, 1885, the plaintiff and defendant entered into the agreement set out in the complaint, marked "Exhibit A." This was a lease, or what may be termed a cropping contract, by which plaintiff was given possession of the land for one year, with the privilege of extending the term from year to year for two years, the plaintiff and defendant each to have a share of the crops. The lease varied from that under which the plaintiff held the land in Abbott v. Water Co., 87 Cal. 323, 25 Pac. 693, in one particular only. In the present case the lease gave to the tenant no option to purchase the land leased by him, while in that case it gave such option. The contract or lease was renewed on the 1st of October, 1886, for another year, upon the same terms as before, but including another 320 acres of land, and without any option of purchase being given to the plaintiff. The court further finds that there was never any oral agreement that plaintiff should purchase or have the option to purchase the land described in the complaint, and, without going into details, it may be said the findings are in favor of defendant, and negative all the facts relied upon by plaintiff as giving him a right, option, or privilege of buying the land.

Several of the findings are objected to as being unsupported by evidence, but a careful examination of the testimony shows that it involved a material conflict upon every fact assailed by appellant. There was testimony tending to show that plaintiff had leases for cropping purposes upon a large area of land, or had selected land of defendant for such purposes, and that, as a consequence, he did not desire an option to purchase the land described in the complaint. Be this as it may, the findings are not unsupported by evidence, and to analyze the objections in detail would subserve no useful purpose. The rule in cases of this character is stated in Boyd v. Brinckin, 55 Cal. 429, where Sharpstein, J., quotes from Pomeroy on Contracts, where it is said contracts of this kind are "created by representations made by one party, and acts done by the other party upon the faith of such representations. Where an absolute unconditional representation of something to be done in the future is made by one person, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the act by which the intended result is obtained, a contract is thereby concluded between the parties." In that case the Central Pacific Railroad Company had issued a circular, inviting settlers to locate upon its lands, promising that those who should do so should be preferred purchasers when the lands should be offered for sale. Plaintiff had settled upon the land, and offered to purchase in due time, was refused, and the court held the contract complete by the offer of the railroad company and acceptance of plaintiff. In the present case it is apparent from the testimony that defendant by its circulars invited settlers upon its land for the purposes of cultivation and improvement, as tenants, who should receive four-fifths of the crops, and turn over one-fifth thereof to defendant in lieu of rent, with or without the privilege of purchase, but with it if the tenants desired, or offered to sell outright, on a credit for a portion of the purchase price. Their notices specified that the land "was for sale or to rent in tracts to suit on easy terms. * * * Special inducements offered to renters. Terms for leasing, first year, * * * with privilege of buying. * * * To purchasers, the price of the land ranges from $15 to $35 per acre," etc. Their letterheads announced their lands as "for sale or lease on liberal terms, correspondence desired," etc.

I find nothing in defendant's circulars or notices to indicate a consent on its part that parties should locate upon its lands without first obtaining a lease or agreement authorizing them so to do. The whole course of dealing between defendant and its tenants indicates a steady adherence to the practice of executing written leases to all those who cultivated its lands, either with or without the option to purchase. This being so, and a written lease having in this case been executed, it must, in the absence of fraud or mistake, be deemed to embody the final determination of the parties. There is no inference of part performance of a verbal agreement to sell to plaintiff to be drawn from his possession and improvements under the lease, for that possession, and the improvements thereunder, are referable to his rights as a tenant. The findings negative all idea of fraud or mistake, and in such a case to raise an implication of an agreement or option in plaintiff to purchase would be to make for the parties an agreement which they did not make, and that, too, in the face of the statute of frauds. In the other case of Abbott v. This Defendant, cited supra, the original lease contained an option of purchase in favor of plaintiff, and it was only the renewal that omitted it, and that under circumstances sufficient to indicate that the option was to continue. The court in that case, in upholding plaintiff's right to purchase, may be said to have gone to the extreme limit of the rule under which a right to a specific performance of a contract to convey can be enforced in like cases. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

COOPER et al. v. McCARTHY et al. (No. 19,264.)

(Supreme Court of California. Feb. 28, 1894.)

Mortgages—Foreclosure—Attorney's Fees.

1. Where the mortgage secured the payment of principal and interest only, attorney's fees, for which the note provided, could not be made a lien on foreclosure. Clemens v. Luce (Cal.) 35 Pac. 1032, followed.

2. On foreclosure for default of an interest payment on the note, judgment could not include the attorney's fees, without proof that the mortgagee gave notice of his election to declare due the whole amount of the note, and demanded payment. Clemens v. Luce (Cal.) 35 Pac. 1032, followed.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Samuel Cooper and another against D. O. McCarthy and others. Judgment for plaintiffs. Defendants appeal. Modified.

Luce & McDonald, for appellants. Conklin & Hughes, for respondents.

PER CURIAM. On the authority of Clemens v. Luce (No. 19,234, this day decided, in department 1 of this court) 35 Pac. 1032, it is ordered that the judgment appealed from be modified by deducting therefrom the sum of $500, the amount of the attorney's fee therein allowed; and, as so modified, the judgment and order appealed from are affirmed.

(4 Cal. Unrep. 503)

STEWART v. DUNLAP. (No. 18,183.)

(Supreme Court of California. March 2, 1894.)

Appeal—Review—Question not Raised Below.

A judgment in an action by the assignee of an insolvent will not be reversed on the ground, raised for the first time on appeal, that the complaint contained no averment showing that in the proceedings for plaintiff's appointment a copy of the petition filed by creditors was served on the insolvent, as required by statute, the record being silent on the subject.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Trover by Malcolm Stewart, assignee of the estate of W. C. Baber, an insolvent debtor, against Herman Dunlap. Judgment for plaintiff. Defendant appeals. Affirmed.

John T. Harrington, for appellant. W. G. Dyas and U. W. Brown, for respondent.

BELCHER, C. The plaintiff, as assignee of the estate of one W. C. Baber, an insolvent debtor, brought this action to recover the value of certain personal property alleged to have belonged to the said estate, and to have been converted by defendant to his own use. To show plaintiff's authority to sue, it is averred in the complaint that certain creditors of said Baber duly filed a petition in involuntary insolvency against him, and that upon the filing of the petition the court made an order that he appear at a time and place named, and show cause why he should not be adjudged an insolvent debtor, as prayed for in the petition, and that on the next day he was duly and personally served with a copy of the said order; that thereafter the court duly made and caused to be entered its order adjudging him to be, and to have been at the time of filing the petition, an insolvent debtor, and requiring him to file in court the schedule and inventory provided for in the insolvent act; that thereafter the insolvent filed the schedule and inventory, and thereupon the court made an order appointing the time and place for the meeting of the creditors to prove their debts, and choose one or more assignees of the estate; that thereafter, at the time and place appointed, the plaintiff was duly elected by the creditors assignee of the estate, and duly qualified as such, and afterwards the clerk of the court duly assigned and conveyed to him all the estate, real and personal, of said insolvent. No demurrer to the complaint was interposed, and the answer denied none of the averments above referred to. The case was tried by the court, and judgment given for the plaintiff, from which the defendant appeals on the judgment roll.

The only point made for a reversal is that it does not appear that the court ever acquired jurisdiction of the insolvent in the insolvency proceedings, for the reason that the complaint contains no averment showing that a copy of the petition filed by the creditors was served upon him, with a copy of the order to show cause, as required by section 10 of the insolvent act. This point is apparently made here for the first time, and a sufficient answer to it is that it does not appear that a copy of the petition was not served on the insolvent,—the record is simply silent on the subject,—and it does appear that he appeared and filed his schedule and inventory, and thereby voluntarily submitted himself to the jurisdiction of the court, and that the court duly adjudged him to be an insolvent debtor, and the clerk duly assigned and conveyed to the plaintiff all of his estate. The law presumes that a court or judge, acting as such, was acting in the lawful exercise of his jurisdiction. Code Civ. Proc. § 1963, subd. 16. Under the circumstances shown, it is too late to raise the question of the jurisdiction of the court here. The judgment should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(4 Cal. Unrep. 505)

PEOPLE v. STRYBE et al. (No. 21,046.)

(Supreme Court of California. March 3, 1894.)

HOMICIDE—ACCOMPLICE—CONFESSIONS — INSTRUCTIONS.

1. On a murder trial, the court, on evidence fully authorizing it, submitted to the jury the question as to whether or not a certain witness for the state was an accomplice. The only corroborative evidence was given by the wife of such witness, who testified to certain oral confessions. *Held*, that it was error to refuse to charge that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of defendants ought to be viewed with caution, under Code Civ. Proc. § 2061, which directs such instructions to be given "on all proper occasions."

2. It was also error to refuse to charge that, if the jury found such witness to be an accomplice, and did not believe the evidence of his wife, then there was no corroborating evidence of the accomplice, and it was their duty to acquit.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Manuel Strybe and Richard Strybe were jointly convicted of murder, and they appeal. Reversed.

Hiram W. Johnson and Johnson & Johnson, for appellants. Frank D. Ryan, Dist. Atty., and W. H. Hart, Atty. Gen., for the People.

BELCHER, C. The defendants were jointly charged by information with the murder of one A. G. Damon, in the county of Sacramento, on the —— day of March, 1888. The information was filed April 15, 1893, and the trial thereafter resulted in a verdict against both defendants of guilty of murder in the second degree, and in a judgment that they be imprisoned in the state prison at Folsom for the term of 30 years. From this judgment, and from an order denying their motion for a new trial, they have appealed.

The theory of the prosecution at the trial was that on the evening of March 6, 1888, Damon went into a disreputable house, known as the "Mobile House," situate at the southeast corner of Second street and the alley between L and M streets, in the city of Sacramento; that defendants were also in the house, and that, with the intent to rob Damon of his money, and with the aid of one Kate Cooper, who was with them, they induced him to drink some whisky, in which they had put a large quantity of morphine, and that the drinking of it caused his death. It was proved that, about 5 o'clock in the afternoon of the day named, Damon went to the Western House and ate his supper, and then went down to the corner of Second and K streets and took a cigar; that after standing there four or five minutes he walked down Second street, and turned into the Mobile House, and that he then appeared to be sober, and had in his possession about $200 in money; that a little after 8 o'clock in the same evening he was found groaning and in an unconscious condition, lying on the north side of the alley, about opposite the rear end of the Mobile House, and that he was then removed to the station house, and shortly thereafter died; that, when found, the only valuables about him were two silver dollars, a pair of spectacles, and a silver or plated watch; that a physician was called to see him at the station house, who testified that he found him lying in an unconscious condition, breathing heavily, and from his breathing and general appearance suspected poisoning; that in his opinion he was suffering from narcotic poisoning,—that is, some poison that produces insensibility, like opium or morphine; that on the next day a post mortem examination was made by the physician of the county hospital, who testified: "I examined all the principal vital organs. The cause of death was not determined by the autopsy. There was evidence of overfullness of the vessels of the brain. There was some evidence of disease in the lungs. Further than that, the organs were normal. The brain was found to be very much charged with blood. The purpose of the examination was to determine the cause of death. The cause of death was not determined by my report. It is possible that some narcotic drug caused death. It would be merely a surmise to say that the conditions that I found would lead to that conclusion. There was no positive evidence as to what was the cause of death. I made no examination of the stomach or its contents. * * * I arrived at no conclusion as to the cause of death."

To connect the defendants with the commission of the offense charged, the prosecution then called as a witness one Richard Reed, whose testimony, briefly stated, was in substance as follows: He had lived in Sacramento thirteen years, and had known defendants six or seven years, and had been familiar and running with them for a year or more prior to March 6, 1889. Knew Kate Cooper and Mollie Jones, and was familiar with the Mobile House. It was kept by Mollie Jones prior to March 6th, but she was then in jail, and Kate Cooper and Manuel Strybe were then living in it. It had four rooms, the front room opening on Second street, and the rear room having an entrance from the alley. About 5 o'clock on March 6th he went through the alley into the rear room without knocking, as he was accustomed to do, and found the two defendants sitting there at a table. Kate Cooper came in, and says: "We've got a sucker. He's got stuff." One of defendants said: "We are going to have it. Give him some whisky and morphine." Dick said: "Where are we going to get the morphine?" Manuel said: "It is in Mollie's bureau drawer." Kate said she would get the whisky, and she and Manuel went out, and shortly returned. She poured out two glasses of whisky, and he put in some morphine. She then took a tray, and, with the two glasses of whisky on it, went out of the room, and that was the last the witness saw of her for a day or two. He remained ten or fifteen minutes, and then went away. He met defendants at the corner of Second and K streets between 8 and half-past 8, and said, "What did you do, boys?" and one of them spoke up, "We doped him and drug him out in the alley, and left him." A few days later, witness had a conversation with Manuel. "He came and told me to go down under the cellar, and there was some cash buried there. I was to dig down and find two handkerchiefs. One had about $150, and the other about $100. I went there and made an examination, but I didn't find the money. He told me he went there a few days after, and found a handkerchief that contained the $100. He said the officers got away with the other." The witness knew that Damon was found in the alley and died, but never told any one what he knew about the matter until the fall of 1892. Then he had a falling out with defendants, and said: "I told him if he bothered me any more I would kill him." "I told Manuel he must recollect I knew something about the Mobile case. He says: 'Hell! you are as deep in the mire as we are in the mud.'" "The row I had with them was in Green's saloon. I might have said then: 'You son of a bitch, I will fix you.'" "After I had a falling out with them, I met Officer Gibson, and he wanted me to tell him about this matter, and I said 'No,' that I wouldn't say anything about it. Finally, I agreed to tell him, provided I could see the city attorney and the district attorney, so that I could be all right. I did not say a word before they promised that they would not prosecute me. I made an agreement first that I should not be prosecuted."

The only testimony introduced to corroborate the testimony of Reed was that of his wife, Helen Reed. She testified that in March, 1888, she was living with her husband in the Colusa House, in Sacramento, and had three rooms; that she knew the defendants, and remembered the occasion of Damon being found in the alley; that between 7 and 8 o'clock on that night defendants came to her house and asked for her husband, and she told them he was out, but would be in soon, and to come in and sit down; that they remained about ten minutes in the front room, and she was sitting six or eight feet from them in the same room; that they were talking between themselves, and she could hear them; that the first thing said was, Robert asked, "Where is he?" and Manuel replied, "The old stiff is in the alley," and Robert then asked about the money, and Manuel said, "It is all right." On cross-examination the witness testified: "Never had any conversation with my husband about it. Never told him anything about what I overheard. Never asked him what it meant. I knew, when the papers came out, about the killing of Damon. I understood then what it meant. * * * Never spoke a word to him about it. Lived with him as his wife ever since, continuously to the present time, and have never spoken to him about what I overheard. * * * I never talked to my husband on this subject at all. I know Mollie Jones. I told her I didn't know anything about this case, and I didn't want to know anything about it. I was talking then. I was not sworn. I tell a person anything. * * * It never occurred to me that I ought to notify the authorities about what occurred that night. I have never thought of what was said that night in 1888, until I have taken the stand here."

For the defense, 12 witnesses were called, and testified that they knew the reputation of Richard Reed for truth, honesty, and integrity, and that it was bad; and their testimony in this regard was in no way contradicted. It was proved by two police officers that shortly after the death of Damon they separately asked Reed if he knew anything about the matter, and he said he did not. It was also proved that after he had the falling out with the defendants in September, 1892, he said to one witness, speaking of them, "Those sons of bitches, I will have them in jail in twenty-four hours;" and to another witness he said, "They were a couple of sons of bitches that he was going to do up; that he was going to job them, and, if he could not do anything else, he would run them out of town." It was further shown that his testimony given at the preliminary examination was in many respects different from and contradictory of that given at the trial.

The defendant Richard was called as a witness in his own behalf, and denied that he was in Sacramento at the time of the alleged murder, or that he had anything to do with it, or knew anything about it, and said that he was in Davisville, Yolo county, at the time named; and in this he was supported by the testimony of his two brothers, Manuel and Stephen. The defendant Manuel was also called as a witness, and denied all the statements made by Reed; and he said: "Neither I alone, nor my brother and myself, called at Mrs. Reed's or Mr. Reed's house the night of the 6th of March, or had any conversation of any kind in that house then. Never at any time did we have any conversation about carrying a stiff in the alley, or about money. * * * I was not with Richard Reed that day or evening at all."

It is earnestly contended for appellants that, looking at all the evidence, a verdict of guilty was clearly not warranted, and also that numerous errors of law were committed by the court in its rulings upon the admission of evidence, which call for a reversal; but we do not deem it necessary to notice these points particularly. The court, of its own motion, instructed the jury at great length, and, among other things, told them that it was for them to determine whether or not Richard Reed was an accomplice; that to be an accomplice it was not necessary to actually participate in the crime; and that a conviction could not be had on the testimony of an accomplice, unless he was corroborated by other evidence, etc. The defendants asked and the court refused to give the following instructions: "I instruct you that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of the defendants in this case ought to be viewed with caution." "I instruct you that if you find the witness Richard Reed to be an accomplice, and you do not believe the evidence of the witness Mrs. Richard Reed, then there is no corroborating evidence of the accomplice in this case, and it is your duty to acquit the defendants." In view of the testimony, these instructions, we think, should have been given. The first is substantially in the language of section 2061, subd. 4, of the Code of Civil Procedure, which directs that the jury are to be so "instructed by the court on all proper occasions;" and in People v. Bonney, 98 Cal. 278, 33 Pac. 98, the refusal to give such an instruction was held to be error. It is objected for the people that this was not a proper occasion for giving the instruction, because it was not proved that Reed was an accomplice; but the court expressly submitted to the jury the question of whether he was an accomplice or not, and the evidence was fully sufficient to authorize such a submission. "An accomplice is defined to be one who is in some way concerned in the commission of a crime, though not as a principal; and this includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." Cross v. People, 47 Ill. 152. The second instruction referred to stated the law correctly, and it was proper, under the circumstances shown, that such an instruction should be asked and given. The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

(101 Cal. 542)

AUZERAIS et al. v. SUPERIOR COURT.

(No. 15,499.)

(Supreme Court of California. March 3, 1894.)

Judgment after Appeal—Remedies.

Where the trial court makes an order and finding in a case after an appeal, a petition to annul the same will be dismissed, as the petitioners have adequate remedy by presenting the findings as a part of the record on that appeal.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Petition by Auzerais et al. to have order and finding of superior court of Sacramento county annulled. Denied.

Johnson, Johnson & Johnson, for appellant. McKune & George, A. C. Freeman, and L. T. Hatfield, for respondents.

PER CURIAM. The petitioners seek by this proceeding to annul a certain order and finding made by the superior court of the county of Sacramento on July 29, 1893, in a certain proceeding then or before then pending in that court in the Matter of the Estate of Lewellyn Williams, deceased. The ground of the application is that the superior court was at the time without jurisdiction to make such an order and additional finding, because the cause in which it was made was then pending in this court on appeal. Conceding this to be so, the petitioners have a plain, speedy, and adequate remedy in due course of law when the additional finding is presented here as a part of the record on that appeal. If the superior court was without authority to make the finding complained of, such finding will be entirely disregarded as a part of the record on the appeal referred to. The proceeding is dismissed.

(4 Cal. Unrep. 511)

In re WILLIAMS' ESTATE. (No. 18,247.)

(Supreme Court of California. March 3, 1894.)

Appeal—Dismissal—Striking Out Record.

1. A motion to dismiss appeals involving an inquiry into the merits will not be considered.

2. A motion to strike from the records a certain order and findings will not be considered until final hearing.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

In re estate of Williams. Motions by respondents to dismiss appeals and strike matter from record. Denied.

Johnson, Johnson & Johnson, for appellants. McKune & George and L. T. Hatfield, for respondents.

PER CURIAM. The respondents have moved to dismiss the appeals in this case upon the ground that the appellants are not persons aggrieved by the order and decree appealed from. The determination of this motion involves an inquiry as to the merits of the case, and must, for that reason, be denied at this time.

Respondents have also moved to strike from the transcript, and disregard, a certain order and additional finding made July 29, 1893, on the ground that the same is not part of the record. The motion is premature. The question attempted to be presented by the motion is one which, if necessary to the decision of the case, will be considered in the final decision of the case. This motion will, therefore, be denied. The application to amend the record, in accordance with the certificate of the clerk accompanying the application, is granted.

(101 Cal. 529)

FAIRBANKS v. LAMPKIN. (No. 15,372.)

(Supreme Court of California. March 3, 1894.)

School Lands—Right to Purchase—False Affidavit.

Under Pol. Code, § 3500, providing that any false statement in the affidavit, required by section 3495, of an applicant to purchase school lands, defeats his right to purchase the land, a statement that the six quarter sections included in his application are suitable for cultivation, though false as to two, does not defeat his right to purchase the remaining four.

Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Lewis H. Fairbanks against W. P. Lampkin. Judgment for plaintiff. Defendant appeals. Affirmed.

T. L. Carothers and J. H. Seawell, for appellant. J. A. Cooper and J. M. Mannon, for respondent.

GAROUTTE, J. This is an action brought to determine a contest arising in the office of the surveyor general of the state of California as to the right of the respondent Fairbanks or the appellant Lampkin to purchase state school lands described as follows: The S. E. ¼ and E. ½ of S. W. ¼ of section 16, township 11 N., range 15 W., Mt. Diablo meridian. The cause was tried and judgment rendered, which decreed that the plaintiff was entitled to purchase from the state of California the E. ½ of S. E. ¼, the S. W. ¼ of S. E. ¼, and S. E. ¼ of S. W. ¼ of said section, and that a certificate of purchase issue to him for said land, and that neither party was entitled to purchase from the state the N. W. ¼ of S. E. ¼ and N. E. ¼ of S. W. ¼ of said section. From this judgment, Lampkin appeals to this court.

The provisions of the Political Code require that the affidavit of the applicant should state, among other things, the condition of the land,—as to whether it is or is not suitable for cultivation. In the affidavit accompanying respondent's application, he stated that this land was suitable for cultivation. At the trial the court found that only 160 acres thereof were suitable for cultivation, and gave judgment in his favor to that extent. It is now insisted that respondent's affidavit, wherein it stated that all the land applied for was suitable for cultivation, being declared untrue by the court, to the extent of 80 acres, his affidavit and application are valueless as a basis upon which to assert any claim for any portion of the land, and section 3500 of the Political Code is cited to support such contention. That section provides: "Any false statement contained in the affidavit provided for in section 3495 defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto, and, if willfully false, subjects him also to punishment for perjury." As to whether or not a particular tract of land is suitable for cultivation is largely a matter of opinion. It remains to a great extent a matter of opinion, although section 3495 of the Political Code declares the meaning of the phrase "suitable for cultivation." It is a matter upon which honest men often differ, and we see no reason, either in law or sound public policy, why a party's application to purchase one quarter section of land should be denied because his affidavit does not state the true condition of another legal subdivision of land included in the same application. The false statement spoken of in section 3500 of the Political Code refers to a false statement made with reference to the particular tract of land. In this case there was no false statement made as to the 160 acres awarded to the applicant, but the statement was made as to the 80 acres which the court refused to award him. The construction given section 3500 by the trial court is the true one, and is in full consonance with justice. The cases relied upon to support the contrary view do not go to the lengths claimed for them by appellant. It is ordered that the judgment be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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101 Cal. 543

PEOPLE v. EDWARDS. (No. 21,055.)

(Supreme Court of California. March 6, 1894.)

JURY—IMPANELING—DIMINISHING NAMES IN JURY BOX.

Where, before the impaneling, the clerk has withdrawn from the box the names of jurors out on another case, but pending it these come in, and are discharged, the clerk should at once restore their names to the box; and if he has failed to do so until ten are impaneled, and the court's attention is called to the matter, and defendant then exhausts his peremptory challenges, and has to take one juror against his will, defendant is entitled to a new panel.

Department 1. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

One Edwards, convicted of burglary in the second degree, appeals. Reversed.

Ben. B. Haskell, for appellant. Wm. S. Barnes, Dist. Atty., and Atty. Gen. Hart, for the People.

HARRISON, J. The defendant was convicted of burglary in the second degree, in entering a room of a building on Market street, in San Francisco, with intent to commit larceny, and was sentenced to the state prison for three years. When the court commenced to impanel the jury for the purpose of trying the defendant, 12 of the jurors who were in attendance upon the court had been impaneled to try another cause, and were then deliberating upon their verdict; and the slips upon which their names were written had been tied together by a rubber band, and placed by the clerk in the jury box. When 5 or 6 jurors had been drawn and sworn in the present case, this other jury came into court with their verdict, and were discharged. The clerk did not, however, remove the band from their names until after 10 jurors had been accepted and sworn to try the defendant, nor until after the defendant's counsel had called the attention of the court to this fact. The defendant's attorney then moved for the discharge of the jury upon the ground that it had been irregularly and illegally drawn and impaneled, and, after the completion of the jury, made another motion for its discharge upon the same grounds. These motions were denied by the court, and exceptions taken. It appears from the minutes of the trial, of which a copy is included in the judgment roll, that, out of the 12 jurors first drawn in the box, 4 were peremptorily challenged by the defendant, and 7 accepted and sworn in the case, and that, before 10 had been accepted and sworn, 3 others were peremptorily challenged by the defendant. Of the 4 next drawn, he challenged 3 peremptorily, and was compelled to accept the twelfth juror against his will.

It does not appear how many jurors were in attendance upon the court, whose names should have been in the jury box before the impaneling of the jury began; but the defendant had the right to have all the names of the jurors, from which were to be drawn the jury by which he was to be tried, in the jury box before the impaneling began. Code Civ. Proc. § 246. It is to be assumed that the defendant knew the names of the jurors in attendance upon the court, as it was a part of the records of the court, and also those to whom he might wish to take a peremptory challenge. The right of peremptory challenge is one of the chief safeguards of a defendant against an unjust conviction, and courts ought to permit the freest exercise of this right, within the limits fixed by the legislature. Any diminution in the number of names in the jury box would reduce the proportion of acceptable jurors, and to the same extent diminish the opportunity of the defendant to exclude from the jury those against whom he could assign no legal cause for challenge, but with whom, for some reason that he was not called upon to explain, he might be dissatisfied. If, therefore, when the other jury were discharged, their names had been placed in the jury box, this increase of the number of names from which the jurors to try him were to be drawn would have rendered it less probable that the names of those whom he wished to challenge peremptorily would be drawn, and consequently he would have had a better opportunity to be tried by a jury against whom he had no objection. While the other jurors were actually engaged in deliberating upon the verdict for which they had been impaneled, it would be immaterial to the defendant whether their names were in or out of the jury box, as it would be impracticable to have them impaneled in the case; but, when they were discharged from that verdict, it was the duty of the clerk to restore their names to the jury box, and, when the attention of the court was drawn to the fact, it should have granted the motion of the defendant to discharge those that had already been sworn, and impanel a jury anew. Its failure to do so wrought a prejudicial error to the defendant, and for this reason the judgment is reversed.

We concur: GAROUTTE, J.; PATERSON, J.

(4 Cal. Unrep. 521)

USHER v. USHER. (No. 18,236.)

(Supreme Court of California. March 7, 1894.)

CHANGE OF VENUE—ACTION FOR DIVORCE.

A motion by defendant in divorce to change the place of trial to a county other than that in which the action was brought, on the ground that defendant resides in the former county, should be granted, where the affidavit of plaintiff creates no substantial conflict with defendant's, as to his residence. Warner v. Warner, 34 Pac. 523, followed.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Dora Usher against J. B. Usher for a divorce. From an order denying his motion to change the place of trial to Tuolumne county, defendant appeals. Reversed.

J. B. Curtin, for appellant. Rowen Irwin, for respondent.

PER CURIAM. Respondent brought her action for divorce in the county of Tulare, alleging her residence therein as required by law. The summons was served upon the defendant in the county of Tuolumne; and he moved for a change of the place of trial to that county, upon the ground that he was a resident of said last-named county at the time the action was commenced. His motion was denied, and this appeal is from the order denying his motion. The motion should have been granted. The affidavit of plaintiff is not sufficient to create a substantial conflict with the affidavit of defendant as to his residence; and upon the authority of Warner v. Warner, 34 Pac. 523, the judgment is reversed.

(101 Cal. 459)

McKENZIE et al. v. BARLING et al. (No. 18,231.)

(Supreme Court of California. Feb. 28, 1894.)

VENUE—PARTIES—REVIEW ON APPEAL—CONFLICTING EVIDENCE.

1. Where an action triable only in the county where defendants, or some of them, reside is brought in a county where one of them resides, a motion to change the venue to another county, where others of the defendants reside, will not be granted, unless joined in by all, or unless good cause is shown why they have not so joined.

2. A complaint in an action against several defendants, alleging that one of them has commenced proceedings in voluntary insolvency, that he has been adjudged insolvent, and that no decree of discharge has been made, does not show him to be an unnecessary party, for the purpose of a motion for a change of venue in which he does not join.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by W. H. McKenzie and others against A. D. Barling, Edgar A. Cohen, and others. From an order denying a motion for change of venue, all the defendants except Barling appeal. Affirmed.

L. L. Cory, for appellants. Strother & Webb, for respondents.

McFARLAND, J. This is an appeal by some of the defendants from an order of the superior court denying their motion for a change of the place of trial. The action was brought against the defendants, Barling, Cohen, W. F. Beck, and Alfred Beck, to recover a money judgment. The complaint avers that the defendants were partners in the business of receiving raisins, preparing them for market, and selling them, the profits to be divided with those furnishing the raisins in the raw state; that plaintiffs furnished them certain raisins, which defendants prepared, and sold for a certain amount of money; and that defendants refuse to pay plaintiffs any part of said money, etc. The suit was commenced in Fresno county. The defendants Cohen and the two Becks moved the court for a change of venue to Alameda county, upon the ground that Alameda, and not Fresno, is the "proper" county for the trial, because said defendants Cohen and the Becks reside in Alameda county. It is admitted, however, that the residence of the defendant Barling is in Fresno county. We do not think that the court erred in denying the motion. In the first place, it cannot be said that, under the general provision of the statute, Fresno was "not the proper county for the trial," for the provision is that, in cases like the one at bar, "the action must be tried in the county in which the defendants, or some of them reside." Code Civ. Proc. § 395. Therefore, as defendant Barling resided in Fresno county, the latter is not an improper county for the trial. And it has been settled that where, in a case coming under section 395 of the Code, any of the defendants reside in the county in which the suit is brought, a motion to change the place of trial to a county in which others of the defendants reside will not be granted, unless all of the defendants join in the motion, or unless good reason is shown why they have not so joined. Pieper v. Land Co., 56 Cal. 173; Machine Co. v. Cole, 62 Cal. 311; Fickens v. Jones, Parker, Cal. Dig. 83, (not reported in California Reports, but cited in Pieper v. Land Co., supra.) See, also, Sailly v. Hutton, 6 Wend. 508; Legg v. Dorsheim, 19 Wend. 700; Simmons v. McDougall, 2 How. Pr. 77. This rule has not been overturned by any of the cases cited by appellant. In O'Neil v. O'Neil, 54 Cal. 187, the action was brought in San Francisco to determine the rights of the parties to certain land situated in Sacramento and Yolo counties. San Francisco was clearly not, in any sense, the proper county for the trial; and it was properly held that either defendant had the right to have the action tried in the county where the land was situated. In that case the rights of the defendant rested on section 392, Code Civ. Proc., as was stated by the court in Pieper v. Land Co., supra. As to the other cases cited by appellant on the point, Rathgeb v. Tiscornia, 66 Cal. 96, 4 Pac. 987; and McSherry v. Mining Co., 97 Cal. 637, 32 Pac. 711, were cases in which no one of the defendants resided in the county where the action was brought; and Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120, was a case where it appeared from the complaint that the defendant residing in the county was not a necessary party to the action, and had no interest in its result. Where it sufficiently appears upon the face of the complaint that the defendant residing in the county where the suit was begun is not a proper and necessary party to the action, the other defendants may, no doubt, have the trial changed to the county where they reside, without the consent of the resident defendant; but such is not the fact here. The complaint states the same cause of action against all of the defendants. Appellants contend that Barling is a mere nominal defendant, because it appears that he has been declared an insolvent. With respect to that matter, the complaint does state that Barling had commenced proceedings in voluntary insolvency, and that an order had been made adjudging him an insolvent debtor, and in that connection it is averred that the said proceedings are still pending, and no decree of discharge has been made; that the indebtedness sued for in the case at bar was incurred in a fiduciary capacity, and cannot be discharged; and that this present action is prosecuted by leave and upon an express order of the court in which said insolvency proceedings are pending. But these averments do not show that Barling was an improper or unnecessary party to the action. We are not called upon to inquire, at this stage of the case, whether the indebtedness sued on was contracted by the defendants in a fiduciary capacity, or whether a general discharge of Barling from his debts would be a good defense to this action, because he, alone, could set up such a defense. There is in the record an affidavit on the part of appellants that certain averments of the complaint, to the effect that Barling was a partner of appellants, are false; that Barling has no interest in the suit; and that he was made a defendant merely to prevent appellants from getting a change of place of trial. There is also an affidavit on the part of respondents controverting all the statements of appellants' affidavit. These matters go mostly to the merits of the action, and it could hardly be expected that a court would dispose of them upon affidavits made on a motion for change of place of trial. At all events, we could not disturb the ruling of the court below in the premises, for the evidence was certainly conflicting in a marked degree. The order appealed from is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

101 Cal. 571

PEOPLE v. THOMAS. (No. 18,207.)

(Supreme Court of California. March 13, 1894.)

JUDGMENT—SERVICE BY PUBLICATION—MOTION TO VACATE.

1. The affidavit and order for service by publication under Code Civ. Proc. § 412, are no part of the judgment roll, and their absence does not show the judgment invalid.

2. The affidavit of publication required by Code Civ. Proc. § 415, to be made by "the printer or the foreman or principal clerk," is sufficient, as part of the judgment roll, if it purport to be made by the "publisher," he being presumably the printer.

3. A judgment foreclosing a certificate of purchase of state lands against the purchaser will not be opened 12 years later, on motion of his grantee by conveyance before suit begun, on the ground that such grantee was not served with summons, as against subsequent bona fide purchasers from the state, who allege, moreover, adverse possession, and notice to such grantee of their possession and improvements; the grantee's remedy, if any, being in equity.

Commissioners' decision. Department 2. Appeal from superior court, El Dorado county; N. D. Arnot, Judge.

Action by the people of the state of California against W. O. Thomas. Judgment was rendered for plaintiff. On motion by the El Dorado Slate Company to vacate the judgment. Motion denied, and said company appeals. Affirmed.

H. A. Powell, for appellant. Prentiss Carpenter and Chas. A. Swisler, for the People.

HAYNES, C. Appeal from an order refusing a motion to set aside and vacate a judgment. On October 12, 1880, the state commenced an action in the superior court of El Dorado county against the appellant, W. O. Thomas, to foreclose a certificate of purchase of certain state lands, issued to him in 1875, and in which action judgment was rendered against said Thomas on the 27th of December, 1880. Prior to the commencement of that action, Thomas conveyed the lands embraced in said certificate to the El Dorado Slate Company, a corporation; and on September 21, 1892, said corporation served notice of a motion to set aside and vacate the said judgment upon the ground that the said judgment is void, the court never having acquired jurisdiction of the defendant. Attached to the notice, an affidavit was served, which contained a copy of all the entries made upon the register of actions of said court in said cause, in which record no mention was made of any affidavit for an order of publication of the summons, nor of any order made by the court for such publication, and it is alleged that no such affidavit or order was ever made or filed. The affidavit further alleges that the defendant, Thomas, was, at the time of the commencement of the action, and for more than a year after the judgment was entered, a nonresident of this state. It is also contended that the service of summons was made under section 3549 of the Political Code, whereas it should have been made under the Code of Civil Procedure.

A judgment, however, is void upon its face only when that fact is made apparent by an inspection of the judgment roll. Hahn v. Kelly, 34 Cal. 404; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899. And, as these objections do not appear upon the judgment roll, they do not show that it is void upon its face. The affidavit required by section 412, Code Civ. Proc., and the order that the service be made by publication of the summons, if they had been made, constituted no part of the judgment roll; and their absence, therefore, does not show the invalidity of the judgment, when examined in the light of the judgment roll alone. In re Newman, 75 Cal. 220, 16 Pac. 887.

It is contended, however, that the affidavit showing the publication of the summons, which is part of the judgment roll, is insufficient, as it was made by the "publisher," and not by "the printer or the foreman or principal clerk," as required by section 415, Code Civ. Proc. We think this objection is not well taken. In Sharp v. Daugney, 33 Cal. 513, it is said: "And the further objection that the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or principal clerk, is fully met by Bunce v. Reed, 16 Barb. 347. It was held in that case that, for the purposes of the question, printers and publishers might be considered synonymous, the latter being within the spirit of the statute. An affidavit which should fail to show that the affiant had any relations to the paper might demand, if unaided by other portions of the judgment roll, a different consideration." In Menard v. Crowe, 20 Minn. 452 (Gil. 402), upon this question, the court said: "Ordinarily, and therefore presumably, the publisher of a paper is a printer, in the sense of being the person for whom, as principal, and by whose servants the paper is printed. So that, without going as far as Bunce v. Reed, 16 Barb. 347, where it is held that 'publishers' and 'printers' are synonymous, it would be enough for this case to say that the ordinary presumption that the publisher of the paper is the printer, in the sense above, is not overcome by any showing to the contrary;" citing Sharp v. Daugney, supra. See, also, Kipp v. Cook, 46 Minn. 537, 49 N. W. 257, where the same authorities are followed. The proof of publication of the summons being sufficient, no ground is suggested by appellant upon which it can be said that the judgment is void upon its face.

Appellant contends that, even though the judgment roll does not disclose the invalidity of the judgment, his attack upon the judgment being direct, and not collateral, the motion should have been granted; and People v. Mullan, 65 Cal. 396, 4 Pac. 348, and People v. Greene, 74 Cal. 400, 16 Pac. 197, are cited in support of this contention. That a judgment void upon its face may be vacated at any time, upon motion, is well settled; and it is also clear that a judgment in fact void for want of jurisdiction over the person of the defendant, where its invalidity does not appear from the judgment roll (as where the summons was served upon a third person, and the return shows service upon the defendant), may be vacated upon motion, at least within a reasonable time after its entry. Norton v. Railroad Co., 97 Cal. 394, 30 Pac. 585, and 32 Pac. 452. The time within which a judgment, the invalidity of which does not appear upon its face, may be set aside upon motion, seems not to have been definitely determined, further than that it may be done within the time limited by section 473, Code Civ. Proc. See People v. Harrison, 84 Cal. 607, 24 Pac. 311, and concurring opinion of Mr. Justice McFarland, at page 610, 84 Cal., and at page 313, 24 Pac.; People v. Blake, 84 Cal. 611, 22 Pac. 1142, and 24 Pac. 313; Norton v. Railroad Co., 97 Cal. 394, 30 Pac. 585, and 32 Pac. 452. It is not necessary to decide, in this case, whether there is any limit to the time within which such motion may be sustained, or to fix such limit, if there is one, since the circumstances of the case point to another and more appropriate remedy, viz. an equitable action to vacate the judgment; and these circumstances, I think, should be held a sufficient justification of the denial of the motion, even if it be conceded that mere lapse of time should not defeat the motion.

The land sold by the state to Thomas was the W. ½ of section 36. On June 4, 1875, Thomas sold and conveyed the same lands to the El Dorado Slate Company; but this conveyance was not recorded until August, 1892, nor was the register of the state land office notified thereof. In January, 1887, the state sold the N. W. ¼ of the N. W. ¼ of said section to one Reeg, who afterwards, in February, 1888, conveyed the same to Mothersole and Perine, and their deed was recorded in April of the same year. Mothersole and Perine allege in their affidavit that they have been in the actual possession and occupation of said quarter section ever since their purchase; that they have expended more than $30,000 upon the property; that they had no knowledge or notice of any claim thereto by the El Dorado Slate Company, but that the slate company had knowledge during all that time of their possession and improvements, and claim title by adverse possession; and the slate company deny that they had such knowledge or notice. Under these circumstances, I think that the appellant should be left to its remedy by an equitable action; that, upon that ground, its motion was properly denied; and that the order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(101 Cal. 600)

EICHHOFF v. EICHHOFF. (No. 18,261.)

(Supreme Court of California. March 12, 1894.)

ANNULMENT OF MARRIAGE—DECREE—EFFECT.

1. Jurisdiction is presumed in favor of a decree of the superior court when offered as evidence in another proceeding within the state, though the record fail to show that defendant was served with summons or appeared in the suit.

2. A man may contract marriage before entry of a decree declaring his former marriage to have been void.

Department 1. Appeal from superior court, San Joaquin county; Thomas J. Bowers, Judge.

In the matter of the estate of Gustave Eichhoff, deceased. Appeal of George Eichhoff from an order granting letters of administration to Magdalena Eichhoff. Affirmed.

J. J. Paulsell and Kile & Plummer, for appellant. James H. & J. E. Budd and Nicol & Orr, for respondent.

HARRISON, J. Upon the death of Gustave Eichhoff, Magdalena Eichhoff, claiming to be his widow, applied for letters of administration upon his estate. Her application was resisted by the appellant, a son of the deceased, who also made application that letters of administration be issued to himself. The court granted the application of Magdalena, and denied that of the appellant. The deceased and Magdalena were married May 25, 1882, and from that time lived together as husband and wife until his death in February, 1893. In 1863 he had been married to Milceon Winike, and they had lived in Stockton as husband and wife until 1876, during which time the appellant and five other children were born to them. In 1876 the wife was committed to the insane asylum at Stockton, and she is still living as an inmate of the insane asylum. In April, 1882, the deceased brought an action against her in the superior court of Marin county to procure a decree annulling his marriage with her upon the ground of fraud on her part in concealing the fact that she was insane at the time of their marriage, and a decree to that effect was rendered by that court in July, 1882. Upon the present application for letters of administration the judgment roll in that action was introduced in evidence, and it is claimed by respondent that by virtue of this judgment her marriage with the deceased constituted her his lawful wife, while the appellant maintains that it fails to show that the marriage between his mother and the deceased was ever annulled. The judgment roll shows that the complaint was filed April 21, 1882; that on the same day a summons was issued thereon, and that it was returned April 25, 1882, without any proof of service; that on the 17th of July, 1882, after hearing evidence upon the averments of the complaint, the court rendered its judgment "that the marriage between the plaintiff, Gustave Eichhoff, and the defendant, Milceon W. Eichhoff, be, and the same is hereby, annulled, and said parties are, and each of them is, restored to the status and position of unmarried persons." There is also in the record an affidavit of the plaintiff, filed on the same day with the return of the summons, to the effect that the defendant was then confined in the insane asylum at Stockton, and asking for the appointment of a guardian ad litem, together with the order of the same date making such appointment; but, as these documents do not form a part of the judgment roll, they cannot be considered in determining the effect of the judgment. There is no recital in the judgment, or in any part of the record, of any service upon the defendant, or appearance in her behalf; and the ground of the appellant's contention is that, as the evidence offered did not show affirmatively that the superior court had any jurisdiction over the defendant, the court was not authorized to determine therefrom that the marriage between her and the deceased had been annulled; while on the part of the respondent it is claimed that the record of the judgment and of its rendition raises the presumption that the court had acquired jurisdiction of the defendant, in some form authorized by law, before it entered upon the hearing of the cause, and exercised its judicial power. The appellant herein made no offer to show that the defendant in the former action had not in fact been served with the summons, so that we are not called upon to determine whether it would be competent to show by extrinsic evidence that the court did not in fact have jurisdiction over the defendant, or to contradict the presumption which arises when the record is silent upon that subject. The question sharply presented for determination is whether a domestic judgment, wherein both of the parties thereto are residents within the state, and where there is no proof of service, or appearance on the part of the defendant, and which is itself silent concerning the jurisdiction over the defendant, raises any presumption in reference thereto, when the same is offered in evidence in another proceeding. This question has not often arisen, and has not, we believe, been before presented in this state, although the principles applicable thereto have been often discussed in opinions upon cognate subjects, notably in Carpentier v. Oakland, 30 Cal. 439, and in Hahn v. Kelly, 34 Cal. 391, two leading cases thereon; but in the former of these cases there had been an appearance on the part of the defendant, and it was sought to show that it was unauthorized, while in the latter case the judgment roll itself contained a recital that service had been made upon the defendants, as was also the case in Sharp v. Brunnings, 33 Cal. 528, and in Reeve v. Kennedy, 43 Cal. 643; and in Mahoney v. Middleton, 41 Cal. 41, the judgment recited the appearance and answer of the defendants. In Drake v. Duvenick, 45 Cal. 455, there had been an attempted service upon the defendant, and it was contended that it was insufficient, for the reason that a copy of the complaint had not been served with a copy of the summons; but it was held that by such personal service, though defective, the defendant had received such notice as gave the court sufficient jurisdiction over him to prevent its judgment from being void. The same principle was repeated in Bank v. Spencer, 53 Cal. 737. More than 200 years ago it was said in Peacock v. Bell, 1 Wms. Saund. 74, that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged;" and this rule has been so frequently repeated as to have become a maxim in the law. This presumption extends to everything necessary for the support of the judgment, as well those facts which are necessary to give the court jurisdiction of the defendant as those which are necessary to sustain its decision of fact or conclusions of law thereon. Every court is called upon to determine, in the first instance, whether it has jurisdiction to hear the cause before it; and its decision upon this point is entitled to the same presumption of verity as its decision upon any other point. It is also its duty, before it hears the complaint of the plaintiff, to determine whether the defendant has been properly brought before it; but to assume that the court has determined this question without making any inquiry, or without any evidence before it, involves the presumption that it has neglected to perform its official duty, whereas a presumption that an official duty has been neglected is never indulged. The fact that the court has rendered a judgment implies a determination by it, before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. Its jurisdiction does not exist by virtue of its mere decision that it has jurisdiction, as that would be reasoning in a circle; but the presumption of its jurisdiction exists because it has been authorized to determine this question in the same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it. Its determination upon this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support its conclusion thereon, it has the jurisdiction to make the determination; and if its conclusion is incorrect it is merely error, which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision. The existence of the jurisdiction antedates its exercise, and does not depend upon any subsequent record thereof. The facts must be brought to its notice before the decision is made, and the decision must be made before there can be any record of its action. If it makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only when the record is silent that the necessity for presumption arises. Freem. Judgm. § 124; Black, Judgm. § 271; Brittain v. Kinnaird, 1 Brod. & B. 432; Foot v. Stevens, 17 Wend. 483; Hart v. Seixas, 21 Wend. 40; Huntington v. Charlotte, 15 Vt. 46; Baker v. Chapline, 12 Iowa, 204; Pope v. Harrison, 16 Lea, 82; Benefield v. Albert, 132 Ill. 671, 24 N. E. 634; Horner v. Doe, 1 Ind. 130; Sims v. Gay, 109 Ind. 501, 9 N. E. 120; McClanahan v. West, 100 Mo. 309, 13 S. W. 674. The judgment roll in the present case is consistent with the fact that proper service was made upon the defendant before the hearing upon the complaint, and, as any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, it must be presumed, in support of the action of the court, that such service was shown to it, although it has not preserved any record thereof. This presumption was sufficient to sustain the finding of the court in the matter appealed from herein, that the respondent was the wife of the deceased at the time of his death. The fact that the judgment annulling the marriage between the deceased and his wife was not entered until July did not invalidate his marriage with the respondent in the previous May. The decree annulling the marriage was a judicial determination of the status of the parties thereto. It did not render the marriage void, but simply declared that it had been void; and the marriage thereby annulled is to be regarded as never having, in fact, existed, except in so far as was necessary to protect the civil rights that others may have acquired in reliance upon its apparent validity. Stew. Mar. & Div. § 141; 2 Bish. Mar. Div. & Sep. § 1596 et seq.; Perry v. Perry, 2 Paige, 501. The order is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(4 Cal. Unrep. 512)

PEOPLE v. KILVINGTON. (No. 21,033.)[1]

(Supreme Court of California. March 3, 1894.)

MANSLAUGHTER — SETTING ASIDE INFORMATION — NEW INFORMATION — CRIMINAL NEGLIGENCE — EVIDENCE — IMPEACHING WITNESS — POLICE OFFICER — SHOOTING TO EFFECT ARREST — PROBABLE CAUSE — IGNORANCE OF LAW.

1. Where it is apparent that a defendant has had a fair and full examination before an examining magistrate, and has been held to appear and answer on a criminal charge, and an information against him has been set aside for some technical error or irregularity, not going to the merits,—such as failure to certify the depositions in a homicide case,—the court may permit a correction to be made, and a new information filed, without a further examination before a committing magistrate.

2. In a homicide case, where defendant, a police officer, shot at—intending to frighten—deceased, who was running away from a person who was shouting "Stop thief!" the admission of evidence that deceased had gone to the place for a lawful purpose, though improper, is harmless, the real question being whether defendant acted with criminal negligence. De Haven and Harrison, JJ., dissenting.

3. On a prosecution of a police officer for killing deceased, who was being pursued by a person shouting "Stop thief!" such person, having testified for defendant, may be impeached by evidence that, a few days before, he had a quarrel with deceased, he having testified that he never saw him before the time of the shooting.

4. On a prosecution of a police officer for shooting deceased, who was running from a person who was shouting "Stop thief!" defendant having testified that he intended to shoot over him, an instruction that act and evil intent must combine to constitute crime is properly refused, the question being whether there was criminal negligence.

5. Where one shoots a person through criminal negligence, his ignorance of the law can form no basis for acquittal.

6. The fact that the person whom defendant (a police officer) shot was being pursued by a person shouting "Stop thief!" did not raise an implication that a felony had been committed, by reason of which he might shoot him to effect his arrest.

In bank. Appeal from superior court, Santa Clara county; W. A. Lorigan, Judge.

George Kilvington was convicted of manslaughter, and appeals. Affirmed.

Wm. P. Veuve, for appellant. V. A. Scheller, Spencer & Burchard, E. E. Cothran, and W. H. H. Hart, Atty. Gen., for the People.

PER CURIAM. The defendant, George Kilvington, was informed against by the district attorney of the county of Santa Clara for the crime of murder, alleged to have been committed at said county on the 3d day of May, 1892, by the felonious killing of one Henry Schmidt. Upon a trial the defendant was convicted of manslaughter, and adjudged to be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of seven years. The appeal is from the final judgment, and from an order denying a new trial.

The first point made on behalf of appellant is that the court below erred in refusing a motion on his part to set aside the information. The facts essential to a correct understanding of the question involved are as follows: On the 25th day of May, 1892, defendant was examined before a justice of the peace of San Jose, in the county of Santa Clara, on a charge of having murdered Henry Schmidt, and was held by the magistrate on a charge of manslaughter, in the killing of said Schmidt. On the 7th day of June, 1892, the district attorney of said county filed an information for murder against defendant, for killing said Schmidt, which information was on the 14th day of June, 1892, on motion of counsel for defendant, and by consent of counsel for the people, set aside and dismissed, and a new information ordered by the court to be filed by the district attorney against the defendant, upon the ground that the testimony taken by the reporter at the preliminary examination, and by him written out in longhand and filed in the superior court, was not certified to by said reporter before filing with the county clerk; that the original notes of the reporter had not been filed with such clerk; and that neither were filed within 10 days after the close of such examination. At the time of the order of dismissal the court also ordered the testimony on file withdrawn to be certified to. Thereupon, the transcript of the testimony, duly certified, was filed, together with the original shorthand notes, and the order of the committing magistrate made May 26, 1892, holding defendant for manslaughter as aforesaid, but without any other or further examination before a magistrate. A new information, charging the defendant with the murder of said Schmidt, was thereupon, and on the 15th day of June, 1892, duly filed in the superior court, and defendant's motion to dismiss the same was denied. Appellant refers, as authority for his contention, to the case of Ex parte Baker, 88 Cal. 84, 25 Pac. 966, in which this court says: "And, if the information is set aside upon the ground that the defendant has not been legally committed, it can readily be seen that it would be idle for the court to order another information to be filed, for the same fatal defects would necessarily be present at any future hearing." The facts of that case no doubt warranted the expression there used. There, so far as appeared, no other or further cause was shown in support of the second information than the first. The facts here are quite different: (1) It does not appear from the record in this case that the commitment was filed prior to the presentation of the first information. (2) It does affirmatively appear that the reporter's notes were not filed, and that the depositions written out in longhand were not certified, at the time of filing the first information. If it was in fact filed, being for manslaughter, the district attorney was not authorized, in the absence of depositions duly certified, to present an information for any higher offense than that indicated in the commitment. Under these circumstances the information was properly and promptly set aside, upon the ground that, as to the offense with which the defendant stood charged, there was no evidence "that before the filing thereof [the information] the defendant had not been legally committed by a magistrate," as provided by section 995 of the Penal Code. The first information charging the defendant with murder was beyond and in excess of the jurisdiction of the district attorney, and utterly void. The second information, which was filed within 30 days after commitment, was not so filed until after the commitment, the notes of the reporter, and the depositions written out in longhand, and duly certified, were on file. We have no doubt of the correctness of the following propositions: (1) If A. has been properly examined before a magistrate, but no order holding him to appear before a proper court has in fact been made, an information filed against him before the commitment is entered and depositions are sent up is void. (2) In such a case, upon the filing of the order of commitment and depositions, the district attorney may, within the time provided by law, file a proper information; and the fact that the former information has been set aside by the court will not, in such a case, render a second examination and commitment necessary. Section 997 of the Penal Code provides that, if an indictment or information is set aside, the defendant, if in custody, shall be discharged, etc., unless the court directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney. The evident object of the statute, in authorizing the court to direct the district attorney to file another information when the first had been set aside, was, it is believed, to provide for a class of cases in which a proper examination has been had, but yet, from some informality or omission, the evidence thereof is wanting, or defective, so that it cannot be said, judicially, that the defendant has been, before the filing of the information, legally committed by a magistrate. The case at bar affords a familiar example. The depositions on file brought to the court knowledge that depositions had been taken, and that an examination had been had before a magistrate, but not being duly certified, as required by section 869 of the Penal Code, they lacked the verity essential as a basis for an information for murder, which could only be founded upon them, because the order of probable cause, if it appeared upon the depositions, or was entered in the docket of the magistrate, or otherwise reduced to writing, as we know, only held the defendant to answer for manslaughter. In People v. Thompson, 84 Cal. 598, 24 Pac. 384, this court held that the court below properly set aside an information because the indorsement on the depositions returned was not in accordance with the statute, and that, having done so, there was no error in directing such depositions to be returned to the justice for proper indorsement, and that such indorsement could be made without a re-examination of the case. In People v. Wallace, 94 Cal., at page 500, 29 Pac. 950, the decision in People v. Thompson was approved, although some doubts may have been entertained as to the broad scope of the reasoning. From the consensus of opinion expressed by this court in different cases, and from the wording of the Penal Code, the conclusion is reached that, where it is apparent that a defendant has had a fair and full primary examination before a committing magistrate, and has been held to appear and answer before a superior court upon a criminal charge, and an information has been filed against him, which has been, upon his motion, set aside for some technical error, or irregularity, not going to the merits of the case, and which may be remedied and a new information filed, the superior court is authorized and empowered, under section 997 of the Penal Code, to permit a correction to be made, and to direct a new information to be filed, without a further or other examination before a committing magistrate, and that the reasoning in Ex parte Baker, 88 Cal. 84, 25 Pac. 966, should be confined to cases in which the information is set aside for causes other than merely technical, and susceptible of remedy without impairing the substantial rights of a defendant. It follows that the court did not err in refusing to set aside the second information filed against defendant.

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[1] Reversed in banc. See 37 Pac. 799, 104 Cal. 86.

Louis Schloss was called as a witness on the part of the prosecution, and having identified the spot where deceased was killed, by a pool of blood which he found, and which other witnesses identified as the place of the homicide, was asked the following question: "Do you know of any business he [deceased] had there, on that particular locality, at that time?" Counsel for defendant objected to the question upon the ground that it is immaterial, irrelevant, and incompetent. The objection was overruled, to which ruling an exception was taken. The witness then testified, in substance, that on the 3d day of May, about 4 to 5 o'clock p. m., he negotiated with deceased, who was a butcher, in regard to the sale to the latter of a lot, situated about 100 feet from where he was killed, and that deceased said to him that he would go down and see the lot that night, when he closed his shop, as he could not get off before, and would see the witness the next morning. Deceased was shot that night by defendant at about 9 o'clock p. m. In view of testimony introduced later by the defense, this testimony is claimed to have been important. The witness was permitted, also, against the objection of defendant, to draw and exhibit to the jury a diagram of the surroundings, showing the location of the streets, the lot in question, the pool of blood, etc. Testimony of the witness Weisel was also admitted, over defendant's objection, tending to show that deceased was rightfully at the place when he was shot. This testimony as to the reasons why deceased was at the place at which he was killed was, we think, improperly admitted; for the real question was whether the defendant, under the circumstances as they appeared to him, acted recklessly and with criminal negligence; but we think that such testimony was unimportant and not prejudicial to appellant. The defendant was night watchman in Chinatown, San Jose, and was, as the court instructed the jury, "a police officer" of the city of San Jose. On the night of the 3d day of May, 1892, he had been at Chinatown with one Henry Burgess to show the latter through a cannery which defendant, as a carpenter, had erected, or had aided in erecting. On their return, and when on Taylor street, which seems to be a new street, and not fenced, at least on one side, they heard some one cry "Stop him!" or "Stop thief!" and two men were observed running across the open ground northerly, and diagonally to their course, in a direction which, if continued, would have taken them across defendant's line of travel, from 20 feet to 20 yards ahead of defendant and his companion. The two men running were not together, but one was in advance, and the other pursuing him, and crying out to stop him, or "Stop thief!" The night was dark, but the parties were visible at some distance. Defendant ordered the man in advance to stop, and, as he claims, repeated the order two or three times, until the stranger threw up his hands, when, as defendant claims, he saw something in the man's hands, drew his pistol, and fired, killing the man, who at the time was say 30 feet distant, and who fell upon his face, and who, upon examination, had no weapons, and was, as it proved, Henry Schmidt. Defendant did not, so far as appears, recognize deceased before firing the fatal shot, and, as he testifies, intended to shoot over his head; but the deceased being upon higher ground, by two or three feet, the ball entered his neck. The man in pursuit proved to be one William H. Howard. The testimony of the latter was lengthy, but may be epitomized as follows: He was passing the house of one Mrs. Hayford, when a man ran out of the back yard, who he thought was a criminal, and pursued, crying "Stop!" or "Stop thief!" for some distance, with the result as above stated. There were upon the face of Schmidt, when found dead, bruises and wounds, such as might have been made by a blow or blows of the fist or from a blunt instrument, and which a number of physicians testified must have been inflicted before death. Others were of the opinion these wounds might have been caused by contact with the earth when Schmidt was shot, and fell upon his face. Howard testified that he was not personally acquainted with Schmidt, and had never spoken to him; never had any trouble with him; did not have an altercation with him on the Monday preceding; was not in town that day, etc. In rebuttal, and for the purpose of impeaching the witness Howard, one Harrison was called by the prosecution, and testified that, on the Monday next preceding the Wednesday on which the homicide was committed, the witness Howard had a quarrel with Schmidt, during which he threatened the latter, and used vile and obscene language to him; and the admission of this testimony is assigned as error. The evidence was clearly admissible. The theory of the prosecution was that the contused wounds upon the face of deceased had been inflicted by Howard, and that deceased was fleeing from him, and not as a criminal, when shot; and, to the extent to which it contradicted the testimony of Howard, it was admissible. It tended in some degree to render the testimony of Howard improbable,—nothing more.

The court instructed the jury at length, on its own motion, and at the request of counsel for the prosecution and defense, which instructions were as to the right of defendant, as a police officer, to arrest, as provided by law, persons whom he has reasonable cause to believe have committed a felony, and where a felony has in fact been committed, and he has reasonable cause to believe the person arrested to have committed it; his right to arrest at night; his right to use all the force reasonably necessary to affect the arrest, etc. Defendant asked the court to instruct the jury as follows: (1) "The jury are instructed that an act and evil intent must combine, to constitute, in law, a crime, and that each of these elements, to wit, the act and evil intent, must be proven beyond reasonable doubt. The court refused the instruction as asked, and gave the following in lieu thereof: (1) "The jury are instructed that to constitute, in law, a crime, there must exist a union or joint operation of act and intent or criminal negligence." It will be observed that the instruction as asked was erroneous, in that it eliminated entirely what in this case was the important factor, viz. the question of criminal negligence. As given, it was proper. The question of reasonable doubt was properly expounded to the jury elsewhere in the instructions. Like considerations apply to the second and third instructions asked by defendant, and refused by the court. The third is liable to the further objection that it sought to make defendant's ignorance of the law a basis upon which to acquit the defendant. The few exceptional cases in which it is said ignorance of the law prevents the formation of an intent to commit crime are exceptions to a general rule, and have no application to a case where criminal negligence is the main question in issue. The exceptional doctrine found at section 297 of Bishop on Criminal Law has no application here. The length to which this opinion has extended precludes the propriety of noticing seriatim all the instructions given or refused. It is sufficient to say that the jury was fully instructed upon all the issues submitted; that the instructions asked by the defendant and refused by the court were either given in other portions of the charge, or in a modified and unexceptionable form, or properly refused as not embodying law applicable to the case.

One proposition further needs to be noticed. Defendant asked the court to give several instructions to the jury upon the subject of "probable cause," of which the following is a sample: "If the jury believes the evidence of the witness Burgess and the defendant, then the court instructs the jury, as a matter of law, that the defendant, at the time of the killing, had reasonable cause to believe that the deceased had committed a felony." And again: "The court instructs the jury that the uncontradicted evidence in this case shows that the defendant had reasonable cause to believe, at the time of the killing, that the deceased had committed a felony." The contention of appellant is that the question of probable cause is one of law, and that the court, upon the evidence, should have instructed the jury as indicated in the foregoing. Assuming for present purposes that the rule in criminal cases is the same as in actions for malicious prosecution, then we think the court should have instructed the jury that no probable cause was shown for believing that Schmidt had committed a felony. The evidence was sufficient to show probable cause to warrant defendant in making an arrest, and, in an action for false imprisonment for detaining Schmidt, would have been, we may assume, a justification of defendant therefor. But how a cry of "Stop him!" or "Stop thief!" raises an implication that a felony has been committed, any more than a misdemeanor, is not apparent. The term "thief" applies equally to one who has committed petty larceny, which is not a felony, as to one guilty of grand larceny, which is a felony; and as an officer may not go to the extreme of slaying one who is only guilty of a misdemeanor, in order to effect his arrest, there should be, even according to appellant's contention, evidence showing that a felony has been committed, not that it may have been, before the court can properly instruct the jury, as matter of law, that an officer has reasonable cause to believe that a felony has been committed. Under the testimony, the question whether defendant had reasonable cause to believe deceased had committed a felony was one of fact, to be determined by the jury, and not a question of law, to be arbitrarily passed upon by the court. The court so viewed it, and instructed the jury fully in that view, and therein committed no error. The instructions upon the question of reasonable doubt were all that were required. The case seems to have been fairly tried, the defendant well defended, and properly convicted of manslaughter. The judgment and order appealed from are affirmed.

DE HAVEN and HARRISON, JJ. We dissent. The evidence of Schloss and Weisel, referred to in the foregoing opinion, was clearly irrelevant; and we cannot say that it was not used upon the trial, and in the argument before the jury, to the prejudice of the defendant. In this case it was of the utmost importance to the defendant that the evidence should be confined to the single question before the jury, which was whether the defendant, upon the circumstances as actually presented to him, was guilty of criminal negligence in firing the shot which killed the deceased; and, as the evidence was not so confined, we are of the opinion that the judgment and order should be reversed.

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101 Cal. 513

PEOPLE v. LANE. (No. 21,050.)

(Supreme Court of California. March 3, 1894.)

Homicide—Insanity—Evidence — Instruction—Information—Dismissal for Want of Proper Commitment — Second Information — When Proper—Remarks of Counsel.

1. Where, on a murder trial, defendant claims that he had become insane through fear that deceased was trying to debauch his daughter, evidence is admissible, in rebuttal, to show that defendant's relations with her were illicit.

2. Defendant asked the court to charge that, if defendant was insane at a period before the homicide, it is presumed to have continued. The court gave the instruction after adding the words, "up to the time of the homicide, provided the exciting cause of such insanity also exists up to the time of the homicide." *Held* that, where the evidence tended to show defendant insane a year before the killing, and it all showed that his condition gradually grew worse up to the homicide, such instruction, as modified, even if erroneous, was not prejudicial.

3. The rule as to privileged communications between physician and patient does not apply in criminal cases; and it is proper to permit the prosecution, in a murder case, to cross-examine defendant's physician as to the diseases for which he had treated defendant, where the defense is insanity.

4. Where there is evidence of joint prepara-

tions by defendant and another to kill deceased, evidence of the acts and declarations of such other person is competent.

5. Where an information charging defendant with murder is dismissed because the justice failed to make a proper indorsement of the commitment on the complaint, and the court orders the papers sent to the justice for indorsement, it is proper to permit a second information to be filed after the return of the papers by the justice properly indorsed.

6. Where the attention of the trial court is not called to objectionable remarks of counsel, made during the argument, no question in relation thereto can be considered on appeal.

Department 1. Appeal from superior court, Yuba county.

William R. Lane was convicted of murder in the first degree, and he appeals. Affirmed.

Grove L. Johnson, M. C. Barney, and C. A. Webb, for appellant. Atty. Gen. Hart, E. P. McDaniel, Dist. Atty., and E. A. Forbes, for the People.

PATERSON, J. An information was filed in the court below charging the defendant with the crime of murder, but the same was dismissed by the court on motion of the defendant, on the ground that the defendant had not been legally committed by a magistrate. It appears that the only irregularity in the proceedings before the justice of the peace consisted in the failure of the latter to make a proper indorsement of the commitment upon the complaint at the conclusion of the examination. The court, therefore, ordered that the papers be sent back to the justice of the peace for proper indorsement, and that upon return of the same to the superior court the district attorney should file another information. This was done by the district attorney, and we think the court properly denied the motion to set aside the second information. It was unnecessary to go into another examination upon the same charge. People v. Thompson, 84 Cal. 598, 24 Pac. 384; Pen. Code, § 997; People v. Kilvington (No. 21,033, this day filed), 36 Pac. 13.

The court did not err in permitting the witness Williams to give testimony relating to Flowers, who was killed at the same time and in the same affray which resulted in the killing of Foulk. The testimony of this witness, as well as that of Hawkins and Barricklo, was necessary, in order that the jury might understand the transaction. The affray occurred in the dark. Many shots were fired. Two persons were killed, and one wounded. Three pistols were introduced in evidence, of different calibers. Each contained a number of empty and a number of loaded cartridges. To determine whether or not the defendant killed Foulk, it was necessary that the jury should be put in possession of all the facts and circumstances; and, to do this, the condition of the ground, and the finding of the body of Flowers, were necessarily referred to.

It is urged that the court erred in allowing the prosecution to cross-examine Dr. Danforth as to the nature of the complaint for which he treated the defendant. It is claimed that the testimony was "irrelevant, immaterial, and incompetent, being a privileged communication between patient and physician." There is no merit in the contention. The rule as to privileged communications between patient and physician does not apply in criminal cases. The chapter on "Witnesses" in the Code of Civil Procedure limits the rule to civil actions (section 1881, subd. 4); and the Penal Code, which expressly preserves the rule as to husband and wife in the chapter determining "Who may be Witnesses in Criminal Actions," makes no mention of physician and patient. Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730. At common law the rule as to physicians was not observed in either civil or criminal cases. 3 Rice, Ev. § 209. The statutory privilege was not conferred to shield a person charged with the murder of another (People v. Harris, 136 N. Y. 448, 33 N. E. 65), and it certainly was not intended to be used as a weapon against one charged with crime.

We do not think the court erred in permitting certain witnesses to give their opinions as to the mental condition of the defendant. It was shown that they were acquainted with the defendant, and had more or less opportunity for acquiring knowledge on which to base an opinion. As was said in Estate of Carpenter, 94 Cal. 416, 29 Pac. 1101: "A very large discretion must be conceded to the trial court." See, also, People v. Pico, 62 Cal. 53.

The evidence of acts and declarations of Dynelly was competent and material. There was evidence tending to show joint preparations on the part of the defendant and Dynelly to kill Foulk. The two met on the picnic grounds prior to the shooting, and approached the deceased together, with revolvers drawn. Proof of a conspiracy, like any other fact, may be accomplished by circumstantial evidence. Our attention has not been called to any act or declaration on the part of Dynelly which was inadmissible, if the jury believed, as they might well believe, under the evidence, that there was a conspiracy between him and the defendant to kill Foulk.

One of the points—perhaps the main point—relied upon by the defense for a reversal is that the court erroneously permitted the prosecution, in rebuttal, to prove that the defendant had committed the crime of incest. It is claimed that nothing brought out in the defense justified the introduction of such evidence; that it is an attempt to prejudice the jury against the defendant, by showing that he had committed other offenses, and not of the same nature as the one for which he was on trial. But we think that the evidence was relevant, material, and properly given in rebuttal. It was the claim of the defense that the defendant had become insane through fear that the deceased was trying to debauch his (defendant's) daughter. If the prosecution could show that, as a matter of fact, the defendant had committed the crime referred to, the jurors might fairly infer that he was of such a nature that, conceding it to be true that the deceased had illicit, or was trying to have illicit, intercourse with his daughter, the knowledge of the fact would not have the effect of unbalancing his mind; or the jury might have fairly inferred, if they believed the charge to be true, that the defendant's motive in attacking the deceased was not that, entirely, of a parent desirous of protecting the virtue of his daughter. Evidence which tends to show a material fact or motive, although it tends to prove the commission of another offense by the defendant, is relevant and admissible in a criminal action. People v. Harris, supra; 3 Rice, Ev. § 216; People v. McGilver, 67 Cal. 55, 7 Pac. 49; People v. Rogers, 71 Cal. 565, 12 Pac. 679.

The attention of the court was not called to the objectionable remarks of the prosecuting attorney in his argument to the jury. The learned judge was at the time engaged in examining the instructions, and, so far as the record shows, knew nothing about the fact. No opportunity was given the court, therefore, to prevent or correct the abuse.

The twenty-ninth instruction given by the court is not in conflict with the decision in People v. Bushton, 80 Cal. 167, 22 Pac. 127, 549, but, on the contrary, is in line therewith.

The court's modification of the eighteenth instruction asked by the defendant neither added anything thereto, nor did it take anything away; but if it rendered the instruction unintelligible, as appellant now insists, no prejudice resulted. The court fully instructed the jury that the plea of not guilty puts in issue every allegation, "and compels the prosecution to prove every element necessary to make up the crime charged."

The first instruction asked by the defendant, and refused, was fully covered by other instructions.

The only action of the court, upon which there can arise any serious question, we think, was its modification of the twenty-first instruction asked by the defendant. The instruction, as presented, reads: "I further instruct you, gentlemen of the jury, that if you find from the evidence that the defendant was insane at a period before the homicide in question, then, in that case, his insanity is presumed to have continued." To that the court added these words, "up to the time of the homicide, provided the exciting cause of such insanity also exists up to the time of the homicide." Whether insanity at a period before the homicide is presumed to have continued up to the time of the homicide is determined by the nature of the disease. If the insanity results from some temporary or transient cause, no such presumption arises. The rule does not apply to cases of occasional or intermittent insanity, but does apply to cases of confirmed insanity, of whatever nature. Physio-Medical College v. Wilkinson, 108 Ind. 319, 9 N. E. 167. In People v. Francis, 38 Cal. 188, it appears the court below had been requested to instruct the jury that "insanity once shown to exist is presumed to continue until the contrary is shown;" and the court held that if the term "insanity" referred to a general unsoundness of mind, and not to an aberration of a temporary nature, proceeding from some transient cause, the instruction correctly stated the law; that if the intellectual faculties were so impaired as to produce a general, habitual derangement of them, not traceable to some temporary cause, the law would presume the mind to have continued in the same condition until the contrary was shown. In the view which we take of the case, however, the instruction, if conceded to be erroneous in the abstract, could not possibly have prejudiced the defendant. There is evidence tending to show that the defendant was somewhat deranged a year or more prior to the time of the homicide, but the evidence all shows that the defendant became more excitable as time went on, and his family troubles increased. The jury must have believed, if they believed any of the evidence as to the condition of the defendant's mind, that his mind was in a worse condition at and just prior to the time of the homicide than ever before. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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101 Cal. 522

GORDON v. CITY OF SAN DIEGO. (No. 19,031.)

(Supreme Court of California. March 3, 1894.)

QUIETING TITLE—EVIDENCE—ESTOPPEL.

1. By Act Jan. 30, 1852, organizing the city of San Diego, the board of trustees was authorized to sell as much city property as was necessary to pay certain debts. Section 11 provided that, "when the debts of the city are paid, no more of the city property shall be sold, except" as authorized by a vote of the inhabitants. Act Feb. 7, 1874, § 1, provided that no deed made prior to November 24, 1871, on behalf of the city of San Diego, for a valuable consideration, by the corporate authorities, should be invalid for want of a corporate seal. *Held*, in an action against the city by its grantee to quiet title to land under a deed made in 1869, which recited that the officers who executed it were authorized so to do by a vote of the inhabitants, such deed was admissible in evidence, though not attested by defendant's corporate seal. 32 Pac. 885, affirmed.

2. In an action to quiet title to the east half of a tract of land, it appeared that defendant, being the owner of the entire tract, conveyed to plaintiff the undivided half interest therein; that afterwards, but before plaintiff's deed was recorded, defendant conveyed to another the entire interest in the west half of the tract in fee. *Held*, that this last conveyance did not estop defendant to claim its undivided interest in the east half. 32 Pac. 885, affirmed.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action to quiet title, by H. C. Gordon against the city of San Diego, in which a judgment for plaintiff was reversed in department 1 (32 Pac. 885), and plaintiff appeals. Decision in department affirmed.

William H. Fuller, for appellant. Cassius Carter, for respondent.

PER CURIAM. In this case department 1 rendered the following opinion, which was prepared by Mr. Commissioner Searls. We still adhere to the views therein expressed:

"This is an action to quiet title to the east half of pueblo lot 1,215, containing about 45 acres of land, situated in the city of San Diego. The appeal is taken by defendant from a judgment in favor of plaintiff, adjudging him to be entitled to said east half of pueblo lot 1,215, according to the Poole map of the pueblo lands of the city of San Diego, made in 1856, and adjudging that defendant has no title thereto, etc.; also, from an order denying a motion for a new trial. The city of San Diego was a municipal corporation, organized under two acts of the legislature, approved January 30, 1852, and April 28, 1852, respectively. The title of respondent is derived from the appellant, the city of San Diego, through a conveyance executed by the trustees of said city on the 27th day of February, 1869, to one Thomas Whaley, and which conveys the 'undivided half of lot twelve hundred and fifteen (1,215) according to the official map of said city made by Charles F. Poole, A. D. 1856, and on file,' etc. The deed is executed by the president and trustees of the city, who attach their private seals, it being recited that no corporation seal had been 'as yet provided.' Among the recitals of the deed are the following: 'Whereas, the president and trustees aforesaid, by the vote of the duly-qualified electors of the said city of San Diego, at an election for the special purpose, held in said city on the 25th day of May, A. D. 1868, in pursuance of an act of the legislature of the state of California entitled "An act to repeal the charter of the city of San Diego, and to create a board of trustees," approved January 30, 1852, were directed, authorized, and empowered to sell pueblo or city lands, the property of said city; and whereas, on the twenty-seventh day of February, A. D. 1869, the said president and trustees, in compliance with said vote and said act of the legislature, sold to said party of the second part the land and premises hereinafter described for the sum of twenty dollars in gold coin of the United States of America, being at the price of twenty-five cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the 8th day of June, A. D. 1868, and said party of the second part has made and completed all the improvements upon said lands by said resolutions or order required to be made, and has fully paid said sum of twenty dollars into the treasury of said city.' The conveyance was duly acknowledged, and was recorded in the office of the county recorder of the county of San Diego, August 21, 1869. On the 28th day of February, 1869, the same trustees, by a like deed containing like recitals, conveyed the west half of the same lot (No. 1,215) to one J. C. Babcock, which deed was acknowledged and duly recorded March 1, 1869, viz. prior to the acknowledgment and recordation of Whaley's deed. At a special meeting of the board of trustees held June 8, 1868, it was resolved 'that the only way pueblo lands will be granted is as follows.' Then follow the conditions, which are, in substance, that one-half of the purchase price is to be paid on securing certificate; the land to be occupied and improved within six months after certificate is taken, and it must be taken out within one month after approval of the petition; $250 worth of improvements to be placed upon tracts of 40 acres or less, and $400 upon tracts of 80 acres, within one year, and, if not made, previous payment to be forfeited, and land to revert to the city. When the improvements were made, the petitioner became entitled, upon payment of the residue of the purchase price, to a deed, surveys to be made at expense of purchaser.

"It was conceded at the trial that title to the pueblo lands, of which lot 1,215 was a part, was, at the date of the execution of the Whaley deed, in the city of San Diego, and that whatever title passed by that conveyance was vested in H. C. Gordon, the respondent. Appellant objected at the trial to the introduction of the Whaley deed upon several grounds, the most important of which was that said deed was not executed on the part of the city as required by law. The specification of the reasons why not executed as required by law shows that there was no showing that the city ever passed a resolution authorizing the sale or transfer of the property described in the deed; that the property was not sold or conveyed in accordance with the charter of the city of San Diego. The Whaley deed recites the particular facts upon which the authority of the city trustees to convey is supposed to be founded.

"That particular recitals in a deed are binding upon parties and privies, and that this doctrine applies to the authorized acts of a corporation, does not seem to be disputed by appellant. It is essential to an estoppel by deed that the deed itself should be a valid instrument; and, if void, though under seal, it does not work an estoppel at law or in equity. Caffrey v. Dudgeon, 38 Ind. 512; Merriam v. Railroad Co., 117 Mass. 241. The contention of counsel for appellant is that, the deed to Whaley not being executed under the corporate seal of the city of San Diego, before it was admissible in evidence respondent should have been required to show that the corporate authorities possessed the power to sell the property, that it was sold under such power, and that the board of trustees, when assembled and acting as such, sold the property, and directed the execution of the deed to Whaley. The city of San Diego, as it existed at the date of the execution of the Whaley deed, as before stated, was organized under an act of the legislature of the state of California approved January 30, 1852, and by an act approved April 28, 1852. The first-named act provided for the election of three trustees, one of whom should be president, etc. The seventh section of the act authorized the board of trustees to sell as much of the property of the city as was necessary to pay its debts, 'giving at least ten days' notice of any property to be sold, and to continue the sale from time to time until said debt is paid.' Section 11 of the act provides that, 'when the debts of said city are paid, no more of the city property shall be sold except by a vote of the inhabitants of said city they shall be authorized to do so,' etc. It appears from the act that there had been a previous corporation of the same city, the charter of which was repealed by the act first above cited, and the provisions of section 7 were intended to apply to the payment of the debts thereof. The language of section 11, that after the debts were paid 'no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so,' must be construed to empower the trustees to sell upon a vote in favor thereof. When the debts were paid the power of the trustees under section 7 ceased, and thereafter their power of alienation came, if at all, from section 11 and the vote of the inhabitants. According to the recitals of the Whaley deed, the qualified electors, at an election for that purpose held, directed, authorized, and empowered the trustees to sell the land in question, and the board of trustees duly assembled, and acting as such by resolution, prescribed the terms and conditions upon which sales would be made. The recitals in the deed, coupled with the law, are sufficient evidence to bind the parties and show that title passed by the deed, provided it was properly executed. We have seen before that it was executed by the trustees, who purported to act for and in the name of the city, except that they signed their names as trustees, and affixed their private seals, etc. On the 7th day of February, 1874, an act of the legislature was approved in the following language: 'Section 1. No deed, conveyance, or grant of land in fee, made prior to the 24th day of November, A. D. 1871, for and on behalf of the city of San Diego and the inhabitants thereof, for a valuable consideration, by the corporate authorities of said city, shall be invalid by reason of the want of a corporate seal, but all of said deeds, conveyances and grants shall have the same force, effect and validity as if a corporate seal of said city had been regularly provided and properly affixed thereto by the proper corporate authorities of said city.'

"It is not deemed necessary to go to any great length in discussing the question of the power of the legislature to enact valid curative laws. The field is a broad one, often involving questions of constitutional law, vested rights, retroactive laws, etc., and giving rise to distinctions sometimes too subtle to be readily grasped by the ordinary mind. Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' Tested by this rule, all doubt must vanish as to the power of the legislature to enact the curative law above quoted. No question has ever been suggested, so far as known, of the power of the legislative branch of government to abolish the distinction between sealed and unsealed instruments, as was done by section 1629 of the Civil Code. That a like provision might be enacted in reference to corporate and official documents can scarcely admit of doubt. It is therefore held that the deed of conveyance to Whaley is to be taken, received, and interpreted between the parties to this action precisely as though sealed with a corporate seal of the city of San Diego at the date of its execution. Had vested rights in third parties accrued between the execution of the instrument and the passage of the curative act, a different question would have been presented. That question need not concern us in the present case. Treating the deed as duly executed in point of form, under a statute conferring power upon the officers to sell and convey the lands of the city upon a majority vote of the inhabitants, the recitals in the deed that an election had been held pursuant to the provisions of the statute, at which the trustees 'were directed, authorized, and empowered to sell pueblo or city lands, the property of said city,' etc., is prima facie evidence that an election had been held. It is not here a question of power, but of proof. Many of the authorities go much further in holding to the binding force of recitals in deeds executed by municipal corporations than is necessary to uphold the conveyance in this case. Jamison v. Fopiana, 43 Mo. 565; Devl. Deeds, § 348, and cases cited. I am certain the court did not err in the admission of the

Whaley deed. Like considerations apply to the admission of the conveyance from the city to Babcock, provided, always, that it was material testimony in the case, relevant to the issues joined therein, all of which may properly be considered in connection with the findings.

"The point is made that the judgment is contrary to the findings, and not warranted by the facts as found in the case. The facts as found by the court may be epitomized as follows: (1) The city of San Diego, being the owner of pueblo lot 1,215, on the 7th day of February, 1869, conveyed in due form and by valid deed an undivided one-half thereof to one Thomas Whaley; that the plaintiff herein, H. C. Gordon, is the successor in interest, by proper mesne conveyance, of the land and interest conveyed to Whaley. (2) That on the 28th day of February, 1869, one day after the conveyance to Whaley, the city of San Diego executed to one J. C. Babcock a proper deed of conveyance of the entire west half of the same lot, viz. lot 1,215. (3) The deed to Babcock was first acknowledged and recorded. Upon this state of facts the court entered judgment quieting and confirming plaintiff's title to the entire east half of lot 1,215, and perpetually restraining defendant, the city of San Diego, from asserting title thereto, and that it be declared to have no title thereto. The position of respondent is: (1) That by the conveyance to Whaley of the undivided one-half of lot 1,215 he became tenant in common with the city therein. This, no doubt, is a correct conclusion. (2) That when, on the next day, the city conveyed the entire west half of the same lot to Babcock, it had conveyed the whole thereof, and, as a consequence, ceased to have any interest in any part of the lot. This second position is not readily apparent. No doubt two halves of a thing are equal to the whole of it; but the undivided one-half and the whole of one-half of a thing are not equal to the whole of it. When Whaley received a deed of an undivided one-half of lot 1,215 he was a tenant in common with the city, and when, on the next day, the city sold the whole of the west half of the same lot, it simply attempted to convey the whole of a parcel of the lot in which it owned but an undivided half. If a guarantor conveys lot A, which he does not own, I am at a loss to see how, in the absence of mistake or fraud, he can be deemed to have conveyed lot B, which he does own. If the title of Whaley failed to the west half of the lot, it was by a failure to have his deed acknowledged and recorded prior to the recordation of the Babcock conveyance.

"There is, however, another and distinct theory upon which respondent contends the judgment of the court below can be upheld. Section 764 of the Code of Civil Procedure, so far as material, is as follows: 'Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being an owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance.' Under this section, or rather by analogy to it, respondent claims that where there are two tenants in common, each owning an undivided half of land, while neither can make a partition binding upon the other by assuming to convey either half specifically, yet if one does so convey, the other would be at liberty to acquiesce, and to accept the remaining half; and that where he has, as in the present case, done so by conveying such remaining half specifically, the two conveyances operate as a complete and binding partition. In support of this proposition we are referred to Freem. Coten. §§ 188, 535, and to the cases of Dall v. Brown, 5 Cush. 289, and Eaton v. Tallmadge, 24 Wis. 223. At section 188 of Freeman, supra, it is said: 'A deed of a specific parcel of land made by one cotenant is not binding on the others, nor can their rights be, to any extent, prejudiced by it. Such a conveyance is not void, but only voidable. It may, therefore, be approved and ratified by the cotenants, and thereby be made to operate as a conveyance in severalty.' Eaton v. Tallmadge, cited supra, is substantially to the same effect as the above quotation. The same may be said of many decisions upon the same question. A partial agreement for the partition of land is void under the statute of frauds, and cannot be enforced, but where consummated and ratified by the parties it will be upheld. In Borel v. Rollins, 30 Cal. 409, it was held that, where an attorney in fact exceeded his authority in executing a deed of partition, his principal, who had ratified the act of partition by his own acts and conduct of solemn significance, such as the execution of deeds of conveyance, which necessarily recognized the partition as of legal validity, was estopped from saying there had been no partition. If the city of San Diego is bound by its acts in the premises, it must be upon the ground of estoppel. But estoppels must be mutual. All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land in common is not binding upon his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley or those holding under him. It is true it appears that the deed to Babcock was first acknowledged and first recorded; but Babcock, for all that appears, may have taken with actual notice of the prior deed of Whaley. Had Whaley conveyed the whole of the east half of lot 1,215, an inference might be predicated, perhaps, on that act, as tending to show his acquiescence in a partition; but, so far as appears, he did not do so. It was stipulated at the trial 'that the plaintiff in this action succeeds, by proper mesne conveyances, to any title and interest in and to said pueblo lot No. 1,215 which was conveyed to Thomas Whaley by the deed dated February 27, 1869.' The finding of the court is in harmony with the stipulation. I fail to find in these points any basis for an estoppel in pais. Non constat but that Whaley or his grantees may still hold an undivided interest in the west half of lot No. 1,215." 32 Pac. 885.

It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

(104 Cal. 369)

CHURCHILL v. BAUMANN et al. (No. 18,164.)[1]

(Supreme Court of California. March 10, 1894.)

WATER RIGHTS—DIVERSION—CONSENT—JURY TRIAL.

1. In 1885 plaintiff bought an eleventh share in a dam and ditch, and in 1887 helped the coowners to repair them. In 1886 and 1887 he used his share of the water diverted, or so much as he needed for his land, bought with said water right. He had notice of the making of the dam and ditch, and acquiesced therein until he began suit in 1888. *Held* sufficient evidence that he consented to the diversion in derogation of his prior rights.

2. In an action for diversion, where defendants deny plaintiff's injury, the record showing no objection to defendants' proof that plaintiff consented to the diversion, waiver of the variance is presumed.

3. An action to enjoin diversion of water and abate defendants' dam and for damages is not an action to recover specific property, or for money due on contract, or for damages for breach of contract, or for injuries, such as, under Code Civ. Proc. § 592, gives the right to a trial by jury. McLaughlin v. Del Re, 2 Pac. 244, 64 Cal. 472, followed.

Department 1. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by Jerome Churchill against H. Baumann and others for diversion of water. Judgment for defendants. Plaintiff appeals. Affirmed.

Spencer & Raker and C. A. Raker, for appellant. J. D. Goodwin and Jenks & Claffin, for respondents.

PER CURIAM. Action to enjoin the defendants perpetually from diverting water from a stream called "Pine Creek" by means of a dam across the same and a ditch leading therefrom, alleged to have been wrongfully constructed and maintained by the defendants; and also to abate the dam as a nuisance, and to recover damages alleged to have been suffered by plaintiff in consequence of such diversion of water during the years 1887 and 1888. The case was here on a former appeal from the judgment on the judgment roll. On that appeal the judgment was affirmed on the ground that the trial court found as a fact that the plaintiff had consented to all the acts complained of. 95 Cal. 541, 30 Pac. 770. The present appeal is from an order denying plaintiff's motion for a new trial, and, in view of the judgment on the former appeal, raises only two questions which need be considered, namely: (1) Is the finding of plaintiff's consent to the acts complained of justified by the evidence? (2) Did the court err in refusing a trial by jury?

1. The evidence, without conflict, shows that in October, 1885, the plaintiff purchased an undivided share of the dam and ditch, which entitled him to the use of one-eleventh part of the water thereby diverted, and that he has owned the same ever since; that in May, 1887, he assisted the defendants in their work of repairing and tightening the dam so that it would divert 550 inches of water,—the largest quantity shown to have been diverted; that in the years 1886 and 1887 he used his proportion of the water diverted, or such part of it as he needed, to irrigate his land purchased with his interest in the ditch; that he had notice of the original construction of the dam and ditch, and of the diversion of the water thereby ever afterwards, and acquiesced therein without objection until he commenced this action. Surely this evidence strongly tends to prove that he consented to the acts in which he participated for his own benefit, and, in the absence of conflicting evidence, was amply sufficient to justify the finding that he did consent. On this appeal,

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[1] Rehearing granted.

as on the former, it is insisted that the consent of plaintiff was not pleaded as a defense, and, therefore, that the finding of consent has no foundation in the pleading. On the former appeal it is said that this finding was responsive to the issue as to whether plaintiff was damaged or injured by the acts to which he consented. From this Mr. Justice De Haven dissented, but said: "But this appeal is upon the judgment roll without any bill of exceptions, and upon this record the presumption is that the evidence by which this defense was established was received without objection, and that the case was tried by consent of the parties, as if such defense had been specially alleged. This being so, appellant should not be permitted to urge here for the first time that no such issue was made in the court below." Upon this ground Mr. Justice De Haven concurred in the former judgment. Since the record upon this appeal, including the statement on motion for new trial, shows no objection to the evidence of plaintiff's consent, the presumption must remain the same as on the former appeal; so that the former judgment is the law of this case, not only as to the effect of plaintiff's consent, but also as to the presumption that the issue was tried by consent of the parties, as if the defense had been specially alleged. It is the consent of the plaintiff to the acts complained of which constitutes the defense upon which the judgment on the former appeal rests, and not the fact that the plaintiff was a tenant in common with defendants in the dam and ditch, as counsel for appellant seems to understand. The tenancy in common is but a circumstance, connected with others, tending to prove such consent, and is not relied on as being equivalent to consent, nor even as being, of itself, sufficient evidence of consent. It may be conceded that plaintiff might have become a tenant in common with defendants in the dam and ditch in question, without prejudice to any prior rights he may have had to divert water from the same stream through other ditches, in which case his cotenants, without his consent, would be entitled to only the surplus water after supplying his prior rights. Yet his consent to the diversion by his cotenants to the extent found in this case (there being no pretense that it was greater than found) is a complete defense to this action, without regard to his alleged prior rights; and therefore it is unnecessary to consider any question as to priority of right independently of such consent.

2. The denial of plaintiff's demand for a trial by jury seems to be justified by section 592 of the Code of Civil Procedure, as construed and applied in the case of McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244. So far as this question is concerned, that case cannot be distinguished from this.

All points made by appellant other than those above considered are deemed immaterial. The order is affirmed.

4 Cal. Unrep. 522

PEOPLE v. BELL. (No. 21,051.)

(Supreme Court of California. March 8, 1894.)

Criminal Law—Record on Appeal—Continuances.

Where the record fails to show that defendant objected to numerous continuances, a denial of motion to dismiss, made on the ground that he had not been brought to trial within the time required by the Penal Code, will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Sidney Bell appeals from a conviction of robbery. Affirmed.

Henley & McSherry, for appellant. Atty. Gen. Hart and Wm. S. Barnes, Dist. Atty., for the People.

SEARLS, C. Defendant was informed against for the crime of robbery, and upon a trial had was convicted, and judgment of imprisonment in the state prison for a term of 10 years was entered, from which judgment this appeal is prosecuted.

One point only is made by appellant as cause for reversal. The information was filed in the superior court in and for the city and county of San Francisco, February 11, 1891. On the 13th day of the same month and year the cause was assigned to department 12 of said court, where, on the 14th day of February, the defendant was arraigned, and given until February 21st to plead, on which last-mentioned day, he having refused to plead, a plea of not guilty was, by order of the court, entered, and the cause continued until February 28th to be set for trial. On the day last mentioned the cause was by consent of parties set for trial on the 30th day of March, 1891. Between the date last mentioned and May 7, 1891, the cause was continued some 15 times; sometimes on motion of defendant, sometimes by consent of parties, and at others the record simply shows the cause to have been continued, without specifying the cause therefor, or upon whose motion the same was granted. On May 7, 1891, there is an entry in the record as follows: "Off calendar." On August 15, 1892, the cause was again continued on motion of defendant to August 22d, and thereafter was continued to September 3d, when, on motion of defendant, it was set down for trial on the 6th day of September, 1892. It was again continued by consent of parties to September 14th, when it was again set for trial on the 15th day of September, 1892. On that day, and before the trial commenced, defendant moved for a dismissal upon the ground that he had not been brought to trial within 60 days, as required by the Penal Code. The record fails to show that defendant ever at any time objected to any of the numerous continuances granted in the case. The case of People v. Douglass (decided by this court October 10, 1893) 34 Pac. 490, is in point, and conclusive against the contention of defendant here. In that case the court said: "It will be observed that it does not appear from the first entry that the defendant objected to the continuance, or that it was not granted with his full and free consent. And the rule is that, in the absence of any showing as to what took place when the order was made, the appellate court will presume, in support of the action of the court below, that the defendant assented to the order. People v. Swafford, 65 Cal. 223," 3 Pac. 809. It was further said, as it has been said in numerous other cases, "that on appeal all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear;" and that "under this rule it was incumbent upon the defendant, if he claimed error, to set out in his bill of exceptions the facts showing it." There are other reasons which might be advanced in support of the propriety of the action of the court below, but the foregoing is deemed sufficient. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

DE HAVEN, J. I concur in the judgment, not only for the reasons stated in the foregoing opinion, but also upon the ground stated in my concurring opinion in People v. Douglass, 34 Pac. 490.

(101 Cal. xviii)

PEOPLE v. BELL. (No. 21,052.)

(Supreme Court of California. March 8, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Sidney Bell appeals from a conviction of robbery. Affirmed.

Henley & McSherry, for appellant. Atty. Gen. Hart and Wm. S. Barnes, Dist. Atty., for the People.

PER CURIAM. The appeal in this case involves the same question as that involved in People v. Bell (No. 21,051, this day decided) 36 Pac. 94, and the judgment herein is affirmed for the reasons given in said cause.

(101 Cal. xviii)

PEOPLE v. BELL. (No. 21,053.)

(Supreme Court of California. March 8, 1894.)

Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Sidney Bell appeals from a conviction of robbery. Affirmed.

Henley & McSherry, for appellant. Atty. Gen. Hart and Wm. S. Barnes, Dist. Atty., for the People.

PER CURIAM. The appeal in this case involves the same question as that involved in People v. Bell (No. 21,051, this day decided) 36 Pac. 94, and the judgment herein is affirmed for the reasons given in said cause.

(101 Cal. 583)

FLAGG v. PUTERBAUGH, Judge. (No. 19,270.)

(Supreme Court of California. March 13, 1894.)

APPEAL—TIME OF TAKING — DISSOLUTION OF ATTACHMENT.

The fact that under Code Civ. Proc. § 946, one loses the lien of his attachment by not appealing from an order dissolving it within 5 days, does not destroy his right of appeal thereafter, as section 939 expressly authorizes an appeal from such order within 60 days.

Commissioners' decision. In bank.

Original application by O. J. Flagg for mandamus to compel George Puterbaugh, judge of the superior court, to certify and settle a bill of exceptions. Granted.

O. S. Flagg and Thos. F. Capps, for petitioner. Wellborn, Stephens & Wellborn, for respondent.

TEMPLE, C. This is an original proceeding in this court for a writ of mandamus to compel the respondent to settle and certify a bill of exceptions. The petition was demurred to on various grounds. The demurrer was sustained solely on the ground that more than 60 days had elapsed since the order was made, and the petition does not show that an appeal had been taken. All other objections were expressly overruled, and leave was given to amend in order that the defect might be supplied, if the facts would warrant it. An amended petition was filed from which it appears that an appeal to this court was perfected eight days after the order dissolving the attachment was made. The amended petition is now demurred to on the ground of insufficient statement of facts, and two points are made:

1. The appeal can serve no useful purpose, because it was not perfected within 5 days, and the undertaking on appeal was not for double the amount claimed. Therefore the lien of the attachment was not preserved. Code Civ. Proc. § 946. But the Code expressly authorizes an appeal from an order dissolving an attachment within 60 days (Id. § 939), and it is evident that the appellant is given the option either to take the steps which will preserve the lien of the attachment or not. We are not now called upon to say what effect a reversal of the order dissolving the attachment may have on the lien.

2. It is said that the respondent is not asked to settle and certify the bill of exceptions; that the proposed bill contains no such request. Landers v. Lawler, 84 Cal. 547, 24 Pac. 307, is relied upon as authority for this contention. I do not think that case is authority for this. The original proposed bill of exceptions here was signed by the attorneys, and opposing counsel were notified that it was proposed as a bill of exceptions, and the judge certifies that he was asked to settle and certify it, and that he refused simply because it was not in time. Besides, the bill, as amended, is the bill which respond-

ent is now asked to settle. I think the demurrer should be overruled.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the demurrer be overruled; and under the provision of rule 26, subd. 30, a peremptory writ of mandate is ordered against the respondent, commanding him to settle and certify the bill of exceptions as prayed for in the petition herein.

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101 Cal. 582

RICHTER v. FRESNO CANAL & IRRIGATION CO. (FRESNO MILLING CO., Intervener).

(No. 18,238.)

(Supreme Court of California. March 13, 1894.)

REVIEW ON APPEAL—PRESUMPTIONS.

On appeal, where respondent fails to file a brief or make oral argument, the court will assume that points made by appellant are well taken.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Suit by J. A. Richter against the Fresno Canal & Irrigation Company, defendant, and Fresno Milling Company, intervener. From an order denying motion for new trial, intervener appeals. Reversed.

T. P. Ryan, for appellant. Firman Church, for respondent.

FITZGERALD, J. Action to abate an alleged public nuisance. Plaintiff had judgment, and the Fresno Milling Company, intervener, appeals from the judgment and the order denying its motion for a new trial. It appears that certain material findings in this case are attacked by the specifications, on the ground of the insufficiency of the evidence to support them. But as the respondent herein has not seen fit to file a brief, or to argue the case orally, we do not feel called upon to perform the duty of counsel by hunting through the record for the purpose of discovering evidence to support the findings, which it was his duty, if it existed, to point out to the court. Under such circumstances, this court will assume, without looking into the record, that the point urged by appellant, that the evidence is insufficient to justify the findings attacked, is well taken. Judgment and order reversed.

We concur: McFARLAND, J.; DE HAVEN, J.

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4 Cal. Unrep. 524

PEOPLE v. DAVIS. (No. 21,035.)

(Supreme Court of California. March 13, 1894.)

JURY—QUALIFICATION—SECONDARY EVIDENCE.

1. A juror on his voir dire was asked by the defense if he had any special prejudice against offenses "committed during Sunday broils." The district attorney, objecting, remarked that no one broiled but defendant. The juror was accepted without challenge. *Held* no prejudice.

2. Where a juror understands English "pretty well," but will not say that he could always understand what any one might say in English, it is for the court to decide whether he is competent to comprehend all that might be said in his hearing.

3. A subpoena for the prosecuting witness, a farm laborer, issued more than two weeks before the trial, and like writs sent and specially commended to the sheriffs of four adjoining counties, were all returned unserved. The county officer testified that inquiry had been made of the farmers in the chief towns of the county, and all over the county. *Held* a predicate for a sworn stenographer's report of his evidence in the preliminary examination.

4. On error assigned to the admission of the reporter's record of evidence on preliminary examination, the certificate, if not set out in the record, is presumed to have been in proper form.

5. There is no objection to the district attorney's reading to the jury parts of the court's instructions, if the court permits.

6. In the absence of a plea of insanity, evidence that defendant had long ago been hit on the head, and mentally and physically injured, is immaterial.

7. An assault with a knife, where prosecutor is cut on the head and neck, is not a simple assault.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

David Davis, convicted of assault with a deadly weapon, appeals. Affirmed.

W. M. Gibson and H. P. Andrews, for appellant. L. V. Hitchcock, Dist. Atty., and Atty. Gen. Hart, for the People.

BELCHER, C. The defendant was convicted of an assault with a deadly weapon upon one Charles Schmidt, and this appeal is from the judgment and an order denying his motion for a new trial.

It is contended for appellant that he was prejudiced by the conduct of the district attorney, and by numerous alleged erroneous rulings of the court, during the progress of the trial, and hence that the judgment should be reversed. The matters complained of will be noticed briefly in their order.

When the juror first called was being examined on his voir dire, he was asked by counsel for defendant if he had any special prejudice against offenses "committed during Sunday broils." The district attorney objected to the question, and remarked: "Nobody broiled but the defendant." It is said that this remark was uncalled for, and tended to prejudice the juror against the defendant. The juror was accepted without challenge; and, conceding that the remark was uncalled for, and should not have been made, still we are unable to see how any prejudice necessarily did result, or could have resulted, therefrom.

Again, when the district attorney was making his opening argument, he read to the jury portions of the instructions of the court; and it is said that, conceding counsel in his argument may read the instructions of the court, still it is improper to read only portions thereof, "and those portions presumably the part bearing most strongly against the defendant; thus emphasizing that portion of the charge of the court most damaging to the defendant." The district attorney had the undoubted right to state to the jury the facts of the case and the law applicable thereto, and it must be presumed that, when he read portions of the charge, he was permitted by the court to do so, and that the portions read were applicable to the facts under discussion, and declared the law correctly. In this we fail to see any misconduct on the part of the attorney, or anything of which the defendant should be heard to complain.

One of the jurors called was a German. On his examination as to his fitness to serve, he was asked by counsel for defendant if he could speak and understand the English language with ease. He answered: "Well, I understand the English pretty well. Can talk it, but I can't write much. Can write a little. I can read pretty well." "Q. Can you always understand what any one says when they speak in English? A. I would not say I could always. In some cases I don't think I could." Other like questions were asked and answered, and the counsel then challenged the juror upon the ground that, according to his own statement, he did not understand the English language so as to comprehend all that might be said in his hearing. The challenge was denied, and an exception reserved. There was no error in this ruling. It was for the court to determine as to the qualifications of the juror, and, after seeing him and hearing him talk, it properly concluded, so far as we can see, that he was competent to act.

Another juror, on being called, was asked by counsel for defendant: "Do you think there are cases in which an aged and decrepit man might, on account of his physical infirmity, necessarily have to use a weapon to defend himself, whereas, in the same case, a younger and stouter man might be able to resist whatever force was used without weapons?" An objection that the question was irrelevant and immaterial was sustained, and this ruling is assigned as error. Undoubtedly a case may be supposed where an aged and decrepit man might be justified in using a weapon to defend himself when a young and vigorous man would not be. But to constitute justification in any case the circumstances shown must be such as are declared by the statute to have that effect; otherwise, neither age nor decrepitude, youth nor vigor, would cut any figure in the case. In this case the law bearing upon the subject in hand was clearly and fully stated by the court to the jury, and we fail to see, therefore, how the defendant could have been prejudiced by the ruling complained of.

The prosecuting witness, Charles Schmidt, was not present at the trial. The district attorney called the under sheriff of the county, and proved by him that a subpoena for Schmidt was placed in his hands for service more than two weeks before the trial, and that like subpoenas were sent to the sheriffs of the four adjoining counties, with directions to use every effort to find the witness; and that all of the subpoenas had been returned unserved. The said subpoenas, with the returns thereon, were offered in evidence, and the officer was then asked: "What other efforts, if any, have you made towards finding the whereabouts of the witness? A. We have made inquiry of every farmer of any prominence we could see in town, and Corning and Vina, and different parts of the county. Q. All over the county and different parts of it? A. Yes, sir. Q. Have you been able from any and all steps taken by you personally, or by the office, to ascertain and find the whereabouts of the man Chas. Schmidt? A. I have not been able to ascertain anything about where he went." One Grinnell was then called, and testified: "I am official court reporter of Tehama county, California, and was sworn to take the evidence in the preliminary examination of People vs. David Davis. The transcript shown me was the evidence of Chas. Schmidt, taken at said examination. The certificate shown me is my certificate. The evidence taken at that time was taken in shorthand, and written out in longhand by me." Thereupon the evidence of Schmidt given on the preliminary examination of defendant was offered and admitted in evidence, against the objection of defendant that no sufficient foundation for its admission had been laid, and that there was no proper certificate to the reporter's transcript. It is earnestly contended for appellant that the court erred in admitting the offered evidence, for the reason that there was no sufficient showing that the missing witness could not, with due diligence, be found within the state. We do not think this contention should be sustained. It appeared from other evidence given during the trial that the witness had been a laborer on farms in Tehama county for several years. He had disappeared, and we cannot say that the court abused its discretion in holding that due and reasonable diligence had been used to find him.

The objection that no proper certificate was attached by the reporter to the transcript cannot be entertained. The certificate is not set out in the record, and what was its form or character does not appear. If deemed insufficient, it should have been set out; and, not being so, it must be presumed to have been in proper form. The other objections to the transcript are without merit, and do not require special notice.

It was proved that, some 10 or 12 years before the trial, defendant received a violent blow on the head, which rendered him unconscious and kept him in bed 5 or 6 weeks, and that his physical condition was greatly impaired by the blow. Several witnesses were then called by the defendant to prove that his mental condition was also greatly impaired by the blow. The evidence was objected to as irrelevant and immaterial, and the court held that it was so, unless the plea of insanity was set up. No such plea being interposed, the evidence was excluded and exceptions reserved. It is not claimed that defendant was an idiot or lunatic when he committed the offense charged; and, this being so, the evidence sought to be introduced was clearly immaterial, since he was responsible for his willful acts, whether he was then a strong or weak minded man.

The instructions given to the jury were very full, covering the whole case, and stated the law correctly. The court properly modified one of the instructions asked by defendant. As presented, it was inaccurately drawn, and, as modified and given, it was clearly correct. The failure of the court to instruct the jury that, under the charge made, the defendant might be found guilty of a simple assault, was not error. The charge was an assault with intent to commit murder, and it was proved, without dispute, that defendant made the assault on Schmidt with a knife, and cut him on the head and neck. He was therefore, if guilty at all, guilty of more than a simple assault. People v. Madden, 76 Cal. 521, 18 Pac. 402; People v. Scott, 93 Cal. 516, 29 Pac. 123. The instructions asked by the district attorney, to which objection is made, have been given and approved in many cases, and do not require further discussion. See People v. Bruggy, 93 Cal. 483, 29 Pac. 26, where the authorities are reviewed.

Looking at the whole case, we find no prejudicial error, and therefore advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(101 Cal. 349)

In re THOMPSON'S ESTATE. (No. 19,295.)[1]

(Supreme Court of California. March 17, 1894.)

APPEAL—AMENDMENT OF DECREE.

Where it appears after decision that, by inadvertence of the court, appellant was charged with the wrong amount, the decree will be corrected.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Application to amend decree. 35 Pac. 991. Granted.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Myrick & Deering and L. Lamy, for respondent.

PER CURIAM. Since the decision in this case was filed, our attention has been called to the fact that the decree charges the appellant with $14,275.21. This is evidently a clerical mistake, because the court below decided, after hearing the evidence, that the appellant should be charged with $13,296.90. But, after a careful computation, we find that even the latter amount is too great. The error arose, doubtless, out of the failure to consider the fact that in all of the years except one the expenses allowed exceeded the income. Starting with the sum of $11,453.84, and computing the interest each year at 10 per cent., with allowances for the excess of expenses over income, the amount for which the appellant should be charged is $12,154.68. It is ordered, therefore, that, in addition to the modification heretofore directed, the court below change the figures of the decree to $12,154.68.

(101 Cal. 549)

LA POINT v. BLANCHARD. (No. 18,241.)

(Supreme Court of California. March 12, 1894.)

FRAUDULENT CONVEYANCES — PREFERENCE — CONVEYANCE OF POSSIBLE HOMESTEAD.

The mere fact that property conveyed by an insolvent debtor to a creditor with intent to prefer him is of such a nature that it could, and probably would, have been set aside to the debtor as a homestead, does not render the conveyance any the less a fraud on the other creditors.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Moses La Point, assignee in insolvency of Thomas M. Boulware, against C. S. L. Blanchard, to set aside an alleged fraudulent conveyance. From a judgment for defendant, plaintiff appeals. Reversed.

John Gale, for appellant. Reardan & White, for respondent.

TEMPLE, C. The complaint shows that on the 10th day of September, 1892, a petition was filed in the superior court of Butte county, under the insolvent act of 1880, praying that Thomas M. Boulware be adjudged an insolvent debtor; that thereafter such proceedings were had that on the 19th day of December, 1892, an order was duly given and entered, adjudging said Boulware to be an insolvent debtor; that plaintiff, having been duly elected assignee of said insolvent on the 23d day of January, 1893, duly qualified as such, and on the same day an assignment of the estate of the insolvent was executed by the clerk, as required by said act; that on the 1st day of September, 1892, and within one month before the filing of the petition in insolvency, the insolvent assigned, transferred, and conveyed to defendant certain real property, which is specifically described in the complaint; that at the time of said transfer said Boulware was, now is, and ever since has been indebted to a large number of persons in a large amount, and then was, ever since has been, and now is wholly insolvent; that at the time of the transfer said Boulware was also indebted to the defendant, and that the transfer was made with the intention of giving defendant a preference, and of preventing the property so transferred from coming to the assignee in insolvency, under the act, and to prevent the same from being ratably distributed among his creditors, and that defendant accepted said property as a preference as a payment of her indebtedness, and at the time had reasonable cause to believe, and did believe and know, that said property was transferred to her with the intention of giving her the preference, and of preventing the property from being divided ratably among the creditors of said insolvent debtor; that the transfer was not made in the usual course of business, but was made and accepted with the view of preventing the property from coming to the assignee of the insolvent, to prevent it from being distributed among the creditors of the insolvent, and to delay the operation of, and evade the provisions of, the insolvent act of 1880 of the state of California; that the property is of the value of $3,500,—wherefore he asks that the conveyance be canceled, etc. The answer denies some of the allegations of the complaint, and particularly that the transfer was made and received with intent alleged. The court finds that Boulware was an insolvent, as alleged, and that plaintiff was appointed and qualified as assignee, and that the assignment was made; also, that Boulware was, and still is, insolvent and unable to pay his debts from his own means; that, at the time of the transfer, Boulware was indebted to defendant, and that the transfer was made with a view of giving defendant a preference, and that defendant accepted it as a preference and in payment of an indebtedness due her from the insolvent, and then had cause to believe, and did believe and well knew, that the transfer to her was with the view and intention of giving her a preference, and with knowledge that Boulware was an insolvent and unable to pay his debts; that the property so transferred consisted of lots with a dwelling house thereon, in which the insolvent debtor then was, and long prior thereto had been, residing with his family, which consisted of a wife and two minor children; the premises were then worth $3,500; and that the debt due defendant, with certain incumbrances which were upon the premises, fully equaled the value of the premises. The court then found, as a conclusion of law, that the property involved was property which the court could and would have set apart as a homestead for the insolvent, and therefore it would not have been applied to the payment of the indebtedness of the insolvent, and therefore the conveyance did not prevent it from being ratably divided among the creditors, and the conveyance was therefore not a fraud upon the creditors or the insolvent law.

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[1] For dissenting opinion, see 36 Pac. 508.

The premises had not been selected as a homestead by a declaration by either husband or wife at the time of the transfer, and might have been attached by the creditors. It was not, therefore, property exempt from execution. The sole reason why the court found that the transfer was not fraudulent was because it could and would have been set apart as a homestead for the family if it had not been transferred to defendant. All the facts are found to exist which, under section 55 of the insolvent act, are required to render the transfer fraudulent and void, except that it is not found that the transfer was with the view to prevent the ratable distribution of the property among the creditors of the insolvent; and the reason why this was not found is as above stated. But how can the court now know that this property would have been set apart for a homestead? It would have been done, if at all, as an act of judicial discretion,—a discretion which can now never be exercised. Whether the insolvent had other property suitable for a homestead does not appear. Can it now be determined that the court would have selected, designated, and set apart this precise property? And may not the insolvent still be entitled to a homestead from other property? And again, while it is the duty of the court, in a proper case, to set apart a homestead for the insolvent if he desires it, I do not think the court should do so if he does not desire it. It is not against public policy for one to relinquish his property to his creditors in payment of his honest debts. It cannot now be known whether the insolvent would have desired to retain a homestead. Surely, a creditor to whom land suitable for a homestead has been conveyed cannot insist upon having such property set apart as a homestead for the insolvent's benefit. Such, however, is the real effect of the judgment in this case. Admitting that it is the duty of the court, of its own motion, to set apart a homestead, defendant cannot complain of a failure to do so. Had the property, when conveyed, been exempt from execution, and therefore then beyond the reach of creditors, there would have been much force in the argument of the respondent; but I think it is going too far to hold that, when one is charged with taking property in violation of the insolvent act, he may defend by showing that the property was of such a nature that it might have been made exempt from execution. By conveying it to defendant, the insolvent put it beyond his power to have it declared a homestead. That could only be done for the benefit of the insolvent and his family. The complaint is sufficient. It contains all that the statute requires. I recommend that the judgment be reversed, and the court directed to enter judgment upon the findings for plaintiff, as prayed for in the complaint.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed, and the court below directed to enter judgment upon the findings for plaintiff, as prayed for in the complaint.

(4 Cal. Unrep. 529)

NATOMA WATER & MIN. CO. v. HANCOCK et al. (No. 14,624.)

(Supreme Court of California. March 13, 1894.)

APPEALABLE ORDERS.

No appeal lies from an order adjudging one guilty of contempt for violating a restraining order.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

Action by the Natoma Water & Mining Company against John Hancock and Joseph Wild. An order was granted restraining defendants from doing certain things pending the litigation. From an order adjudging defendant Wild guilty of contempt for violating this order, he appeals. Appeal dismissed.

S. Solon Holl, for appellant. Daniel Titus, for respondent.

HAYNES, C. This is an appeal from an order adjudging the defendant Joseph Wild guilty of a contempt of court, and imposing a fine of $250 therefor. Upon the complaint filed by the plaintiff at the commencement of the above-entitled action an order was granted requiring the defendants to show cause, at a day named, why they should not be enjoined pending the litigation, or until the further order of the court, from doing certain things in the order mentioned; "and that, in the mean time, and until this order to show cause be heard and determined, the defendants be restrained," etc. It was for an alleged violation of this restraining order that appellant was adjudged guilty of contempt. A bill of exceptions was taken, and several errors of law and specifications wherein the evidence is insufficient to justify the decision appear therein. But these alleged errors cannot be examined, as the order is not appealable. See Code Civ. Proc. § 1222; Tyler v. Connolly, 65 Cal. 28; Sanchez v. Neuman, 70 Cal. 210, 11 Pac. 645; In re Vance, 88 Cal. 262, 26 Pac. 101; Ex parte Clancy, 90 Cal. 556, 27 Pac. 411. If the restraining order was invalid and without force for the want of an undertaking (a point not necessary to consider here), defendants had a remedy by motion to vacate it, or by appeal from an order refusing to vacate it. The court below had jurisdiction to determine that question in this proceeding, but, as an appeal from that order does not lie, this court has no jurisdiction to correct any errors of law or fact it may have committed. The appeal should be dismissed.

We concur: TEMPLE, C., SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal herein is dismissed.

(101 Cal. 594)

STEWART et al. v. SUPERIOR COURT OF SAN DIEGO COUNTY. (No. 15,482.)

(Supreme Court of California. March 14, 1894.)

CERTIORARI—HEARING ON APPLICATION.

Sup. Ct. Rule 26, relating to original writs from the supreme court, provides that on the return day of the alternative writ respondent may demur or answer, or both, but if he demur only, and his demurrer is not sustained, the writ will issue without further leave to answer. *Held*, that in certiorari, a hearing after notice of the application is equivalent to a hearing on return of the alternative writ in other proceedings, and calls for decision on the judgment attacked; so that, if the petition do not truly or fully state the judgment, it is better to allow the writ to issue, and try the merits on the formal return.

Department 1.

Certiorari on petition of Julia V. Stewart and W. B. Prentice to the superior court of San Diego county. Order annulled. For opinion on demurrer to petition, see 35 Pac. 156.

Gibson & Titus and V. E. Shaw, for petitioner. E. W. Britt, for respondent.

HARRISON, J. Certiorari. The application for the writ herein was made after notice to the respondent, and, after service upon it of a copy of the petition, a demurrer to the petition was filed on the part of the respondent upon the ground that the petition did not show that the superior court had exceeded its jurisdiction; and, at the hearing of the application, briefs were filed in behalf of the respective parties. The demurrer was also argued orally, and, after consideration thereof, an opinion was filed in which it was held that the court had exceeded its jurisdiction in its order adjudging the petitioners guilty of contempt, and the demurrer to the petition was overruled. 35 Pac. 156.

Rule 26 of this court contains provisions regarding the procedure to be observed when the original jurisdiction of this court is invoked in matters of this nature, and it is provided in subdivision 3 thereof that "upon the return day of the alternative writ the respondent may make return, either by demurrer or by answer, or both. If the return be by demurrer alone, and the demurrer is not sustained, the writ will be ordered to issue without further leave to answer." Although, technically speaking, there is no alternative writ of certiorari, the manifest object of the rule is applicable to petitions for that writ as fully as to those for the other original writs referred to in the rule. A hearing after notice for the application serves the same purpose as the hearing upon the return to an alternative writ of mandate or prohibition. One object of the rule is to enable the parties to the application to obtain a decision upon the sufficiency of the order or judgment sought to be annulled, without incurring the expense or the delay attendant upon waiting until there has been a return to the issuance of the writ. If the order or judgment is set out at length in the petition, and the respondent concedes that it is correctly set forth therein, no useful purpose is served by the issuance of the writ and a formal return thereto in which the same order or judgment would be merely repeated. It is only when the correctness of the order as set out is challenged, or when other portions of the record will qualify its terms, that it would seem necessary for the issuance of the writ before a hearing upon the merits, and in such case the better practice would be to allow the writ to issue, and have the hearing upon the merits await the return; but when the entire merits of the controversy are presented in the petition, and the only question for determination is one of law depending upon a consideration of the order or judgment itself, a demurrer to the petition calls for a decision upon the sufficiency of the order. If the parties prefer to adopt this course of procedure the decision thereon will be upon the merits, and, if the demurrer is overruled, the subsequent issuance of the writ and the judgment to be rendered after its return will be merely formal, and in accordance with the decision upon the demurrer.

After the decision upon the demurrer herein, upon the suggestion of the respondent that the import of this rule had been misconceived, and that the record to be certified under return to the writ might be different from that set forth in the petition, an order was made for the issuance of the writ. In response thereto, the clerk of the superior court has made a return in which he has certified to this court a transcript of the proceedings of the court below. The copies of the judgment of the superior court, and of the order adjudging the petitioners guilty of contempt, of which they ask a review, as contained in the return of the respondent, do not differ in terms from the copies of the same judgment and order which had been set out in the petition, and the other portions of the return are merely matters of inducement, leading up to the rendition of the judgment in the action and to the order sought to be annulled, but do not qualify or change the scope and effect of the order itself; and, as it was held in our decision upon the demurrer that the court had exceeded its jurisdiction in making that order, it follows that the judgment to be rendered upon the return of the writ is merely to apply the decision thus made, and direct a judgment to be entered annulling the order; and it is so ordered.

We concur: PATERSON, J.; DE HAVEN, J.

(101 Cal. 624)

In re BURRIS. (No. 21,036.)

(Supreme Court of California. March 14, 1894.)

DISBARMENT OF ATTORNEY.

An attorney of an administratrix, who obtains from her a receipt for money of the estate deposited in bank on the false representation that it was necessary to deposit the money with the probate court, and who draws and retains it, not intending to deposit it with the court, though repeatedly assuring her that he had done so, and refuses on demand, and on an order of the probate court, to pay her the money, should be disbarred.

In bank.

Information for the removal of John F. Burris from the office of attorney and counselor at law.

R. P. Tappan, for petitioner. John F. Burris, in pro. per.

PER CURIAM. This is a proceeding based upon the written and verified accusation of Mrs. Johanna Nelson, in which she alleges certain misconduct of John F. Burris, and prays that he be removed from the office which he has heretofore exercised of attorney and counselor at law. Answer was made by the respondent. The matter was referred to a commissioner, to take and report the evidence and findings of fact; and in due time he made his report. One of the specifications in the accusation is that respondent procured the name of one Fred. C. Smith to be signed to a certain affidavit to a bond, so that it falsely appeared that said Smith had appeared before a certain notary public and qualified as a surety, whereas he had never signed said affidavit or appeared before said notary, and that the judge of the superior court who approved the bond was thus fraudulently imposed upon. This averment is supported by the evidence and findings, and the conduct of the respondent in that matter was reprehensible; but, as Smith was really willing and ready to qualify as a surety on the bond, it is difficult to see what bad motive respondent could have had to insert his name in the affidavit, and it may possibly have been the result of mere carelessness.

But the other main charge in the accusation is of a most serious nature. Mrs. Nelson was administratrix of the estate of one David Johnson, deceased, and the respondent, Burris, was her attorney of record. A part of the estate of Johnson consisted of money deposited in a bank known as the "San Francisco Savings Union;" and the charge is that respondent secured possession of said money by false representations made by him to Mrs. Nelson, and that he kept said money, although he had represented to her that it was necessary to deposit it in another place.

This charge is fully sustained by the evidence. The finding of the commissioner upon this point is as follows: "May 8, 1893, Burris procured from the savings bank the form of a receipt which it was necessary for the administratrix to sign for the money, and took the same to Mrs. Nelson, telling her that it was necessary for him to draw the money from the bank, and send it to the judge of Solano county, who would keep it for four months, when, if there was anything left after paying the costs, she would get it. Confiding in these statements, Nelson signed the receipt, and acknowledged the same before a notary. Respondent thereupon drew the money from the bank, and retained it in his own possession. He did not intend to send the money to the judge or the clerk, although he repeatedly assured Mrs. Nelson afterwards that he had done so." It is further found that "such representations were made with the intention of deceiving Mrs. Nelson, and to induce her to consent that he should procure the money, and to enable him to retain it in his possession." In June, 1893, Mrs. Nelson discovered that the money had not been sent to the judge, and changed her attorney, and demanded the money from respondent; but he refused to pay her the money, and still refuses, although the probate court has made an order requiring him to do so. We think that this conduct on the part of respondent is an entirely inexcusable and most flagrant violation of the sworn duties of an attorney. He betrayed the confidence of his client; induced her by false representations and pretenses to consent to the wrongful appropriation to himself of trust funds which she held in a fiduciary capacity; and, presuming upon her want of knowledge of her legal responsibilities, misled her, for his own gain, into a position embarrassing to her reputation. His claim is that he wanted the money to secure a bondsman, and for his own fees and expenses. He would have had no right, under any circumstances, to have taken the money for that purpose; but for the duplicity and false statements by which he deceived his client there could, in the nature of things, be no excuse whatever. Let judgment be entered, ordering and adjudging that the name of the respondent, John F. Burris, be, and hereby is, stricken from the roll of attorneys and counselors of this court, and that he be perpetually precluded from practicing as an attorney or counselor at law in all the courts of the state of California. This judgment shall take effect on April 2, 1894.

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101 Cal. 648

POLY et al. v. WILLIAMS. (No. 18,223.)

(Supreme Court of California. March 17, 1894.)

COUNTERCLAIM—WHEN ALLOWABLE.

A promise to pay a stated sum as damages for property destroyed by trespassing animals is matter arising on contract within Code Civ. Proc. § 438, providing that, in an action on contract, any other cause of action also arising on contract and existing at the commencement of the action may be counterclaimed.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Poly, Heilbron & Co. against W. M. Williams. From a judgment for plaintiffs, defendant appeals. Reversed.

J. P. Strother, for appellant. H. H. Welsh, for respondents.

FITZGERALD, J. This action was brought by plaintiffs to recover on a certain promissory note executed to them by the defendant. Defendant, in his answer, set up a counterclaim, alleging "that the plaintiffs are indebted to the defendant in the sum of $1,200 upon an account for nursery stock, consisting of fruit trees and grape vines eaten up and destroyed by the hogs, cattle, and horses of the plaintiffs, during the year of 1892, prior to the commencement of this action, at the county of Fresno, and state of California, which the plaintiffs then and there promised and agreed to pay the defendant; that no part thereof has been paid, and that the said sum of $1,200 is now due and owing to the defendant from the plaintiffs." Plaintiffs demurred to that part of the answer pleading a counterclaim, and at the same time moved the court to strike it out. The demurrer was sustained, and the motion granted, and, upon defendant declining to amend, the case was tried by the court without a jury, and judgment given for plaintiffs. This appeal is taken by the defendant from the judgment and the order denying his motion for a new trial.

The only question necessary to be determined on this appeal is, did the counterclaim set out in the defendant's answer state a cause of action arising upon contract, and existing at the commencement of the action, within the meaning of the provisions of subdivision 2 of section 438 of the Code of Civil Procedure?[1] It is contended by respondents that the alleged counterclaim is based entirely upon an alleged trespass, from which no contractual liability can be implied. This contention cannot be sustained. While it is true that a counterclaim sounding in tort cannot be set up as a defense to an action arising upon contract, yet it is equally true that a promise or agreement to pay a stated sum of money in full satisfaction of damages resulting from a tort becomes a matter arising upon contract, and, as such, may be properly pleaded as a counterclaim to an action founded upon contract. The counterclaim herein, although somewhat informally pleaded, states a valid, express promise by plaintiffs to pay to the defendant the sum of $1,200 upon an account for nursery stock destroyed as alleged. It may be that the facts constituting the trespass were stated merely for the purpose of showing a consideration for the promise and agreement alleged, and not for the purpose of raising an implied promise therefrom, as claimed by respondents. "An implied promise is a mere conclusion of law, and the facts from which such a promise is implied must, under our system of pleading, be stated. But the rule is different in the case of an express promise, for such a promise is an ultimate fact, and must be pleaded as such. Nor is the word "express" necessary to be used in pleading a promise, for the reason that, when a promise is alleged in a pleading, it must be held to be express; and proof of an express promise or agreement is necessary in order to sustain the counterclaim pleaded herein. From these views it is clear that the court below erred in sustaining the demurrer and granting the motion to strike out that part of the answer setting up a counterclaim, for which error the judgment and order are reversed.

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[1] Code Civ. Proc. § 438, provides that, in an action on contract, any other cause of action also arising on contract may be counterclaimed.

We concur: DE HAVEN, J.; McFARLAND, J.

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101 Cal. 563

GWYNN v. DIERSSEN. (No. 18,244.)

(Supreme Court of California. March 13, 1894.)

HUSBAND AND WIFE — COMMUNITY PROPERTY — SALE UNDER DECREE RENDERED AGAINST WIFE —EFFECT.

1. A conveyance to a wife vests title in the community where the consideration was not paid out of her separate estate.

2. Under Pol. Code, § 3461, providing that a list of assessments against land must contain "the names of the owners of each tract if known, and, if unknown, that fact," an assessment of community land in the name of the wife is void, and a sale thereof under a decree in an action against the wife to foreclose the lien of the assessment does not affect the husband's title.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by William Gwynn against D. Dierssen. There was judgment for defendant, and, from an order denying a new trial, defendant appeals. Reversed.

Johnson, Johnson & Johnson, for appellant. J. H. McKune and Robert T. Devlin, for respondent.

PATERSON, J. This is an action to quiet title. The plaintiff's title to the locus in quo is derived as follows: (1) A grant, no consideration being named, from W. B. Taylor, who was at the time the owner of the land, to Cornelia S. Gwynn, November 5, 1880; (2) deed, grant, bargain, and sale in form, expressing a consideration of $350, from Cornelia S. Gwynn to R. W. Bessinger, June 4, 1887; (3) deed from R. W. Bessinger to plaintiff, December, 1887; (4) deed from plaintiff to C. S. Gwynn, consideration of love and affection, dated September 6, 1888; (5) deed from C. S. Gwynn to plaintiff, February 21, 1889; (6) deed from William Gwynn, Sr., father of plaintiff, to the plaintiff, expressing consideration of $500, February 20, 1889; (7) deed from William Gwynn, Sr., to plaintiff, November 20, 1889. The defendant claims title under a certificate of sale by the sheriff of Yolo county, dated April 18, 1891. The sale was made pursuant to a decree rendered against Cornelia S. Gwynn, June 11, 1888, in an action brought to foreclose the lien of a delinquent swamp-land assessment upon the land in controversy. At the time of the conveyance by Taylor to Cornelia S. Gwynn, the latter and William Gwynn, Sr., were, and ever since have been, husband and wife. The court below rendered judgment for the defendant. The plaintiff moved for a new trial, and, from the order denying the same, he has appealed.

The deed from Taylor to Cornelia S. Gwynn vested the title in the marital community. It does not appear whether the purchase price was paid from separate or community funds. The presumption is that they were community funds. Such a presumption may be rebutted by showing that it was purchased with money belonging to the separate estate of the wife, but no attempt to do so was made in this case. The defendant could take no better title, under the decree foreclosing the swamp-land assessment lien, than he would have acquired if the plaintiff had conveyed directly to him, and all parties purchasing real estate standing in the name of a wife, where the deed presumptively or in fact was given for a money consideration during coverture, do so at their peril. Ramsdell v. Fuller, 28 Cal. 43. The rule stated in the case just cited has been approved over and over again in this state, and has become a settled rule of property. Whether a deed be taken in the name of one or the other of the spouses upon a valuable consideration, the presumption is the same. The fact that the property is taken in the name of the wife alone does not, of itself, give a purchaser notice of any separate claim or right to the property. It is otherwise where the deed, upon its face, shows an intention on the part of the husband to have the property conveyed to her as her separate estate. The fact that the deed from the plaintiff to his mother was a deed of gift is immaterial, it being shown that, at the time the deed was given, he had no title to convey. Section 164 of the Civil Code, as amended in 1889, is not retroactive in effect. Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; Jordan v. Fay, 98 Cal. 267, 33 Pac. 95.

The sale of the land under the decree of foreclosure did not affect the title of William Gwynn, Sr. The assessment in the name of Cornelia S. Gwynn was void. It is a universal rule, applicable to all statutes upon the subject of taxation, that provisions for the assessment of property are in invitum, and must be strictly followed to divest title. Hearst v. Egglestone, 55 Cal. 365; Weyse v.

Crawford, 85 Cal. 199, 24 Pac. 735; Shipman v. Forbes, 97 Cal. 574, 32 Pac. 599. Where an assessment names a party as the owner, no liability is created against anybody else, and not against the party named, unless he is the owner of the property. Taylor v. Donner, 31 Cal. 483. The record does not show whether the property was assessed to Cornelia S. Gwynn, or to unknown owners. It must have been assessed to the former, however, as the suit was against her, and against her alone. She would not have been a party to the suit unless it had been assessed in her name, and, if it was assessed to her and to unknown owners, the assessment was void. Himmelmann v. Steiner, 38 Cal. 178; City of Stockton v. Dunham, 59 Cal. 608; Klumpke v. Baker, 68 Cal. 561, 10 Pac. 197; Jatunn v. O'Brien, 89 Cal. 61, 26 Pac. 635. Section 3461 of the Political Code provides that the list must contain the names of the owners of each tract, if known, "and, if unknown, that fact." In this respect the law applicable to swamp-land assessments is the same as former provisons with respect to taxation; and in Grotefend v. Ultz, 53 Cal. 666, the court said: "The first duty of the assessor, under these provisions, is to ascertain the name of the owner of each piece or parcel of property, and to assess it to him. His second, if he fails to ascertain the name of the owner, is to assess it to 'unknown owners.' It follows that the assessment to D. B. Matlock, and all owners and claimants, known or unknown, was void." See, also, Brady v. Dowden, 59 Cal. 51; Bosworth v. Webster, 64 Cal. 1, 27 Pac. 786. In Reclamation Dist. v. Evans, 61 Cal. 104, it was held that no assessment against any tract of land can be enforced, except by an action to which the owner of the tract has been made a party. He must be given an opportunity to contest the charge before it is declared a lien upon his land. Black, Tax Titles, § 57. We think that the deed from William Gwynn, Sr., to plaintiff conveyed the title to the latter, and that it was not divested by the judicial proceedings referred to. The order appealed from is reversed.

We concur: GAROUTTE, J.; HARRISON, J.

(4 Cal. Unrep. 539)

SPOONER v. CADY. (No. 18,191.)

(Supreme Court of California. March 15, 1894.)

AMENDMENT OF PLEADINGS.

1. A pleading may be amended without leave of court under Code Civ. Proc. § 472, providing that any pleading may be amended once as of course and without costs.

2. An amended pleading which is stricken out on motion does not supersede the original.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county.

Action by Clara Spooner against Frank P. Cady in claim and delivery. Plaintiff had judgment by default, from which, and from an order overruling a motion to set aside the default, defendant appeals. Reversed.

Goodwin & Dodge and Trenmor Coffin, for appellant. A. L. Shinn, for respondent.

SEARLS, C. This is an action in claim and delivery. Plaintiff had judgment, from which and from an order of the court made after final judgment, refusing a motion to set aside the default of defendant and the judgment rendered thereon, defendant appeals. The action was commenced October 3, 1892. On the 13th day of the same month defendant filed a demurrer to the complaint and answer. The demurrer was overruled, but at what date does not appear. On December 15, 1892, defendant served and filed an amended answer, which was not verified, and was filed without any leave of court first had or obtained. Plaintiff moved to strike out the amended answer upon the grounds that it was filed without permission of the court; without notice to plaintiff's attorneys; that it was not verified, and that it did not state facts sufficient to constitute a cause of action. The motion was heard December 23, 1892. At the hearing, defendant asked leave to verify the amended answer, and in support thereof filed an affidavit showing, as cause for want of verification when filed, that defendant was absent from the county on official business, and his attorney was desirous of at once notifying plaintiff's counsel of the contents of the proposed answer before preparations should be made for trial of the cause, etc. Defendant was sheriff of the county of Lassen, and, as one of the defenses of the original answer, an attempt was made, although a defective one, to justify the taking of the personal property in question by virtue of two certain writs of attachment. The attempt of the amended answer was to make a more full and specific defense than that contained in the original answer. The court below denied the application of defendant to verify the amended answer, struck the same out, and ordered judgment in favor of plaintiff, which was entered.

The court erred in its rulings. Under section 472 of the Code of Civil Procedure, "any pleading may be amended once by the party, of course and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading." Any pleading which may be amended, once of course and without costs, may be so amended without application to the court or permission therefrom. It is a right conferred upon parties equally with that of pleading originally; a right which the court cannot take from a party to an action. It must be exercised within the time and in the manner specified in the Code, and is quite distinct from the numerous cases in which amendments to pleadings can only be made by leave of the court. The question whether an amendment to an answer as of course must be made within the 10 days given to demur thereto, where no demurrer has in fact been interposed, or whether in such a case it may be made at any time before trial, is an important one, and, as its decision is not necessary to the disposition of the present appeal, no opinion is expressed upon the question. The court treated the filing of the amended answer without leave as being improperly filed, and gave this as a reason for striking it out. Having stricken it out, it went further, and held that this amended answer had superseded the original answer, and hence that when it was stricken out there was no pleading on file on behalf of defendant, and gave judgment against him. It is true that "an amended pleading supersedes the original," but this must be taken with the limitation that, to perform that office or function, the amended pleading must be a valid, subsisting pleading, entitled to recognition as such, and legitimately in the place and stead of that which it supersedes. If it is a usurper, with no right to live or be of record, and only exists until the court can strike it out of existence because it was void ab initio, it fills no such office, and we cannot subscribe to the logic which treats a pleading as void because filed without leave of the court, and in the same breath asserts it to be valid and subsisting as a substitute for the original pleading. It follows that the court erred in entering judgment in favor of plaintiff, and against the defendant, with the original answer in the same cause standing of record, which answer, though defective, presented issues without the trial of which plaintiff was not entitled to judgment. Like considerations apply to the ruling made after judgment on the motion to set the same aside. The judgment and order appealed from should be reversed, with leave to the defendant, and respondent here, to amend his answer, if he shall be so advised.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to the defendant, and respondent here, to amend his answer, if he shall be so advised.

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101 Cal. 606

DAVIS v. McNEAR et al. (No. 18,121.)

(Supreme Court of California. March 14, 1894.)

REVIEW ON APPEAL—EVIDENCE—INSTRUCTIONS.

1. Where the evidence is conflicting, a verdict will not be disturbed on appeal.

2. Though, after a witness testified that he had been convicted of perjury, it was shown that the conviction was reversed and the prosecution dismissed, a refusal to instruct that a conviction which has been reversed is a mere nullity is not ground for reversal, it being a matter of common knowledge.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by J. T. Davis, substituted for C. E. Vancil, against G. W. McNear and others, to recover the value of certain wheat. Judgment for defendant McNear, and for plaintiff against the other defendants. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

P. J. Hazen, for appellant. Reinstein & Eisner, for respondents.

McFARLAND, J. This action was brought by E. C. Vancil against the defendants, McNear and E. W. Pierce and L. H. Day, to recover the value of certain wheat, alleged to have been the property of Vancil, and to have been wrongfully converted by said defendants. A certain corporation, called the Farmers' Co-operative Union, was also made a defendant, but as to it the action was dismissed. The jury found a verdict in favor of plaintiff, for $2,464.48, against Pierce & Day, but they found in favor of defendant McNear. Plaintiff appeals from an order denying a motion for a new trial.

There is a good deal of testimony in the record, and it appears in a disjointed way, so that it is rather hard to follow. Witnesses were frequently recalled; the testimony of one witness was frequently interrupted by the interjection into it of the testimony of another; and the evidence of each party was introduced at several different times during the trial. Respondents have filed no points or brief, and therefore give us no aid in examining the tangled mass. But, upon examination of the record, we see no reason for granting a new trial. Defendants Pierce & Day owned a warehouse in which they stored wheat of others, and also conducted the business of buying and selling wheat. Defendant McNear bought of them certain wheat, and paid them for it; and it is clear that the purchase of the wheat by McNear was a bona fide transaction on his part, and done under his belief that the wheat so purchased was owned by Pierce & Day. It was contended, however, by plaintiff, that this wheat purchased by McNear was the identical wheat raised on certain ranches of plaintiff, called the "Oswalt" and "Clark" ranches, and that it was merely stored with Pierce & Day, and not sold to them. On the other hand, it was contended by defendants that this wheat was sold by plaintiff to Pierce & Day, and that the latter had full title to it when they sold it to McNear; and the main question of fact in the case was whether the wheat had been sold to Pierce & Day by plaintiff, and upon this point there was ample evidence to warrant the jury in finding that Pierce &

Day were the owners of the wheat. Indeed, it was proved beyond controversy that plaintiff made a written sale of the wheat to Pierce & Day, and received a large part of the purchase money, although he contends that he afterwards canceled the sale, for certain reasons, after a large part of it had been delivered. But as to this matter, as well as to all matters concerning said sale, there was, to say the least, a material conflict of evidence. Therefore, plaintiff's contention that the evidence was not sufficient to sustain the verdict cannot be maintained.

There are a number of exceptions to rulings on the admissibility of evidence, but we see no errors committed by the court in such rulings, and deem it unnecessary to notice them in detail.

A great many instructions were given the jury at the request of both parties, and a few asked by plaintiff were refused. We think that the instructions given presented the case very fairly and fully to the jury, and that no material error was committed by the court on that score. It would be useless to review them all here. One of them, perhaps, calls for special notice. It appears in the record, in a narrative way, that when J. T. Davis, a witness for plaintiff, was on the stand, he, without any objection from plaintiff, made, on cross-examination, this statement: "I was tried once for perjury in this court, and found guilty, before a jury." It does not appear whether the statement was made voluntarily, or in answer to the question if he had ever been convicted of a felony. No objection was made at the time by plaintiff, and no effort was then made to explain the said statement made by the witness. But, at a subsequent stage of the trial, plaintiff introduced the deputy county clerk, and proved by him a minute order of the court, which was read to the jury, and showed that on the first trial of Davis for perjury the jury disagreed; that on a second trial the jury returned a verdict of guilty; that the case was appealed, and the appellate court reversed the judgment, and ordered a new trial; and that then, upon a statement of the district attorney "that the interests of justice would be subserved by a dismissal of said action," the court ordered the action dismissed, and the said Davis discharged. Plaintiff asked the court to give this instruction: "A judgment of conviction, which has been reversed, is a mere nullity, and has no vitality for any purpose." And said instruction is marked in the record "Refused." This instruction might well have been given, and, considering the multitude of instructions asked, may have been inadvertently marked "Refused." But we do not think its refusal is a good ground for granting a new trial. Jurors may be assumed to have ordinary intelligence and good sense, and neglect to instruct them on every commonplace matter is not a ground for reversal, when no erroneous instruction on the subject has been given. The order is affirmed.

I concur: DE HAVEN, J.

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101 Cal. 545

SUTTON v. STEPHAN. (No. 18,201.)

(Supreme Court of California. March 7, 1894.)

CLAIM AND DELIVERY—LIEN OF DEFENDANT—EFFECT—RECORD ON APPEAL.

1. The court's ruling on a motion to strike out parts of an answer cannot be considered on appeal unless embodied in a statement or bill of exceptions.

2. Claim and delivery does not lie where defendant has a lien upon personal property, dependent upon possession, and he is in possession.

3. A refusal to give a specification of the amount due for which a lien is claimed is not a waiver of the lien.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by J. B. Sutton against Jacob Stephan to recover possession of personal property. From a judgment for defendant, plaintiff appeals. Affirmed.

E. T. Hogan, for appellant. Goodwin & Goodwin, for respondent.

SEARLS, C. This was an action in claim and delivery. Defendant justified his right to retain possession of the property demanded (a horse, buggy, harness, etc.) as the keeper of a livery and feed stable, with whom the property had been left by plaintiff to be fed and cared for, and claimed as due him on account of such feed and care the sum of $359.75, for which sum he claimed a lien upon the property in his possession. The cause was tried by the court, and written findings filed in favor of defendant, upon which judgment was entered for costs of suit. The appeal is from the final judgment, and the cause comes up on the judgment roll, without any statement or bill of exceptions.

The record, as presented, contains a motion to strike out portions of defendant's answer, and what purports to be an order of the court denying such motion. These proceedings constitute no part of the judgment roll, and not being embodied in any statement or bill of exceptions cannot be considered. The only question in the case which we can consider arises upon the findings of the court to the effect that on the 22d day of November, 1892, plaintiff demanded possession of the horse and buggy; that defendant refused to deliver them; that thereupon plaintiff demanded of defendant a full and itemized account of all claims and charges for which the said defendant claimed to hold said goods and chattels, and to state the amount of his lien; and that defendant neglected and refused to render any account to plaintiff, or state the amount of his lien, or to surrender the property to plaintiff. The contention of appellant is that these refusals on the part of the defendant entitled him to recover possession of the property. There are various methods by which equitable and statutory liens may be waived. Thus, where one having a lien does not disclose it when the owner demands the property, but claims to be himself the owner, he is estopped from setting up a lien in defense of an action to recover possession by the owner. Maynard v. Anderson, 54 N. Y. 641. Retention upon any ground inconsistent with a lien usually amounts to a waiver. Jones, Liens, § 1019. Other cases might be specified in which the lien would be lost, but in the present instance it would seem to have been the duty of plaintiff to have redeemed from the lien in accordance with the provisions of section 2905, Civ. Code, or he might have brought an action to redeem from the lien. The action in claim and delivery is only proper where the plaintiff has a right to the immediate possession of the personal property. This he cannot have in a case where another has a lien thereon dependent upon possession, and is in actual possession. In New York, and perhaps in some other states, persons keeping any animals at livery or pasture are given a lien only upon giving to the owner, in writing, notice that a lien will be claimed, and the amount of the charges for which such lien is claimed. Where such statutes prevail, a compliance with their provisions is, of course, necessary to the validity of the lien. Our law contains no such provision, and, while it would be eminently proper to amend our Code so as to require parties claiming specific liens upon personal property dependent upon possession to give, upon reasonable demand, a specification of the amount or sum claimed to be due, and for which the lien is claimed, under penalty of a waiver of the lien for refusal, it cannot be said that such is the law in this state. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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101 Cal. 553

LITTLE v. CALDWELL. (No. 18,208.)

(Supreme Court of California. March 12, 1894.)

Partnership — Accounting by Survivor — Suit by Decedent's Widow.

1. Two partners agreed to conduct a lawsuit for a certain per cent. of the amount recovered, and, the judgment being adverse, took an appeal, pending which one died. The survivor modified the contract, agreeing to pay the expense of further proceedings in consideration of an increased compensation if successful, and got judgment. *Held*, that decedent's estate was entitled to half the fee provided for by the original contract after deducting expenses chargeable to the partnership in conducting the litigation.

2. Though Code Civ. Proc. § 1585, provides that the surviving partner must settle the affairs of the partnership, and account with the executor or administrator of decedent, the widow of decedent, if entitled to all his estate, may sue such survivor for an accounting, it not appearing that an action has been brought for the purpose by the executor or administrator of her husband.

Department 2. Appeal from superior court, Nevada county; J. E. Prewitt, Judge.

Action by M. E. Little against John Caldwell, partner of her deceased husband, for an accounting. From a judgment for defendant, plaintiff appeals. Reversed.

J. M. Walling, for appellant. A. D. Mason, for respondent.

DE HAVEN, J. This is an appeal by the plaintiff from a judgment rendered in favor of the defendant. The superior court sustained a demurrer to the complaint, and this ruling is assigned as error, and presents the general question as to whether or not the matters alleged in the complaint are sufficient to entitle the plaintiff to maintain the action. The plaintiff is the widow of L. B. Little, deceased, and in this connection the complaint alleges, in substance, that at and prior to the death of said Little he and the defendant were partners engaged in the practice of the law, and that during the existence of such partnership they entered into an agreement with certain persons claiming to be the heirs of one William Westerfield, deceased, by which the partners undertook to render their legal services to said claimants in the prosecution of an action to be brought for the purpose of establishing the heirship of said claimants, and recovering for them the property of said estate. This agreement was in writing, and by its terms the said Little and the defendant were to receive, as compensation for their legal services, in the event of a successful termination of the contemplated action, 15 per cent. of the amount of the property that should be recovered, the said heir claimants to pay all the expenses of the litigation. The complaint further alleges that under this agreement the said Little and defendant, "after performing all acts preparatory thereto," instituted an action in the superior court of Nevada county for the purpose of having the said claimants adjudged to be the lawful and only heirs of William Westerfield, deceased, which action was tried, and resulted in a judgment of the superior court adverse to such claimants, and thereupon the deceased, Little, and the defendant proceeded to perfect an appeal to this court from such judgment, pending which appeal, and upon March 2, 1890, the said Little died. The complaint then proceeds to allege that, after the death of Little, the plaintiff assigned to defendant her interest in the contract referred to, in consideration of his promise to pay her "what was right for her interest in the same," in the event of a recovery of the property for the claimants named in the contract; and "thereafter, said heir claimants, finding it difficult to procure sufficient funds with which to further prosecute said action and proceedings to recover said property, and still desiring to prosecute the same, paid to defendant the sum of two hundred dollars in part payment of said expense, and then and there entered into an additional contract and agreement with said defendant, by the terms of which * * * defendant was to furnish the balance of the money requisite to pay the expenses of such further proceedings in court or otherwise as might become necessary to recover said property of said William Westerfield, deceased, for said heir claimants," and to receive therefor 60 per cent. of the amount recovered, instead of 15 per cent., as provided in the original contract; and "thereafter, such proceedings were taken and had by said defendant, under said contracts, that said claimants were adjudged to be the sole heirs of said William Westerfield, deceased," and the defendant received from such claimants the full compensation provided for in the additional or modified contract, amounting to the net sum of $12,000, but refused to allow or account to the plaintiff for any greater sum than $100. The prayer of the complaint is for an accounting, and that plaintiff have judgment against defendant for the sum of $5,900.

We do not regard the averment that plaintiff assigned to defendant her interest in the original contract for the contingent fee, in consideration of his promise to pay her what was right for such interest in the event of the final recovery of the property to which the contract related, as adding any strength to the other averments. If that contract did not survive the death of Little, and nothing had then been earned under it, the plaintiff, as the successor to his estate, had no interest in the contract to assign. But, aside from this consideration, the promise of defendant as alleged was in effect only a promise to pay, upon the settlement of the business growing out of the contract, the amount to which she would be entitled as the successor of the deceased partner; and the question of the nature or value of that interest is to be determined upon the general principles underlying the law of partnership, and if, under such general rules, the estate of the deceased partner would have no right to any portion of the contingent fee earned under the circumstances stated in the complaint, the plaintiff ought not to recover.

It is urged here in behalf of defendant and in support of the judgment of the superior court that when Little died nothing had been earned under the contract made by the firm of Little & Caldwell with the Westerfield estate, and that, as the contract was one for the personal services of both defendant and Little, it terminated upon the death of the latter, and was in fact superseded by the subsequent agreement by which the defendant himself undertook to perform the legal services in the action then pending for the recovery of the Westerfield estate for the clients named in the original contract, and also to bear all the costs attending the litigation; and it is further contended that the fee in controversy was the result of the latter contract in which the estate of Little has no interest. It may be conceded that when a firm of attorneys is employed to conduct litigation, the client contracts for the services of all the members of the firm; and, while perhaps the spirit of such a contract does not require that all the partners shall personally participate in all the steps of the trial, if, in their judgment, it is not necessary so to do (Eggleston v. Boardman, 37 Mich. 14; Phillips v. Edsall, 127 Ill. 535, 20 N. E. 801), still such a contract is one so far for the personal services of all that upon the death of one member of the firm the client may elect to consider the employment as terminated (Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293; McGill v. McGill, 2 Metc. [Ky.] 258). This would be the rule in controversies between the client and surviving members of the firm, where such election was properly made by the client; but the option to declare the contract terminated for such a cause is with the client, and if he does not do so, but is willing to intrust the survivor with the further management of the litigation in which the firm was employed, the survivor is bound to complete the unfinished contract for the benefit of the partnership; and, unless it was otherwise agreed upon between the partners, he would not be entitled to compensation from the partnership, or from the estate of the deceased partner, for his services in doing so. The rule is well settled in regard to commercial partnerships that the surviving partner must complete all executory contracts of the firm which remain in force after the death of a partner, and must settle the business of the partnership without charge against the partnership for his personal services; and in the case of Denver v. Roane, 99 U. S. 359, it was said that none of the adjudicated cases recognize any distinction in this respect between such partnerships and those entered into between attorneys for the practice of their profession; and we know of no such distinction. This obligation of the surviving partner is one of the risks assumed by him in entering into the partnership, unless otherwise specially agreed; and in discharge of this obligation or duty the surviving partner occupies the position of a trustee in relation to the unsettled and unfinished business of the firm, and, while he may compromise disputed claims, or modify an existing contract by releasing the other party thereto from some of its obligations, when, in the exercise of an honest judgment, the best interest of the partnership sems to him to require such action, still, in doing so, he is not permitted to make gain for himself at the expense of the estate of the deceased partner by consenting to the extinguishment of a contract belonging to the partnership, and the substitution therefor of another relating to the same subject-matter, and in the profits of which he alone is to participate. Whatever may be the effect of such new or substituted contract as between the immediate parties to it, a court of equity, in settling the accounts of the partnership, will not treat it as an entire extinguishment of the original contract, or deny the right of the representatives of the deceased partner to an equitable participation in the profits realized from the latter contract, and which may be regarded, so far as concerns the partnership, as only a modification of the former contract. This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member, and wherein contracts not fully performed often constitute a large part of the assets of the partnership, and which it is the duty of the survivor as far as possible to complete and preserve for the benefit of the firm. While it is certainly true that when a professional partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the good will of the partnership, or for the profits of such future business as may be intrusted to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, as in this case, under a contract making compensation contingent upon final success, and which the client permits the surviving partner to complete, such a contract, although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership.

Applying the foregoing general principles to the facts of this case as stated in the complaint, we have no difficulty in reaching the conclusion that the plaintiff is entitled to recover. The contract by which Little and defendant were employed to conduct the litigation referred to in the complaint did not ipso facto become extinguished upon the death of Little. The persons with whom it was made did not refuse to permit the defendant to complete it because death had deprived them of the personal services of his deceased partner, but they desired for other reasons to modify it in such a manner as to relieve themselves from some of its burdens, and in consideration of the assumption of such burdens by defendant offered him an increased compensation in the event of final success; and when the defendant consented to this modification of the contract the right of the estate of the deceased partner to share in the contingent fee to the extent given by the contract in its original form was not extinguished. The defendant was at liberty to consent to this modification, and, as the partnership loses no rights thereby, no principle of equity will be violated by permitting him to retain the increased compensation given in the modified contract by reason of the increased personal risk which he assumed. It follows from these views that upon the facts as stated in the complaint the plaintiff is entitled to recover one-half of the 15 per cent. provided for in the original contract, after deducting all proper expenses chargeable to the partnership in the matter of conducting the litigation.

The complaint alleges that the defendant has paid the sum of $2,500 as attorney's fees in the prosecution of the action in which the contingent fee was recovered. If this be so, the partnership is properly chargeable with its proportion of the sum thus paid, viz. one-fourth; but the defendant is personally chargeable with the costs of the litigation assumed by him, and in consideration of which he is entitled to retain the increased compensation of 45 per cent., given by the modified contract.

The further contention of respondent, that under section 1585 of the Code of Civil Procedure[1] the defendant cannot be required to account to the plaintiff, but only to the executor or administrator of his deceased partner, cannot be sustained. It is not alleged in the complaint that any other action for the same cause has been brought by the executor or administrator, and now pending; and, as the plaintiff is entitled to the entire estate of her deceased husband, she certainly has such an interest in the subject-matter as entitles her to maintain the action. Judgment reversed, with directions to the superior court to overrule the demurrer to the complaint.

We concur: McFARLAND, J.; FIZGERALD, J.

101 Cal. 597

PEOPLE v. WHITAKER. (No. 21,002.)

(Supreme Court of California. March 14, 1894.)

ESTABLISHMENT OF HIGHWAY—INSUFFICIENT DESCRIPTION.

An order for the laying out of a public highway, which describes it merely as the "Elam Route," and as "beginning at a certain section corner and extending to "Drum Valley," is void.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Horace Whitaker was convicted of obstructing a public highway, and appeals. Reversed.

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[1] The section provides that a surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator.

E. O. Larkins and R. F. Roth, for appellant. Maurice E. Power, Dist. Atty., and Atty. Gen. Hart, for respondent.

GAROUTTE, J. The appellant was convicted of obstructing a public highway, and sentenced to imprisonment in the county jail for the period of three months. He now appeals from the judgment and order denying his motion for a new trial. None of the counsel, in their briefs, have been kind enough to specify the particular provisions of the law under which this prosecution has been conducted; and it is only after considerable labor and inconvenience that we find certain provisions of the Political Code which appear to be applicable to the offense charged in this information. For the purpose of proving a public highway the prosecution introduced in evidence certain records of the board of supervisors. The prior proceedings before the board culminated in a majority report of the viewers of the proposed road, wherein it is said: "The undersigned, appointed by your honorable body to view and locate a public road, commencing at the one-quarter section corner between sections 7 and 18, T. 16 S., R. 25 E., Mount Diablo base and meridian, running thence to Drum Valley, respectfully report that we commenced to view and survey on the 8th day of April, 1878, from Drum Valley. The course of this proposed road is southwesterly from Drum Valley. The length of the road is ——. The cost of the construction will be as follows: * * * For grading the Elam route on the east side of the Campbell grade, not to exceed $500." After stating some other matters, not necessary to notice, the report concludes: "We therefore respectfully recommend to your honorable body that you declare the road known as the 'Elam Route' a public highway." This report was adopted by the board of supervisors, and the road master of district No. 4 ordered to open the same "on Elam route." The final order of the board in the matter of laying out this contemplated road is as follows: "In the matter of the viewers' report on public road from Sand Creek to Drum Valley, the viewers heretofore appointed by this board to view and locate said road have filed their report thereof, from which it appears that no damages are claimed by any person from the location thereof. It is therefore ordered that said road as reported by said viewers be, and the same is hereby, declared a public highway, and the road overseer of the district in which the road is located is hereby ordered to open the same." The order in itself does not purport to declare any particular described proposed line of road a public highway, but declares the road reported by the viewers a public highway. Upon examination of the report of the viewers it will be seen that their report in no way strengthens the effect of the order. The proposed line of road, as described in the report of the viewers, is a road running from a certain government corner to Drum Valley. It is also there referred to as the "Elam Route." These descriptions amount to nothing. They are so general and indefinite as to describe nothing. And, the existence of the alleged public highway depending upon this final order of the board of supervisors, we are satisfied that no public highway is shown by the evidence, and thus the most material element to constitute the offense charged in the information is not proven. Certain field notes of the county surveyor were offered in evidence, but they do not cure the fatal defects we have indicated in the proceedings. They are neither identified as being connected in any way with this proposed road, nor are they in any manner referred to or made a part of the viewers' report, or the final order of the board declaring the road a public highway. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: PATERSON, J.; HARRISON, J.

101 Cal. 661

CURTIS v. UNDERWOOD et al. (No. 18,229.)

(Supreme Court of California. March 21, 1894.)

PROBATE OF WILL—JURISDICTION—NOTICE.

Code Civ. Proc. §§ 1303, 1304, provide that the clerk must set the time for hearing the petition for probate of a will, and publish notice thereof in a newspaper for a specified time, and that copies of the notice of the time and place appointed for the probate of the will must be mailed to the heirs resident in the state, or personally served, 10 days before the hearing. *Held* that, where such notice was duly published by the clerk, but was not served on the resident heirs before the day set for hearing, it was not necessary to set a new day for the hearing and publish a new notice to give the court jurisdiction, but that it was sufficient to merely postpone the hearing for service on the heirs.

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Addie E. Curtis against Abbie M. Underwood and E. B. Moore, guardian of Abbie M. Underwood, a minor, to quiet title to an undivided half interest in certain property devised to such minor by Weeden Underwood, deceased. From a judgment for defendants, and from an order denying her motion for a new trial, plaintiff appeals. Affirmed.

Louttit, Woods & Levinsky, for appellant. Reddick & Solinsky, for respondents.

SEARLS, C. This is an appeal from a final judgment in favor of defendants, and from an order of the court denying the motion of plaintiff for a new trial. Plaintiff is the widow of Weeden Underwood, who, since the death of the latter, has intermarried with one J. F. Curtis. Plaintiff and said Weeden Underwood were married September 21, 1880. Weeden Underwood died October 3, 1885, leaving surviving him as heirs the plaintiff and the minor child, Abbie M. Underwood, the defendant herein. The object of the action is to quiet the title of plaintiff to an undivided one-half of all the interest of Weeden Underwood in and to the land and premises described in the complaint, upon the theory that it was the community property of herself and of her deceased husband, the said Weeden Underwood, to the one-half interest in which she succeeded upon his death. The answer denies all right and title of plaintiff in and to the property; as to a portion thereof pleads title in the infant defendant, acquired by her since the death of her father; and as to the residue avers it to have been the separate property of Weeden Underwood, that he died testate, and that by his last will said property was devised to his daughter, the infant defendant; that the will was duly admitted to probate, and such proceedings had thereunder that by a decree of distribution said property was by the decree of the court in probate duly distributed to the infant defendant. A copy of the will, the order admitting the same to probate, and the decree of distribution thereunder, are set out, and made a part of the answer. As a further and separate answer and defense to the action, for the purpose of invoking an estoppel against the plaintiff, defendant averred the execution of a last will by Weeden Underwood, by which he bequeathed to plaintiff the sum of $2,000, and a monthly allowance of $100 per month, not to exceed two years; declared all his property to be his separate property, and bequeathed and devised all the residue thereof to the infant defendant. The answer further avers the death of Underwood, the probate of the will, the payment to and acceptance by plaintiff of the legacy to her, etc., the distribution of the property under a decree of the probate court, etc. The findings are in favor of defendant. So far as these findings are to the effect that all the property involved in the action was separate property of the deceased, Weeden Underwood, acquired by him before his marriage to the plaintiff, or purchased and paid for thereafter with the proceeds of his separate property, the contention of appellant against the findings is unavailing, for the reason that the evidence is ample in support of such findings, and in the face of a substantial conflict in evidence the facts as found must stand.

The more important assignment of error by appellant is founded upon the claim that at the trial the court erred in admitting in evidence the record of the probate proceedings of the proof of the last will and administration of the estate of Weeden Underwood, deceased, in the superior court of the county of Calaveras. The facts essential to an understanding of the question at issue are as follows: What purported to be the last will of Weeden Underwood was filed with the clerk of the superior court in and for the county of Calaveras on the 6th day of October, 1885. At the same time Edgar B. Moore, named in said will as the executor thereof, filed the usual petition that said will be admitted to probate, and that letters testamentary issue to him. In said petition the next of kin and heirs of deceased were alleged to be the plaintiff herein and the minor defendant, the latter of whom was stated to be of the age of about four years, and both of whom were stated to be residents of Calaveras county. Both of said parties, as well as an Odd Fellows' lodge, were stated to be devisees under the will. On the same day an order was made by the superior judge, appointing October 24, 1885, at 10 o'clock a. m., at the court room, etc., as the time and place for proving said will, and hearing the application of Moore for letters testamentary, etc., and ordering notice to be given by the clerk by publication in, etc., for not less than 10 days before the hearing; that subpoenas issue to the subscribing witnesses, and that notice be served upon the heirs residing in the county, etc. A copy of this order of the superior judge, signed by the clerk, was published in the Calaveras Citizen from October 10th for five successive weeks. On the 24th day of October, the day set for the hearing, it appearing that notice had not been served upon the heirs, the hearing was, by an order of the court, postponed until 10 o'clock a. m. of Saturday, November 7, 1885, and it was ordered that notice be given to the heirs. On the same day a copy of the order and notice, with notice of the postponement, was served upon the plaintiff, who acknowledged service thereof in writing, and waived all further notice. A like copy was on the same day served upon the infant defendant by E. B. Moore. At the foot of the notice of hearing, as published in the newspaper, there was inserted a notice of the postponement of the hearing by order of the court until November 7, and it was so published until the hearing. Immediately under the notice of postponement as published was the name, "Ira Hill Reed, Attorney for Estate," but whether placed there as the author of the notice, or, as is sometimes done, as indicating him as an attorney in the case, does not appear, and is not, as I think, important.

The contention of appellant is that the statute has prescribed in explicit terms how jurisdiction may be acquired to probate a will, viz. by publication by the clerk, and by mailing copy of same notice to heirs resident in the state, or by personal service in lieu of such mailing; that both are necessary to confer jurisdiction; hence, that when, on October 24th, it was found that the notice had not been served upon the heirs, the only order the court could properly make was one fixing anew a day for the hearing, and requiring notice to be again published and served upon the heirs; and that, not having done so, the court acquired no jurisdiction in the case, and that all its subsequent acts in the premises were void, and of no effect. We regard this view of the case as more technical than the requirements of the statute. Jurisdiction of the subject-matter in the probate of wills is given by law to the superior courts. The statute prescribes the method by which the court may obtain jurisdiction of the persons interested in such probate proceedings. Section 1303 of the Code of Civil Procedure provides that when the petition is filed and the will is produced, the clerk of the court must set the petition for hearing by the court upon some day not less than 10 or more than 30 days thereafter, and must publish a notice of the hearing in a newspaper of the county, if there is one published; that it shall be published at least 10 days, and, if in a weekly paper, it must appear therein at least on three different days of publication, etc. Section 1304 provides that copies of the notice of the time appointed for the probate of the will must be addressed to the heirs resident in the state, and forwarded by mail, etc., and then provides that "personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing." The order admitting the will to probate recites that, "due proof being made that notice has been duly given of the time appointed for proving said will, and for hearing said petition according to law, to all parties interested." The notice required to be given to absent and unknown heirs by publication was complete on the 24th day of October, 1885, the day upon which the cause was set for hearing. It had been published three times in a weekly newspaper, with more than 10 days between the first and last day of publication. This was a compliance with the requirement of the statute, and the continuance of the publication, and publication of postponement of the hearing, while eminently proper as calculated to impart notice to such absent heirs, is not required by any positive provision of the law. As to such absent heirs, this substituted service gave to the court jurisdiction over their persons as fully as is given by service of a summons in an ordinary civil action. That the court had power to continue the hearing for the purpose of procuring service upon the heirs within the state whose places of residence were known, we do not doubt. The jurisdiction to hear and determine a cause or proceeding involves the power to postpone for good cause the time of hearing, unless prohibited by positive law. The Code evidently anticipates the necessity for the exercise of such power, for section 1306 of the Code of Civil Procedure provides that "at the time appointed for the hearing, or the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given." The clause quoted provides for cases in which a postponement has been had, and that proof of service is not necessary as to parties who appear, and in this latter respect is in line with the doctrine enunciated in Abila v. Padilla, 14 Cal. 103, where it was held that as to parties who appeared notice was waived. Plaintiff, as before stated, admitted service of notice of the hearing more than 10 days before such hearing, and is concluded thereby. The service upon the infant defendant was all that the statute requires, and was, therefore, sufficient. The fact that such service was made by Moore, the petitioner for letters under the will, did not invalidate it. "It is no objection that the service was made by an executor or legatee named in the will." Wetmore v. Parker, 52 N. Y. 450. In that case it was held (1) that there is no statute preventing such service by a party; (2) that the probate of the will by the surrogate is conclusive, unless reversed on appeal or revoked by himself. It cannot be attacked collaterally for such an irregularity. The last proposition is probably based upon the theory that there is a distinction between cases where there is a want of jurisdiction over the person, and that other class in which there is irregularity in obtaining such jurisdiction. Cardwell v. Sabichi, 59 Cal. 490; Drake v. Duvenick, 45 Cal. 463. The notices required by the Code having been given and served as therein provided for, the court acquired jurisdiction to hear and determine as to the probate of the will; and, having admitted the same to probate, and no appeal having been taken from the order, its actions became final as to plaintiff. Code Civ. Proc. §§ 1333, 1908; State v. McGlynn, 20 Cal. 234. These views are conclusive of the case made by appellant. It may be said also in favor of the affirmance of the judgment of the court below that, the will having declared all the property of the testator to be his separate property, having bequeathed to plaintiff the sum of $2,000, as well as an allowance pending the closing of the estate, the property having been distributed by a decree to which plaintiff was a party, and she having received all the benefits provided in the will for her, is estopped from contesting its validity; but, as the disposition of the case does not necessarily turn upon this question, it need not be dwelt upon. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

101 Cal. 627

GRIFFITH v. NEW YORK LIFE INS. CO.

(No. 18,180.)

(Supreme Court of California. March 15, 1894.)

Life Insurance—Consummation of Contract—Surrender—Failure to Pay Premium Note—Forfeiture.

1. Where a life insurance company does not authorize the taking of notes for premiums, and when they are taken by an agent the loss falls on him if they are not paid, a contract of insurance is not consummated by the sending of a policy to the agent on an application representing that the first annual premium had been paid in cash, and providing that the policy should not be in force till actual payment of the premium, where the agent had taken applicant's note for the first premium, and by agreement of the agent and applicant the note may be given up, and the policy returned to be canceled, the right of the beneficiary designated not having vested so as to prevent a surrender.

2. Where an agent of a life insurance company which authorizes the taking of nothing but cash for premiums takes a note for the first premium, thereby becoming liable to the company for the cash, and individually subject to loss in case the note is not paid, the nonpayment of the note does not forfeit the policy.

3. The benefit of a statutory provision that "no life insurance company doing business in this state [New York] shall have power" to declare a policy forfeited for nonpayment of premiums, except on notice that the amount was due, etc., cannot be waived by a provision in the policy.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Mary V. Griffith against the New York Life Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed in part.

T. C. Van Ness and J. P. Meux (L. A. Redman, of counsel), for appellant. Wilson & McCutchen, for respondent.

SEARLS, C. This is an action by the appellant, as plaintiff, to recover from the defendant and respondent $20,000, interest and costs, upon two 20-year endowment policies of insurance averred to have been issued by the defendant, an insurance company, for $10,000 each, to and upon the life of E. J. Griffith; loss, if any, payable to his wife, Mary V. Griffith, or, in case of her death, to the representatives or assigns of the insured, and, in the event of his survival for the period of 20 years, to him, the said Griffith. Griffith died within two years after the policies issued, and his wife, the beneficiary named therein, is the plaintiff and appellant herein. The policies were issued, and all payments were to be made, at New York, in the state of New York, where defendant is organized. The cause was tried by the court without a jury, written findings filed, and a judgment rendered thereon in favor of defendant for costs, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

We are satisfied, after an examination of the evidence and findings of the court, that the alleged insufficiency of the evidence to sustain the several findings cannot be maintained. Technical criticism may be properly indulged as to the precise language used in some of them, but, taken together, they express fully and clearly the facts fairly deducible from the evidence. So, too, the two errors of law assigned upon the action of the court in overruling the objections of plaintiff's counsel to questions put to the witness J. D. Mouser are deemed of little importance, in our view of the case. We think the rulings of the court were correct, but, if otherwise, that the errors would not call for a reversal.

The questions involved are highly important, and are well presented by the facts, as found by the court, which are set out at length, and are as follows:

"(1) That at all the times mentioned in the complaint the defendant was a corporation organized and existing under the laws of the state of New York, with its principal office in the city of New York, and carrying on the business of life insurance in said state of New York and in the Pacific coast states and territories, including the state of California.

"(2) That at all the times in the complaint mentioned, and for many years prior thereto, Alexander G. Hawes was the general manager of the defendant for the Pacific coast, including the state of California; that the duties of the said Alexander G. Hawes, as such manager, were strictly confined to the securing of new business for the defendant on said Pacific coast, including the state of California, and the collection of renewal premiums; to receive all applications for life insurance made within said territory, and to forward the same to the home office of the defendant, in said city of New York; to receive the policies when issued by the defendant, and to deliver the same to the assured upon receiving the premium called for thereby.

"(3) That, at all the times mentioned in the complaint, Messrs. Walker & Cerf were the state agents of the defendant in the state of California, and as such state agents they were engaged in procuring applications for policies of insurance in said company, and were paid a commission on premiums paid upon policies issued upon applications obtained by them; and said Walker & Cerf employed various persons to solicit such applications for life insurance.

"(3½) That for many years prior to the application of E. J. Griffith for life insurance in the company defendant, as stated in finding five, it has been the custom of the company to forward policies procured for the company through Walker & Cerf to the company's manager, Hawes, to be by him delivered to Walker & Cerf, to be by them, in turn, delivered to the applicants for the policies; and the company charged said policies to the manager, Hawes, and the said Hawes, in turn, charged the said policies to the state agents, Walker & Cerf. The said Walker & Cerf, with the knowledge, consent, and approval of the said Hawes, frequently, upon the delivery of policies to the applicants therefor, accepted the promissory notes of the said applicants for the first year's premium due upon said policies; and in the cases in which this was done the said Walker & Cerf became responsible to the company for the amount of such premiums, and, in case of the surrender or cancellation of any of such policies without the payment of the note accepted for said premium, became and were liable for the earned premium upon such policies for the time they were in the possession of the applicant, and unsurrendered and uncanceled.

"(4) That at all the times mentioned in the complaint one J. D. Mouser was one of the persons employed by said Walker & Cerf to solicit for them applications for life insurance in defendant company, in the state of California. That, as such solicitor, said J. D. Mouser was to solicit life insurance in defendant company for said Walker & Cerf, and receive the applications therefor.

"(5) That on or about the 1st day of June, 1889, said J. D. Mouser, solicitor as aforesaid, did solicit one E. J. Griffith, in the complaint mentioned, and then the husband of plaintiff, to take insurance upon his life in the defendant company in the sum of twenty thousand dollars; and thereupon, on said last-mentioned date, the said E. J. Griffith did, in writing, make his application to the defendant company for insurance upon his life in said defendant company for the sum of twenty thousand dollars, to be issued in two policies, of ten thousand dollars each, being the same application, a true copy of which is attached to and made a part of the answer of the defendant on file herein, marked 'Exhibit A.' That the said E. J. Griffith then and there delivered said application to said J. D. Mouser, solicitor aforesaid, and at the same time delivered to said Mouser his two certain promissory notes for the sum of $449 each, payable to himself, or order, six months after date, and dated June 21, 1889, which notes were duly indorsed by said Griffith, and by him given for the first annual premium for said insurance, amounting in the aggregate to $898, in the event said application for insurance was accepted by the defendant company, and policies therefor issued by it.

"(6) That, after said application had been delivered to said Mouser, he, the said Mouser, delivered the same to the said Walker & Cerf, and the said Walker & Cerf thereafter delivered the same to the said A. G. Hawes, and the said A. G. Hawes thereupon forwarded the same to the home office of the defendant in the said city of New York; and the defendant, believing and relying upon the truth of the statements and representations made by the said Griffith in said application, and in consideration thereof, did, on the 3d day of July, 1889, by and through its officers, sign two policies of insurance, numbered, respectively, 323,792 and 323,793, for the sum of ten thousand dollars each, being the same policies of insurance, true copies of which are attached to and made part of the answer of the defendant on file herein, and marked, respectively, 'Exhibit B' and 'Exhibit D.' That said two policies of insurance were thereupon mailed to the said Alexander G. Hawes, manager as aforesaid, and then were by the said Hawes delivered to the said Walker & Cerf, state agents as aforesaid, and by them were then delivered to the said Mouser, solicitor as aforesaid, to be delivered to the said E. J. Griffith. That during the month of July, 1889, said Mouser did deliver to the said E. J. Griffith one of the before-mentioned policies, number 323,792. That the above-mentioned policy, number 323,793, was never delivered by the said Mouser, or anybody else, to the said Griffith, nor was said policy ever in the possession or under the control of the said E. J. Griffith.

"(7) That at or about the time said policy, number 323,792, was delivered as aforesaid to the said E. J. Griffith, the said Griffith, not being financially able to pay said note, requested the said Mouser to return said policy, number 323,793, to the defendant company, for cancellation, and that his said note be returned to him canceled. That thereupon said promissory note was returned to the said E. J. Griffith, and said policy of insurance, number 323,793, was returned by the said Mouser to said Walker & Cerf, with a report that the premium thereon could not be collected; and by the said Walker & Cerf said policy was returned to the said A. G. Hawes, with the same report; and by the said Hawes said policy was returned to the defendant company, with the same report. Whereupon on the 12th day of August, 1889, said policy was by said defendant company canceled.

"(8) That on or about the 30th day of January, 1890, and after the maturity of the hereinabove mentioned note, which he, the said Griffith, had given for the first annual premium on the policy so as aforesaid delivered (number 323,792), said E. J. Griffith stated and represented to the said Mouser that he could not pay said note or said premium, and requested the said Mouser to return said note to him, and asked to surrender said policy. Thereupon said note was returned to the said Griffith by said Mouser; and he, the said Griffith, surrendered and returned said policy to said Mouser. Thereupon, the said Mouser returned said policy to said Walker & Cerf, with a report that the premium thereon could not be collected; and thereupon the said Walker & Cerf returned said policy to said A. G. Hawes, with the same report; and thereupon the said Hawes returned said policy to the defendant company, with the same report. The defendant company received said policy, and on the

8th day of March, 1890, marked the same 'Canceled.'

"(9) That the said E. J. Griffith did not at any time ever pay unto the defendant company, or to any one on its behalf, any money whatever, as premiums on said policies, or either of them, or for any other purpose.

"(10) That neither of said promissory notes ever came into the possession or control of the defendant, except as above stated. Nor did defendant ever know that promissory notes had been given by said Griffith for the premium on said policies, except as above stated. Nor did defendant know, until the receipt by it from said Hawes of the policies as above found, that the premiums called for thereby had not been paid, except as above stated.

"(11) Except as herein stated, neither the said Hawes, nor the said Walker & Cerf, nor the said Mouser were ever authorized by the defendant company, or by any of its officers, to waive any of the stipulations or requirements contained in the applications signed by said Griffith, or contained in the policies of insurance signed by the defendant, nor to receive or accept notes in payment of premiums; but, on the contrary, they were instructed by said defendant company to take nothing in payment of premiums except money.

"(12) That neither the said E. J. Griffith nor the plaintiff paid the second year's premium for the insurance evidenced by said policies, but at the time said policies were issued, and at all times thereafter, the statute law of the state of New York provided that 'no life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of nonpayment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured at his last known post-office address, postage paid by the company;' and further stating that unless the premium then due shall be paid to the company or its agent, within thirty days after the mailing of such notice, the policy and all demands thereon will become forfeited and void, and that in case such payment should be made within the thirty days limited therefor, it should be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and that no such policy should in any case be forfeited until the expiration of the thirty days after the mailing of such notice.

"(13) That at no time before or after the second annual premium became due did the defendant give or mail to the said E. J. Griffith, or to the plaintiff, a notice, as by the law of New York (as stated in finding twelve) provided, or any notice, stating the amount of premium, the place where it should be paid, or the person to whom the same was payable, or that unless the premium then due should be paid to the company or its agent within thirty days, or at any other time after the mailing of such notice, the policy and all payments thereon would become forfeited and void, or any similar notice, and did not give nor address nor mail to plaintiff such notice, nor any similar notice.

"(14) That on the 24th day of July, 1890, and in the city and county of San Francisco, state of California, the said E. J. Griffith died.

"(15) That subsequent to the death of the said E. J. Griffith the plaintiff furnished to the defendant notice and proof of the death of said E. J. Griffith, as and in the manner required by the provisions of the policies executed by the defendant, as stated in the foregoing findings."

The question is, was the defendant, upon this state of facts, entitled to the judgment rendered? For convenience of consideration, I change the order in which counsel for appellant formulate their propositions in negation of the question, and in favor of a reversal of the judgment, by stating their second proposition as the first, and their first as second. Thus transposed, they are as follows: First, that there was a perfect legal delivery of policy 793 (323,793), whereupon the right of the plaintiff, as beneficiary, so vested as to prevent the right of surrender upon the part of Griffith; second, that the surrender of the policies by Griffith without the knowledge and consent of the beneficiary, the plaintiff in this action, was void, and of no effect; third, that the nonpayment of the second annual premium does not defeat the right of plaintiff to recover.

The court finds that this policy "was never delivered by said Mouser, or anybody else, to the said Griffith, nor was said policy ever in the possession of, or under the control of, the said E. J. Griffith." Counsel for appellant do not claim that the policy was ever in the physical possession of plaintiff. Their contention is that there was, as appears by the other findings, a consummated contract, and that it was, in legal contemplation, delivered. This position is assumed upon the theory that the contract was consummated, and that thereupon an interest in the policy vested in the plaintiff, as beneficiary, which could not be divested by Griffith without her consent. As a general rule applicable to the ordinary policies of life insurance, "where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation of title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so the person originally designated in the policy will derive the benefit. The change of designation can only be made by the persons originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur." Bliss, Ins. § 339; Gould v. Emerson, 99 Mass. 154; Chapin v. Fellowes, 36 Conn. 132; Insurance Co. v. Applegate, 7 Ohio St. 292; Ruppert v. Insurance Co., 7 Rob. (N. Y.) 155. As an apparent exception to this rule, it was held in Bowman v. Moore, 87 Cal. 306, 25 Pac. 409, that a change of beneficiary in a mutual benefit association, the by-laws of which provided therefor, made according to such by-laws, was a valid substitution. Another proposition which may be considered as established is this: An express provision in a policy of insurance that the company shall not be liable on the policy until the premium is actually paid is waived by the unconditional delivery of the policy to the assured, as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium, and in such a case the company insuring is liable for a loss which may occur during the period of credit. Farnum v. Insurance Co., 83 Cal. 246, 23 Pac. 869, and cases cited. These propositions are stated as prescribing limitations upon the insurers in cases where the contract is fully consummated, but do not go to the essential point in our present inquiry, viz. was it so consummated as to bind the insurer? Griffith desired two policies of $10,000 each. The solicitor of defendant was willing to procure them, and take his notes at three months for the premium for the first year. The applications were sent to defendant at New York, representing the premiums as paid in cash. The policies were forwarded to the manager in San Francisco, and by him, through the general agents, to the local agent at Fresno. This local agent has in the mean time become skeptical as to the solvency of Griffith; and, as he and the California agents will be held personally responsible to the company in case the notes are not paid, he delivers one of the policies, and, with the consent of Griffith, declines to deliver the other, surrenders the note for the premium therefor, and returns the policy in question, which is canceled by the company. Plaintiff's rights in the premises only vested when the contract was consummated. Griffith was under no legal obligation to procure the policy for her. He was to pay the premium from his own funds, and might stop short of doing so, or, having paid the first annual premium, might allow the policy to lapse for the want of payment of subsequent premiums. The most that can be said is that, had he consummated the contract, it would have inured to the benefit of the plaintiff; and, although his acts were purely voluntary, he would have been regarded as the agent of the plaintiff in their performance, and defendant would have been estopped from denying such agency. As long as the contract remained executory, Griffith and defendant, or its agents, could, by mutual consent, decline to complete it, without consulting the plaintiff, who could only become a beneficiary upon its completion. Griffith had not only represented in his statement that the first annual premium had been paid in cash, but he had also agreed, in the same statement, "that any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company, or its authorized agent, during my lifetime and good health." We may concede that this agreement might have been waived by a delivery of the policy without such payment, but it by no means follows that the same result follows without a delivery, or that the agent would be legally bound to deliver without payment. In such a case it is the act of delivery, with intent that it shall take effect, that constitutes the waiver, and raises an estoppel against the insurer, and where the intent and act are wanting there is no waiver. Up to the time of delivery the agreement to give credit was a mere personal one on the part of the solicitor, without authority from defendant, which he might and did cancel, with the consent of Griffith, before consummation of the contract. It follows from these views that the finding of the court that policy No. 793 (323,793) was not delivered is one of fact, and not a conclusion of law, as claimed by appellant, and that the additional facts found by the court are in harmony therewith, and, as a sequence, that the first contention of the appellant cannot be maintained.

2. Was the surrender of the other policy, 323,792 (which we will designate as 792), by Griffith void, as against the plaintiff? It is conceded that this policy was delivered to Griffith, and retained by him from July, 1889, to January 30, 1890, when, being unable to pay the note given by him for the first year's premium when it fell due, he requested Mouser, the local agent of defendant, to return the note to him, and that he be permitted to surrender the policy, all of which was done, and the policy returned to defendant, and canceled, as for want of payment of the premium. So far as appears, defendant had no knowledge of the giving of the note, except what is to be inferred by the knowledge and acts of its agents in California. The findings are full upon this branch of the case. We think the doctrine is well settled that where a valid policy is regularly delivered, in pursuance of a consummated contract, to one who has procured insurance upon his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary. Pilcher v. Insurance Co., 33 La. Ann. 322; Trager v. Insurance Co., 31 La. Ann. 235; Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. 267; Schneider v. Insurance Co., 123 N. Y. 109, 25 N. E. 321; Garner v. Insurance Co., 110 N. Y. 266, 18 N. E. 130; Ricker v. Insurance

Co. (Minn.) 6 N. E. 771; Insurance Co. v. Haley (Me.) 4 Atl. 415; Harley v. Heist, 86 Ind. 196; Hubbard v. Stapp, 32 Ill. App. 541; Packard v. Insurance Co., 9 Mo. App. 469; Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41. We do not understand counsel for respondent to seriously combat this proposition. Their theory is that the giving of a credit was, at most, an extension of time for payment, and that when the promissory note of Griffith fell due, and was not paid, the clause in the policy which provided that it should not take effect until payment of the premium became operative, and the policy lapsed for nonpayment. There are numerous cases reported, in which policies have been held to be forfeited for nonpayment of premium notes; but, so far as observed, they are all cases where the insurers might, under their charters,—or were accustomed to,—take such notes, and in which the policies provided for a forfeiture upon a nonpayment thereof. The agents of defendant were not authorized by defendant to take anything except money in payment of premiums. They did consent to take the note in question in lieu of money, the effect of which, according to the evidence, was that they became individually liable to defendant for so much money, less their commissions. It was, in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents. and not an extension of the time of payment. The note was payable to order, duly indorsed, and, so far as appears, in no way referred to the premium or policy. Under such circumstances, its nonpayment at maturity did not work a forfeiture of the policy, or defeat its validity. Insurance Co. v. Hoover, 113 Pa. St. 591, 8 Atl. 163; Insurance Co. v. Block, 109 Pa. St. 535, 1 Atl. 523; Boehen v. Insurance Co., 35 N. Y. 131; Miller v. Insurance Co., 12 Wall. 285; Farnum v. Insurance Co., 83 Cal. 246, 23 Pac. 869.

3. Did the nonpayment of the second annual premium, which fell due June 1, 1890 (but upon the payment of which a grace of one month was, by the terms of the policy, allowed), work a forfeiture of the policy? The law of the state of New York, under which this policy issued, is set out in the twelfth finding of the court, and need not be repeated. It is also found that the defendant did not give the notice as required by said statute. In avoidance of this statute, and as a waiver of the notice there provided for, respondent relies upon the following clause in the policy: "Notice that each and every payment of premiums is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived." The policy also provided as follows: "That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company." Such provisions as the law prescribes for the advantage or protection of individuals may, as a rule, be waived by them, where not inhibited by public policy. "Where no principle of public policy is violated, parties are at liberty to forego the protection of the law." Sedg. St. & Const. Law, p. 109. Where, however, "the object of a statute is to promote great public interests, liberty, or morals, it cannot be defeated by any private stipulation." Id. p. 110; Civ. Code, § 3268; Code Civ. Proc. §§ 406, 434, 631; Bowen v. Aubrey, 22 Cal., at page 572, and cases there cited. In Caffery v. Insurance Co., 27 Fed. 25, it was held, in substance, that where an act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy shall remain in force for a certain time, for the full amount thereof, "anything in the policy to the contrary notwithstanding," the statute might be waived, by the express agreement of the parties, by the substitution of a nonforfeitable policy, of a different character, and that, as the waiver was a part of the original contract, the beneficiary was bound by the waiver. In Desmazes v. Insurance Co., 7 Ins. Law J. 926, Fed. Cas. No. 3,821, a like question was discussed; Clifford, J., using the following language: "Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had, outside the statute, to waive the nonforfeiture provisions, if the other party consented." The case passed off upon a different point, and is only useful as indicating the opinion of an able jurist. There are other cases, bearing more or less directly on the subject, tending to uphold the same general doctrine. It would seem, however, that the New York statute was intended to cut deeper, and, as a matter of public policy, to inhibit forfeitures by life insurance companies, except by the method therein provided. "No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy * * * by reason of nonpayment of premiums," etc., except as therein provided. The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is ultra vires and void. Admit that Griffith attempted to waive all notice of nonpayment of premiums. If the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except

as conferred by law. A corporation, being the creature of the law, must confine its functions to the limits prescribed for its action; and, if the law expressly inhibits it from doing a given thing, it is powerless to do that thing, and if it can do it only in a given manner the prescribed method becomes the measure of its power. We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights. The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for nonpayment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power, in the face of the law which has taken it away. The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them.

The conclusion is reached that, as no notice was given by defendant, the policy was not forfeited by failure to pay the annual premium which fell due June 1, 1890. It follows from these views that the judgment of the court below, so far as applicable to policy No. 323,793, was correct, and should be affirmed; that the judgment, so far as applicable to policy No. 323,792 is erroneous, and should be reversed. And, as the findings are full and complete, the court below should be directed to enter judgment in favor of plaintiff, and against the defendant, for the amount due upon policy No. 323,792, viz. for $10,000, and interest, less the amount of two annual premiums of $499 each, and interest thereon from the date when they, respectively, fell due, viz. June 1, 1889, and June 1, 1890, and without costs to either party on this appeal.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court below in favor of defendant upon policy of insurance No. 323,793 is affirmed. It is further adjudged that the judgment of the court below in favor of defendant upon policy No. 323,792 be, and the same is hereby, reversed, and the court below directed to enter judgment in favor of plaintiff, and against the defendant, for the amount due on said policy No. 323,792, to wit, $10,000, and interest thereon, less the amount of two annual premiums, of $449 each, and interest thereon from the date when they, respectively, fell due, viz. June 1, 1889, and June 1, 1890, and that the parties pay their own costs on this appeal.

101 Cal. 609

In re HICKMAN'S ESTATE. (No. 18,242.)

BRONNER v. JAHANT.

(Supreme Court of California. March 14, 1894.)

CONTEST OF WILL—EFFECT OF DEATH OF BENEFICIARY.

1. A public administrator cannot contest the probate of a will under Code Civ. Proc. § 1307, providing that any person interested may appear and contest the will.

2. The death of the sole benficiary under a will which nominates an executor does not render it void.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

In the matter of the estate of Richard Hickman, deceased, Victor Jahant filed a petition for the probate of the last will. George F. Bronner, as public administrator, filed a contest of the probate of said will, and also a petition that letters of administration be granted him. From a judgment denying his petition, as public administrator, for letters of administration, and admitting the will to probate and granting letters testamentary to Victor Jahant, Bronner appeals. Affirmed.

Armstrong, Bruner & Platnauer, for appellant. Charles H. Oatman, for respondent.

SEARLS, C. This is an appeal from a judgment of the superior court of Sacramento county, in probate, denying the petition of the appellant, as public administrator, for letters of administration, and granting the petition of Victor Jahant for the probate of the last will, and granting letters testamentary to him, the said Victor Jahant, as executor of the last will of Richard Hickman, deceased. Richard Hickman died on or about May 5, 1893, in the county of Sacramento, leaving what purported to be a last will, by which he devised and bequeathed all of his estate, real and personal, to his wife, Elizabeth Hickman, subject to the payment of his debts, and appointed Victor Jahant as the executor of such will, to serve without bonds. Jahant, the executor named, filed a petition for the probate of the will, showing, among other things, estate, real and personal, in the county of Sacramento; that Elizabeth Hickman, the wife, had died; that there were no heirs in Sacramento county; that the next of kin who are heirs, and their residence, were unknown, etc. Appellant, who is the public administrator of the county of Sacramento, filed a contest of the probate of the will, setting out, among other things, and as evidence of his right to make such contest: (1) That he was public administrator; (2) that the sole legatee and devisee under the will, who was the wife of testator, and not a relative, had died during the lifetime of the testator, whereby the devise and legacy lapsed, and the will became null and void. He also filed a petition praying to be appointed administrator of the estate. A demurrer was interposed to his contest, which was sustained by the court. The two applications were heard together, and upon due proof of the execution of the will it was admitted to probate, Victor Jahant appointed executor under the will, and the application of appellant as public administrator to be appointed administrator was denied.

The demurrer was properly sustained. Appellant, as public administrator, had no standing in court to contest the proof of the will. He was not interested in the sense of having an interest in the estate, within the purview of sections 1307-1312 of the Code of Civil Procedure. In Re Sanborn's Estate, 98 Cal. 103, 32 Pac. 865, McFarland, J., said: "If a public administrator could legally assume the character of a standing contestant of wills, notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities; but the limitations of the statute do not allow such inflation." Sections 1726 to 1743 of the Code of Civil Procedure are not intended to define the cases in which the public administrator is entitled to letters of administration, but to provide for the preservation of the estates of deceased persons until a proper administrator is appointed, as will appear by section 1730, which requires him to deliver the estate over to any person to whom letters testamentary or of administration may be regularly appointed. The will in question was not invalidated by the death of the beneficiary. "The mere nomination of an executor, without making any disposition of one's estate, or giving any other directions whatever, will constitute a will, and render it necessary that the instrument be established in the probate court." 2 Redf. Wills, p. 59; Williams, Ex'rs (7th Ed.) pp. 267, 390; Schouler, Wills, § 297. The fact that a testator nominates an executor, but without giving a legacy or devising any part of his property, makes it none the less a will. It may often occur that, subject to the payment of his just debts, a testator is quite willing that his property shall be succeeded to as provided by law, while the selection of the minister through whom the settlement is to be made and the distribution is to be had is not only a matter of deep interest to him, but of vital interest to the estate; and, as the law accords to him the privilege of making the selection of his executor, it must be upheld, when duly made. The fact that the sole beneficiary under the will had departed this life prior to the death of the testator, if a fact, was not one to be determined as a preliminary question affecting the probate of the will. The fact that the document purported to appoint an executor, and provided for the payment of debts, was sufficient to stamp it as a will, and justify its probate as such. Jolliffe v. Fanning, 10 Rich. Law, 186. Again, if the will was valid when made, it could only be revoked or altered by a subsequent writing, duly executed, or by obliterating or destroying with intent to revoke. Civ. Code, § 1292; In re Tillman's Estate (Cal.) 31 Pac. 563. The court did not err in denying letters of administration to appellant or in granting letters testamentary to respondent. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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101 Cal. 655

PEOPLE ex rel. BROWN v. UNION HIGH SCHOOL DIST. OF SOLANO COUNTY.

(No. 18,203.)

(Supreme Court of California. March 20, 1894.)

UNION HIGH SCHOOLS—ORGANIZATION—ELECTION—VALIDITY—MANNER OF CONDUCTING.

1. Act March 20, 1891, §§ 1, 2, authorizing two or more adjoining school districts to unite and form a union high school district, require "a majority of the trustees of two or more" of such districts to unite in a petition to the county superintendent for an election to determine such question. *Held*, that the signing of the petition by the trustees of the districts need not be authorized by the boards to which they severally belong.

2. Section 2 provides that the petition of the trustees shall be accompanied by a petition for the establishment of such high schools, signed by not less than 100 resident electors of "such school district." *Held*, that the phrase "such school district" relates to the proposed high school district, and not to each of the school districts of which it is to be composed.

3. Under the provision of the act that, if a majority of the votes be cast in favor of a high school, the superintendent shall call a meeting of the boards of school trustees to locate the high school, there need not be a majority of the votes cast in each district in favor of it, and the failure of one district to hold an election will not vitiate the organization of the high school.

4. Under Pol. Code, § 1596, as amended by Act March 20, 1891, relating to the election of school trustees, and providing that the trustees must appoint the inspectors, judges, and clerks of election, and if none are so appointed, or if they are not present at the time of opening the polls, the electors present may appoint them, where the required number of inspectors and other officers were not appointed by the trustees it will be presumed that the deficiency was supplied by appointment by the electors, in the absence of any showing to the contrary.

Commissioners' decision. Department 1. Appeal from superior court, Solano county.

Proceeding in the nature of quo warranto by the people of the state of California, on the relation of W. B. Brown, against the union high school district of Solano county, to determine the validity of the organization of such district. From a judgment for defendant, entered on the refusal of plaintiff to amend the information after a demurrer thereto was sustained, plaintiff appeals. Affirmed.

Atty. Gen. Hart (Crouch & Johnson, of counsel,) for appellant. George A. Lamont and John M. Gregory, for respondent.

VANCLIEF, C. Information in the nature of quo warranto, filed by the attorney general in the superior court of Solano county, charging that the defendant wrongfully claims and exercises the franchises of a duly-organized union high school district, under an act of the legislature passed March 20, 1891, entitled "An act to provide for the establishment of high schools in the state of California." St. 1891, p. 182. A demurrer to the information, on the ground that it does not state sufficient facts, was sustained by the court. The plaintiff declining to amend, judgment was rendered for defendant, from which plaintiff brings this appeal. The first section of the act provides that two or more adjoining school districts may "unite and form a union high school district, for the purpose of establishing and maintaining a high school therein." The second section enacts that "when * * * a majority of the trustees of two or more adjoining school districts, shall unite in a petition to the county superintendent, accompanied by a petition for the establishment of such high schools, signed by not less than one hundred resident electors of such * * * school district, it shall be the duty of the county school superintendent, within twenty days, to call an election, and appoint the officers to conduct the same, for the determination of such question. * * * Said election shall be conducted in the manner prescribed by law for conducting school elections." Section 3 provides: "If a majority of such votes be cast in favor of a high school, it shall be the duty of the county superintendent to call a meeting of the * * * boards of school trustees uniting, within fifteen days, ten days notice of which shall be given to each member of each board, in writing, by the county superintendent. At such meeting the question of locating the high school shall be determined." The defendant district is composed of eight adjoining school districts of Solano county. It is contended by appellant that the information shows noncompliance with some of the essential requirements of the act, expressed in the above extracts therefrom, by reason whereof the union district was never organized as a corporation, and, therefore, that the court erred in sustaining the demurrer.

1. While it is admitted that a majority of the trustees of each of the eight school districts signed the petition to the superintendent of schools for the formation of the union high school district, it appears that such signing was not authorized by any corporate act or resolution of any one of the boards of school trustees of which the signers were members; and it is claimed that this was a defect in the procedure which vitiates the organization of the union district. No corporate action of the boards of trustees of the several school districts was necessary. The act requires only "a majority of the trustees of two or more adjoining school districts" to unite in a petition. In this case a majority of the trustees in each of the eight school districts composing the proposed union district united in the petition, which was even more than is expressly required by the law, though the legislature probably intended that a majority of the trustees of each district should unite in the petition, as they did.

2. The second section provides that the petition of the trustees shall be accompanied by another petition "for the establishment of such high schools, signed by not less than one hundred resident electors of such school district." In this case the accompanying petition was signed by 107 resident electors of the proposed high school district, but appellant contends that this was not a compliance with the law, and that it should have been signed by 100 resident electors of each school district composing the proposed union district. The question is whether the phrase "such school district" relates to the proposed high school district, or to each of the common school districts of which the proposed high school district is composed. When the word "such" precedes a noun in the singular number, as in this case,—"such school district,"—it partakes of the nature of a pronoun as well as that of an adjective (pronominal adjective), and properly relates to the same noun in the same number as antecedently expressed and qualified, and especially to the antecedent qualification of that noun, and denotes that the noun which it precedes is to be understood as antecedently qualified. In the statute under consideration the singular compound noun "school-district" is found to follow the word "such" twice, but qualified in both instances by the words, "union high," —thus, "union high school-district;" and to this qualification it is that the pronominal adjective "such" relates as its antecedent, thus making it quite clear that the phrase "such school district" means the "union high school district," and not the school districts of which it is composed, and which are antecedently expressed in the plural only. And this conclusion is considerably strengthened by the improbability that the legislature assumed that each of the school districts entitled to unite in the formation of a high school district contained 100 resident electors, since a common school district may contain only 10 families and only 15 census school children. Pol. Code, § 1577.

3. The act requires the county school superintendent, within 20 days after receipt of the petitions, to call an election, and to appoint officers to conduct the same, and also to give notice of such election by posting not less than three notices "for each district concerned, one of which shall be upon the schoolhouse in each district at least ten days before said election," and that "said election shall be conducted in the manner prescribed by law for conducting school elections." The law further provides: "It shall be the duty of the officers of such elections to report the result of such elections to the county super-

intendent of schools. If a majority of such votes be cast in favor of a high school, it shall be the duty of the county superintendent to call a meeting * * * of the boards of school trustees uniting, within fifteen days, ten days notice of which shall be given to each member of each board, in writing, by the county superintendent. At such meeting the question of locating the high school shall be determined." An election was called, and notice thereof given, as required by the act. In each of six of the common school districts a majority of the votes cast was in favor of the high school. In one the majority of votes was opposed to the high school, and in one no election was held; but a majority of all the votes cast at the election was in favor of the high school. Counsel for appellant contend that, to authorize the organization of the high school, it was necessary that an election should have been held in each of the eight districts, and that a majority of the votes cast in each should have been in favor of the high school, although they admit that it is not so expressed in the statute. The statute provides that the superintendent shall "call an election * * * for the determination of such questions;" and, "if a majority of such votes be cast in favor of a high school," the superintendent must call a meeting of the boards of school trustees, and proceed to determine the question of locating the high school. I think the court below did not err in construing this to mean a majority of all the votes cast in the proposed high school district. The election having been regularly called, and all persons interested having been duly notified of the time and places at which they would have the privilege of voting, their neglect to hold the election at one of the eight places designated did not vitiate the election. Such neglect indicated only that the electors of the precinct at which no election was held were indifferent as to the result. It would hardly be contended that the neglect or failure of the electors to hold an election for county officers in one of the several election precincts of the county would vitiate the election, or that an illegal election in one precinct would have that effect.

4. It is contended that the election was not "conducted" in the manner prescribed by law for conducting school elections, in that it "was conducted by one inspector and two judges" appointed by the superintendent in each school district. For the election of school trustees, section 1596, Pol. Code, as amended March 20, 1891, in force when the election in question was held, provided: "The trustees must appoint the inspectors, judges and clerks of election; if none are so appointed, or if they are not present at the time of opening the polls, the electors present may appoint them." If the requisite number of inspectors, judges, or clerks was not appointed, the presumption is, nothing to the contrary being alleged in the information, that the deficiency was supplied by the electors present at the time of opening the polls.

5. As I think the foregoing properly disposes of all the points made by appellant, it is not necessary to consider the point made by respondent that, if there were any irregularities in the proceeding to organize the high school district, they were validated by the tenth subdivision of section 1671 of the Political Code, as amended by the act of March 23, 1893 (St. 1893, p. 276). My conclusion is that the judgment of the lower court should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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4 Cal. Unrep. 531

BULLION & EXCHANGE BANK OF CARSON CITY v. SPOONER et ux.

(No. 18,192.)

(Supreme Court of California. March 14, 1894.)

MORTGAGES—FORECLOSURE—MATURITY OF DEBT.

When an overdraft account with a bank is secured by a note and mortgages payable on or before three years, and interest as due is charged in the account, the rules against parol evidence (Civ. Code, § 1625; Code Civ. Proc. § 1856) forbid proof of an oral agreement that the debt should be due at any time within the three years, at the bank's option.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by the Bullion & Exchange Bank of Carson City against M. E. Spooner and Clara, his wife, to foreclose mortgages. Judgment for defendants. Plaintiff appeals. Affirmed.

Goodwin & Dodge and Trenmor Coffin, for appellant. A. L. Shinn, for respondents.

BELCHER, C. In 1890 the plaintiff was a corporation engaged in the business of banking at Carson City, in the state of Nevada. The defendant M. E. Spooner did business with the plaintiff, and on December 27, 1890, was indebted to it in the sum of $14,240.79, on an overdraft account. On that day he executed to the plaintiff a deed, absolute in form, of certain real property situated in Ash valley, Lassen county, Cal., and known as the "Spooner Ranch;" and at the same time he also executed to the plaintiff his promissory note for $20,000, payable "on or before three years after date," with interest, payable monthly, at the rate of 9 per cent. per annum from date until paid, and a chattel mortgage, to secure payment of the note, on certain personal property situated in said Ash valley, and described as 200 head of horses, more or less, including 3 thoroughbred stallions, and 600 head of cattle, more or less, with all the increase of such horses and cattle. The mortgage provided "that, if the mortgagor shall fail to make any payment as in the said promissory note provided, then the mortgagee may take possession of said property, using all the necessary force so to do, and may immediately proceed to sell the same in the manner provided by law," etc. These papers were all parts of one transaction, and were made to secure payment to the plaintiff of the said overdraft account. The deed and mortgage were thereafter, on January 9, 1891, duly recorded in the recorder's office of Lassen county. At the time of the execution of the above-mentioned papers, the plaintiff also executed to the defendant its written obligation to reconvey to him, "on or before the 27th day of December, A. D. 1893," all of the real property described in the said deed, provided the defendant shall, on or before the day named, have paid to the plaintiff the sum of $20,000, according to the terms and conditions of the said promissory note, a copy of which was set out in the undertaking. Thereafter the amount due on the overdraft account was carried forward in the general bank account of defendant, and from time to time up to October 1, 1892, defendant deposited with and paid to plaintiff various sums of money, aggregating, as the court below found, $64,046.83, which sums were credited generally upon said account. The defendant drew checks against the money so deposited, and his checks were paid up to the fall of 1892, when the plaintiff refused to pay any further drafts. Meantime, the plaintiff had computed interest monthly, at the rate of 9 per cent. per annum, on the amount due it, and had charged the same in the account. At the time of the commencement of the action, the amount claimed by plaintiff to be due on the account was $12,146.50. On the 12th of August, 1892, the plaintiff and defendant agreed upon and designated in writing one James Marshall as a pledge holder to go to Ash valley, and to immediately take possession of and hold all the personal property mentioned in the said chattel mortgage as security for the payment of the said indebtedness. Afterwards, the plaintiff, claiming that the value of the property which it held as security was insufficient to secure the balance due on the said account, and that defendant had fraudulently misrepresented the value of the property at the time of executing the deed and chattel mortgage as aforesaid, demanded of defendant that he give further security; and, this demand being refused, it commenced this action, on October 25, 1892, to foreclose its lien upon all of the real and personal property covered by the said deed and chattel mortgage.

One of the issues raised by the answer was as to whether the indebtedness from defendant to plaintiff was due at the time the complaint was filed; and upon this issue the court found "that it was not agreed nor intended that the principal sum of said indebtedness from said defendant M. E. Spooner to plaintiff should be paid whenever demanded by plaintiff, but it was agreed that said indebtedness should be paid on or before the 27th day of December, 1893, at the option of the said defendant M. E. Spooner; and the said indebtedness is not due, nor any part thereof." And as a conclusion of law the court found "that no cause of action exists for the recovery of the indebtedness from the defendant M. E. Spooner to plaintiff, nor for the foreclosure of any mortgage lien or security given to secure said indebtedness, and that plaintiff is not entitled to any judgment for said indebtedness, nor to any decree foreclosing any liens upon, or for the sale of any of, the property described in the complaint." Upon this branch of the case, judgment was accordingly entered in favor of the defendant, from which the plaintiff appeals.

Whether or not the finding above quoted was justified by the evidence is the principal question in the case. In our opinion, the finding was justified, and must be held controlling as to all other questions presented by the record. It is not controverted that the deed, agreement to reconvey, note, and chattel mortgage were all parts of one transaction, and were intended by the parties to operate simply and solely as security for the payment of defendant's overdraft account. These papers are, therefore, to be read together as one instrument; and when so read they express, in clear and unmistakable terms, the time when that indebtedness was to become due and collectible, namely, on December 27, 1893. Section 1856 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms;" and that, as between the parties, there can be no other evidence of the terms of the agreement, except in certain cases, of which this is not one. And section 1625 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Under the circumstances shown, the plaintiff was not entitled to prove that it was orally agreed that the debt should be due and collectible at any time at its option, and the court did not err in excluding the evidence offered upon that subject. Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225. Section 2999 of the Civil Code has no bearing on the case. That section refers solely to a case where a debtor has obtained credit or an extension of time by a fraudulent misrepresentation of the value of property pledged. There is no evidence here that at the time defendant obtained credit, or at the time he obtained the extension of time to pay his debt, he made any fraudulent misrepresentation as to the value of his property; nor does it appear that at that time he made any pledge of property.

The other points discussed by counsel for appellant do not require special notice, for, conceding that the court erred in its rulings, as claimed, the errors were harmless. Where the record shows that the appellant is not entitled to recover in any event, error in the rulings of the court upon the admission of evidence cannot entitle him to a reversal of the judgment. McPhail v. Buell, 87 Cal. 115, 25 Pac. 266. And where evidence, admitted against objection, relates only to an issue which is rendered immaterial by the evidence and findings upon other issues, which are decisive of the case, any error in its admission is harmless, and is not ground for reversal of the judgment. Clavey v. Lord, 87 Cal. 413, 25 Pac. 493. So, the failure to find any fact, or an erroneous finding of any fact, unless the finding, if correctly made, would change the judgment, is immaterial. Dedmon v. Moffitt, 89 Cal. 211, 26 Pac. 800. It follows that the action was prematurely brought, and the judgment should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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101 Cal. 614

MITCHELL v. FINNELL. (No. 18,226.)

(Supreme Court of California. March 14, 1894.)

SETTLEMENT BY AGENT—DURESS—LIABILITY OF PRINCIPAL—RATIFICATION.

1. Under authority to settle with a debtor, and take anything he can get, an agent has power to accept a promissory note.

2. Threats of unlawful imprisonment and criminal prosecution, made to procure a settlement, are within the scope of such agent's authority.

3. An indorsement, with full knowledge of the circumstances under which a note was procured, ratifies whatever an agent did in procuring it.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by D. C. Mitchell against John Finnell to recover money paid on a note procured by duress. From a judgment for defendant, plaintiff appeals. Reversed.

P. H. Coffman and J. T. Matlock, for appellant. Johnson & Chase, for respondent.

TEMPLE, C. The complaint in this action charges: That August 13, 1890, plaintiff executed to defendant his promissory note for $460, payable to defendant's order two months after date. That plaintiff received no consideration for the note, but was induced to execute it by threats of unlawful confinement and criminal prosecution, and injury to his character, which threats were made by one W. S. Knott, acting for said defendant; also, by false representations made by defendant's agent. That defendant, about September 1, 1890, transferred the note to the bank of Tehama county to secure the sum of $250, with interest. That subsequently plaintiff was compelled, by a judgment rendered against him in favor of said bank, to pay said note, with interest and costs, which, with an attorney's fee paid by him, amounted to $402.95, which sum has not been repaid. The answer consists of denials. The court found that the note was executed without consideration, and was procured by threats of criminal prosecution and of arrest, and through plaintiff's fear of the same, and through threats of unlawful confinement, and injury to the character of plaintiff. The court, however, finds that the threats were made by Knott, who, in making them, was not acting for the defendant or by his authority; that the note was executed and delivered to Knott; that defendant had no interest in it, and it was not executed by his authority or direction; that defendant did not, on or about September 1st, or at any other time, transfer the note to the bank of Tehama to secure the sum of $250, or any other sum, but that said Knott borrowed from the bank $250, and left the note there as collateral security; that at the time the note had not been indorsed by defendant, and was not indorsed by him until after it had become due; that defendant never received anything for said note, but indorsed it, at the request of the cashier of the bank, solely for the accommodation of the bank. A motion for a new trial was made by plaintiff, and, on the motion, plaintiff attacked, as not supported by the evidence, the findings that (1) the note was not taken by the authority, or under the direction, of defendant; (2) that the threats were not made by Knott while acting for defendant; and (3) that the note was not indorsed by defendant to the bank to secure the sum of $250 and interest, and that the defendant received nothing upon the note.

As to the authority of Knott to act for Finnell, Knott testified: "I understood that the note was given in payment for John Finnell's sheep,—the sheep that were supposed to have been stolen from Mr. Finnell. * * * Q. Did Mr. Finnell authorize you or tell you to take a note from Mr. Mitchell in payment for sheep, or for any purpose whatever? A. None at all. Told me to take nothing,—never told me to take note, or anything else, but told me to make some kind of a settlement with him. Mr. Finnell and I had a talk the morning before he started for Napa. I told him I was going to see Mitchell, and see what I could do with him. He said: 'All right. Go on, and do the best you can with him. * * * I don't want a cent. Whatever you make you shall have.' I told Finnell I was going to see Mitchell about the sheep that were stolen,—Finnell's sheep. I expected Mitchell to settle or pay for the sheep, because they were stolen from Finnell. * * * Q. Did he tell you to have Mitchell arrested, or to make any threats of that kind? A. No, sir; nothing was said at all by Mr. Finnell in regard to prosecuting Mitchell criminally— To do just what I thought best. I had it all in my own hands to settle it. * * * Q. Did Finnell tell you that Mitchell had stolen his sheep? A. Not of his own personal knowledge. I was a witness in the trial between Mitchell and the Bank of Tehama County. I testified in that trial as follows: 'Mr. Finnell came to me one day, and told me that Mitchell had stolen his sheep.' That is what I did,—from hearsay,—yes, sir. Then he went on, and told me who the witness was, and how he came by the testimony that led him to believe that he stole them. Finnell did not employ me at all. He directed me to go, and make whatever I could out of it. If I got nothing, I made nothing." The witness proceeded to testify that he saw Mitchell Saturday night, when Mitchell was in town attending a circus with his wife and children; that he talked with him about settling for the sheep; that he told him, or might have told him, he would be prosecuted if he did not. Did not tell him, in so many words, that Finnell would prosecute him, and send him to state's prison, if he did not, but took him to one side, and agreed to keep it quiet, and "I told him there must be something done about this matter." He also told him he had a warrant for his arrest. Tuesday, he saw Mitchell again, and told him Finnell had gone below, and had left the matter with him to settle. Mitchell then gave him the note in question. He had a warrant, which he said was handed to him by Judge Stratton, although he had never made a complaint against Mitchell, or asked Stratton to write out a complaint. He also testified that before Finnell left he told him of his first conversation with Mitchell, and before Finnell indorsed the note he had told him of the facts in regard to the taking of the note. At the time of the trial, Knott was dead. His evidence was read from a deposition taken at the instance of the defendant.

Defendant testified that he made no claim against Mitchell for the sheep. He had been told that Mitchell stole some sheep. He had lost about 500. Knott spoke to him about it; told him that Eaton said Mitchell had stolen a lot of sheep, and spoke about seeing Mitchell about it. "I told him, so far as I was concerned, I did not want anything to do in the matter. Whatever you can make out of it,—I have no interest in the matter whatever. I meant to say I had no claim, legally, against him; if he could get anything, he could have whatever he could get. * * * Knott came to me, and told me something about— He would see him or was going to see him. I told him I did not want anything to do with it. Whatever he could get out of Mitchell he could have. I had no claim against Mitchell. He could do as he pleased." He further stated that when he was asked to indorse the note the cashier told him Knott had brought it there, and had drawn $260 on it; that Knott had settled with Mitchell about some sheep which purported to have been taken from him, and again: "When I went into the bank, Mr. Cahoone presented me with the note. I was taken by surprise. I asked him how he came by the note, and he told me. When he presented me with the note, I understood; and I got all the information in regard to how the note had been obtained, and all about it. I refused to sign it. I told him, in fact, I had no interest in it; I had never authorized him to take any sum of money, only what Mitchell gave him freely and willingly in the way of settlement. If he had taken any sheep, and wanted to pay for any sheep, he could have whatever there was in it." He was then asked by his counsel what he found out, and he replied that Mitchell had given a note in payment of the sheep; that was all he knew about it.

I think this evidence establishes, without conflict, that Finnell authorized Knott to settle with Mitchell for the sheep, and take anything he could get. This, of course, includes a promissory note; and the finding that the note was taken without the authority or direction of defendant is not justified by the evidence. So far as they affect the validity of the note, Finnell must also be held responsible for the representations of Knott. They were, undoubtedly, made within the scope of the authority given to Knott to settle with Mitchell, and get what he could out of him, and that is the test. In such case the principal is bound, even though the agent disobeyed his positive directions. Chit. Cont. 866; Story, Ag. § 452; Wood, Mast. & Serv. § 284; Garretzen v. Duenckel, 50 Mo. 104. But, under the facts disclosed, the defendant would be held to have ratified whatever was done by Knott in procuring the note, from the very fact that he indorsed it, with the knowledge that it was given in settlement of a supposed claim that he had against Mitchell. It could only have been so taken by Knott acting for him, and, so far as concerned the validity of the note he was chargeable with knowledge, whether he had it or not. This would have been conceded by all, had Finnell sued upon the note. It was his indorsement that enabled the bank to collect. In the case of the bank against Mitchell it must have been held that Finnell's indorsement was a ratification of the act of Knott, as the agent of Finnell, in his attempt to transfer it. If this were so, the transfer was still the act of Finnell; and it does not matter, in this case, whether the money was paid to Finnell or to Knott, his agent. I think the evidence shows that when Finnell indorsed the note he had full knowledge of the practices through which it was procured; but I think, even without that, he took the note subject to all its infirmities. It was error, therefore, to hold that Finnell did not transfer the note as security, or that he received nothing for such transfer.

The respondent contends that Mitchell should have made his defense in the suit on the note brought by the bank. The record shows that he did, and, although in that case it was found, as in this, that the note was procured by menace and misrepresentations, it was also found that the assignment was made before the note was due, and that the bank took it for a valuable consideration, without notice. The defendant indorsed the note for the express purpose of enabling the bank to collect from Mitchell money which the bank had loaned to Knott. He cannot now complain that Mitchell paid this loan, when he might have defended a suit brought to collect it. He is responsible for the money, as much as he would be had it been paid to him.

Respondent also contends that the transaction between Finnell and Knott amounted to an assignment of Finnell's claim to Knott. I do not think it was an assignment, but, if it could be so held, it will not help Finnell. Mitchell was not informed of any assignment, and Knott settled with Mitchell; acting for Finnell, who, with the knowledge of that fact, ratified it, by indorsing the note to enable the bank to collect it. Knott could only have availed himself of such an assignment by acting as the agent of Finnell. I think the judgment and order should be reversed, and a new trial had.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial granted.

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101 Cal. 585

HEALY et ux. v. VISALIA & T. R. CO.
(No. 18,122.)

(Supreme Court of California. March 13, 1894.)

ACTION FOR PERSONAL INJURIES — OPINION EVIDENCE—EXPERTS—MISJOINDER OF CAUSES—REMEDY.

1. In an action for personal injuries caused by being thrown from the forward end of a hand car which left the track, a passenger on the car may testify whether it was possible for one, sitting in the position plaintiff was in, to stand the jars, and still retain her seat, and that he thought the car too narrow for the track.

2. A medical expert may state that his opinion as to the effect of an injury is based upon information derived from books.

3. Testimony that before the accident plaintiff was able to do her own housework, but since the accident she had not been able to do it, is competent to show the extent of the injury.

4. A demurrer on the ground that several causes of action have been improperly joined must specify the several causes of action.

5. In an action for personal injuries, a witness may testify as to the appearance of plaintiff immediately after the accident.

In bank. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by D. L. Healy and wife against the Visalia & Tulare Railroad Company for damages for personal injuries. From a judgment for plaintiffs, and order denying a new trial, defendant appeals. Affirmed.

N. O. Bradley and Bradley & Farnsworth, for appellant. Chas. G. Lamberson and S. J. Hinds, for respondents.

HARRISON, J. The plaintiffs are husband and wife, and on the 20th of May, 1890, took passage with the defendant, to be carried over its railroad from Visalia to the city of Tulare. At about a mile before reaching Tulare, there was a washout in the track of the defendant, and some passengers, including the plaintiffs, were transferred from the car in which they had been carried to a hand car, by which the defendant undertook to carry them to Tulare. Mrs. Healy took her seat upon the forward end of the hand car, with her feet hanging down towards the track, and, after they had gone some distance, the hand car left the track, and Mrs. Healy, falling to the ground, was run over by it, and received serious injuries, for which the present action was brought. The jury rendered a verdict in favor of the plaintiffs for $7,200, and the defendant has appealed.

1. One Ashmead was a passenger on the defendant's road upon the same trip, and was sitting on the rear of the hand car at the time it was thrown from the track. At the trial, his deposition was read in evidence by the plaintiffs, in which, after describing the accident, he was asked: "Under the circumstances, was it possible for an ordinary person, sitting in the position Mrs. Healy was sitting in, to stand the force of the jars, and still retain her seat upon the car?" To this question the defendant objected upon the ground that it was irrelevant, incompetent, and immaterial, and merely called for the opinion of the witness. The objection was overruled, and the defendant excepted. This question does not fall within the rule which excludes the opinion of a witness. The general rule is that the testimony of a witness shall be limited to the facts of which he has a personal knowledge, and that he shall not give his individual opinion thereon; but in many instances the opinion of a witness may be received in connection with his statement of the facts upon which it is based. The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words,

nor do they affect every individual alike, and the judgment or opinion of the witness by whom they have been experienced is the only mode by which they can be presented to a jury. The question asked of the witness in the present case did not call for an opinion from him depending upon facts which he had subsequently learned, but he was asked to describe the effect of the concussion or jar caused by the car leaving the track, as one of the facts out of which the injury had arisen, and which he had personally observed and felt. The position of the plaintiff on the car, as well as his own position thereon, the jumping of the car from the track, the effect produced upon himself, and the sensation which he experienced thereby, were all facts which it was competent to show by his testimony, in order that the jury might get as clear an idea as possible of the circumstances under which the accident had occurred. The strength or force of this concussion was also a fact which it was proper to bring before the jury, and, as it was not capable of exact measurement by any recognized standard, it was competent for the witness to state its strength or force according to the opinion or judgment which he formed at the time that he felt it. His judgment or opinion of its effect upon an ordinary person would be the most efficient mode of enabling the jury to fully appreciate it, and to give to it its proper consideration in determining its influence in producing the injury. Such testimony is competent upon the same principle that permits evidence showing the strength or force of a blow, the distance at which a sound can be heard, or the direction from which it comes, the speed of a horse, the degree of cold or heat, or of light or darkness. In any such instance, a witness who had a personal experience or knowledge of the sensation is competent to testify, although his answer is only his opinion of the matter. The accuracy or strength of his testimony is to be tested by cross-examination. These observations apply also to the testimony of the witness that he thought that the car was too narrow for the track, and also to the testimony of another witness as to the appearance of the plaintiff immediately after the accident. Eyerman v. Sheehan, 52 Mo. 222; Kelley v. Richardson, 69 Mich. 430, 37 N. W. 514; Whart. Ev. 512; Rog. Exp. Test. § 4.

2. Dr. H. L. Pace, a witness on behalf of the plaintiffs, having testified that an injury to the skull or to the brow or forehead was likely to produce bad results in future years to the party injured, and having been asked what were likely to be the results of such injuries, replied: "Well, an injury to the brow, by cases on record, and by the profession, are considered—that is, we regard them—with a great deal of caution in diagnosis, because there are cases on record"— At this point the defendant's counsel stated: "We object as to cases on record, on the ground that it is irrelevant, incompetent, and immaterial to any of the issues in this case." The court overruled the objection, to which the defendant excepted, and the witness thereafter said: "Cases on record, just where such cases have produced, in future years, death. A blow upon the brow, if a nerve was bruised or severed, would be productive of neuralgia. As to the severing of that nerve just above the eye producing neuralgia I cannot say. An injury of the nose, such as this was, might produce catarrh. Catarrh would be one of its natural effects, and the injury would affect the lining. The injury to the mucous membrane would necessarily follow this breaking of the bones." It is now urged that this question was improper, because it was not adapted to the facts that had been shown in the case, or that it was not based upon an hypothesis consistent with those facts. No objection of this character was made at the trial. If it had been then made, the form of the question could have been varied so as to obviate the objection. It is, moreover, urged that it was erroneous to permit the witness to refer to "cases on record," as that, in effect, is permitting the introduction of medical books to the jury. A comparison of the question put to the witness with his answer will show, however, that the objection made by the defendant does not reach this point, even if it were tenable. The witness was asked as an expert what would be likely to be the result of certain injuries to the brow or forehead. This question sought to obtain from him his own opinion of those results; and the fact that he was called as an expert assumed that his opinion was based, not merely upon the empirical knowledge which he has gained through his own practice, but also that which he had acquired in the study of his profession, and from his intercourse with other members of the same profession. As an expert it was competent for him to give the grounds upon which he based his opinion, as well as the opinion itself; and the fact that his opinion was based upon information derived from his reading did not make it incompetent for him to so state. He was not asked to state, nor did he state, what the "cases on record" were, nor whether the facts of those cases corresponded with the facts of the case on trial, and the contents or statements of the medical books were not given to the jury. But in making his answer to the question of the plaintiffs he gave, as a reason for his opinion, "because" there are cases on record which have resulted in death,—an answer that was doubtless within the observation of each of the jurymen. This is entirely different from reading medical or scientific books to the jury, or seeking to influence them by opinions or theories contained in such books. The witness was only asked to give his own opinion, which he gave under the sanction of his oath, and which must be assumed to have been a conclusion reached

by him after a judicious comparison of all that he had read or learned upon the subject; and upon this opinion, as well as its source, he could be subjected to the most rigid cross-examination. In the Sussex Peerage Case, 11 Clark & F. 117, it was held that an expert who was called to prove a foreign law "may state what it is from his own knowledge, or assist his own knowledge by reference to books and authorities that are within his reach; he may refer to text-books, or to books of decisions, and so render his knowledge more accurate than before." In Collier v. Simpson, 5 Car. & P. 74, it was held that medical books themselves could not be read, but that the witness, who was the presiden of the college of physicians, could state, no only his judgment, but the grounds of it, which were in some degree founded on books, as a part of his general knowledge. See, also, State v. Baldwin, 36 Kan. 17, 12 Pac. 318; Rog. Exp. Test. § 177; Whart. Ev. § 438.

3. Mrs. Healy testified at the trial that prior to the time of the accident she was able to do all of her household work, and that since the accident occurred she had not been able to do this work. The defendant objected to this testimony upon the ground that it was irrelevant, incompetent, and immaterial, and excepted to the ruling of the court in admitting it. The testimony was, however, competent for the purpose of showing the extent of the injury she had sustained, and it was also material for that purpose, and relevant to the issues in the case. There was no evidence presented of any special damage resulting from this particular effect of the injury, and indeed no evidence was introduced at the trial of the amount of damage that had been sustained; nor did the plaintiffs seek to recover damages for any loss of services. If the defendant had made a special objection to this testimony, that the plaintiffs could not recover in this action for any loss of service caused by the injury to the wife, it could have been made apparent to the jury that the plaintiffs were seeking only to show the extent and character of the physical injury which she had sustained. The decision in Tell v. Gibson, 66 Cal. 247, 5 Pac. 223, was made upon the demurrer to the complaint; but in the present case the demurrer was insufficient to present this objection, as it failed to "distinctly specify" this ground. A demurrer to a complaint upon the ground that several causes of action have been improperly united should specify the several causes of action. It is not sufficient to merely state that several causes of action have been improperly united in the complaint, without at the same time pointing out those to which the demurrer is intended to refer. Moreover, in Tell v. Gibson the loss of the wife's services to the husband was distinctly made one of the elements of damage upon which the judgment was sought, and was presented to the witnesses as the basis of their estimate of the damage which she had sustained.

Certain other exceptions were taken to the rulings of the court upon the admission of evidence, but none of these rulings are such as to merit particular notice. The court did not err in refusing the instructions to the jury asked by the defendant, and the instructions to which the defendant has taken objection in its brief were correct. The damages allowed by the jury cannot be deemed excessive, nor can their verdict upon the sufficiency of the evidence be reviewed. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; PATERSON, J.; DE HAVEN, J.

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4 Cal. Unrep. 535

CHADBOURNE et al. v. STOCKTON SAV. & LOAN SOC. (No. 18,173.)

(Supreme Court of California. March 14, 1894.)

EXECUTION—WHAT SUBJECT TO—INTEREST OF POSSIBLE VENDEE—BANK PRESIDENT — AUTHORITY.

1. One to whom an offer for the sale of land is made—the offer to be kept open only on certain conditions—has not, in the absence both of a compliance with such conditions and an acceptance of the offer, an interest in the land, which is subject to sale on execution.

2. In the absence of authority by charter, resolution, or by-law, it will not be presumed that the president of a bank is authorized to waive conditions of a contract for the sale of land.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Joshua Chadbourne and others against the Stockton Savings & Loan Society. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Reversed.

Baldwin & Campbell and James H. Budd, for appellant. J. B. Webster and L. W. Elliott, for respondents.

TEMPLE, C. This is an appeal by defendant from the judgment, and an order refusing a new trial. The case has been here before, and is reported. 88 Cal. 636, 26 Pac. 529. The action is based upon an offer on the part of the defendant to sell certain land, which offer is set out in full in the report of the last appeal. On that appeal it was held that the complaint was defective, and that a demurrer interposed to it should have been sustained, because, it is said, the offer had not been accepted within a reasonable time, nor was there any excuse shown for delay. It is then said: "As there is no allegation in the complaint showing that the agreement of Hart to keep the buildings insured, and to assign to the defendant the policies of insurance, as provided by the terms of said instrument,—which was the only consideration of the offer to sell,—was ever performed or excused, we advise that the judgment and order be reversed, with directions to the court below to sustain the demurrer." The judgment was reversed, therefore, partly because it was not averred that Hart had insured the buildings. The point was certainly presented by the demurrer. It now appears in the proof that the buildings were not insured by Hart, or any one else. Respondents say the agreement to insure was not a condition precedent. If it was not, it had no binding force whatever. The writing was merely an offer to sell, and imposed no obligation upon Hart. He simply could not avail himself of the offer unless he complied with the conditions. But, whether right or wrong, since the facts in reference to this matter are precisely as they appeared to be on the last appeal, the conclusion has become the law of the case. The offer of William Hart was contemporaneous with a demise of the premises, and was attached to the lease. The lease, however, was not to William Hart, nor is it shown in any way that William Hart had any previous relation to the premises, or any interest in the leasehold estate, or control over the tenants. It does not appear, therefore, that he had an insurable interest in the buildings. He must have procured the insurance, if at all, in the name of the defendant. Furthermore, the offer was conditioned that the first year's rent should be paid by August 16, 1888. Hart was not liable for such payment, so far as appears. This rent was not paid at that time. While it was in default, an execution was sued out at the instance of a creditor of William Hart, and levied upon the land, and the interest of said Hart in the same was sold as real estate.

It is claimed and admitted that defendant, through its president, at the sale under the execution, forbade the sale, and notified those intending to bid that William Hart had no interest in the premises, because the conditions upon which the offer was made had not been complied with. Nevertheless, plaintiff's grantors bought in the premises, and plaintiffs are not the assignees of William Hart, as to his interest in the offer to sell, unless they acquired such interest through such sale. It is evident that the conditions upon which such offer was made did not transpire, and there would seem to be no doubt that the defendant was thereby relieved of its obligation to keep the offer open. Subsequently, however, to the execution sale, the rent was paid and accepted. Now, Hart had no interest in the premises, was not in possession, and had expended no money because of the option. He had not accepted the offer, and has never done so. After plaintiffs received their deed from the sheriff, six months after the sale, they tendered to defendant the money for the land, which tender was refused. In its answer, defendant denies that it made the offer to Hart, or that Hart accepted any such offer, or acquired or had any interest in the premises, or that plaintiffs have acquired the rights of Hart under said option. It admits the payment of rent, but avers that the rent was paid long after August 16, 1888. It avers that the buildings were not insured, and denies that the defendant ever waived that condition of the option. It also denies that defendant ever agreed to convey the land, notwithstanding the failure of Hart or of plaintiffs to comply with its conditions. There is evidence tending to show that, soon after plaintiffs received the sheriff's deed to the land, they called upon Shippee, the president of the defendant corporation, and proposed to complete the purchase according to the offer; that Shippee replied that, when they purchased, Hart had no interest in the land, because the rents had not been paid, but since then the rents had been paid, and Hart had an interest, and the bank would convey it to plaintiffs, if Hart's son, to whom he understood Hart had assigned his right, did not wish to purchase, and that it would be necessary to wait till the time was up, when, if no one else claimed the privilege, he would be glad to accept the plaintiffs' offer; that afterwards, when the time was about to expire, and plaintiffs made the formal tender, it was declined solely because Hart was still claiming the right, and had also made a tender, and Shippee said the courts must settle the question as to who had the better right. If it be conceded that Shippee, in making these statements, acted for the corporation, they do not prove a waiver of the conditions of the offer. It must be remembered that there was no contract of purchase. Hart was not in possession, and had no interest in the property, save such as he acquired under the offer. That was conditioned, and, so far as payments of rent are concerned, not upon any performance or default on the part of Hart. Payment of rent was an indifferent circumstance, except as made material by the terms of the offer making it a condition. There was no forfeiture of an estate in land. It was merely that the event did not happen upon which the offer was conditioned. That being so, plaintiffs acquired nothing by their execution sale. If the corporation was still willing to convey, it was not in pursuance of the offer, which by its own terms was no longer open, but because it was still ready to sell for the price named. It is not necessary to determine whether a mere offer to sell land, while it is unaccepted, constitutes an interest in the land, which will pass under an execution sale. There was here no such offer outstanding when the sale was made. But it was not shown that Shippee had any authority to bind the corporation by such waiver, conceding that such waiver could have been made. It was not shown that he had such authority, as president, through a by-law or by resolution, nor that he had been accustomed to transact such business, and that his authority to do similar acts had been recognized by the directors. The authorities are agreed that, as president, he had no such authority, unless it is so ordained in the charter, by-laws, or by resolution. It has sometimes been held, however, that, when the president assumes to act for the corporation in a matter pertaining to the usual business of the corporation, authority will be presumed, in the absence of proof. This was a transaction for the sale of land, and such corporations are prohibited from dealing in land, except within quite narrow limits. It may be true that, when they do violate the law in this respect, no one can object, or take advantage of the fact, except the state. Still, such prohibited business cannot be held to be the customary business of the bank, and authority will not be presumed in the president merely by virtue of his office. I recommend that the judgment and order be reversed, and a new trial had.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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101 Cal. 645

PEOPLE v. ABBOTT. (No. 20,985.)

(Supreme Court of California. March 16, 1894.)

REVIEW ON APPEAL — REMARKS BY COURT — POSSESSION OF STOLEN PROPERTY — EFFECT — INSTRUCTIONS.

1. The court's action in remarking, in the presence of the jury, on the conduct of appellant's attorney as to the bribery of a witness, is not reviewable on appeal, in the absence of exceptions thereto.

2. It is not error to instruct that the unexplained possession of stolen property by defendant is a "guilty circumstance," and that defendant is bound to explain such possession, in order to remove its effect as a circumstance to be considered with other suspicious facts disclosed by the evidence.

3. Where there is direct evidence that accused was in possession of the stolen property soon after the theft, it is proper, though such evidence is contradicted, to charge on the effect of the possession of stolen property.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Abbott was convicted of burglary, and appeals. Affirmed.

O. C. Stephens, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of burglary, and appeals from the judgment and order denying his motion for a new trial. A very large number of exceptions were taken by appellant during the progress of the trial, which are barely alluded to in his brief. We have received no aid from that source, in the examination of them; and, after giving them more consideration than appellant's counsel appears to have done, measured by his brief, we find nothing justifying a reversal of the judgment.

Complaint is made of certain remarks made by the trial court, in the presence of the jury, touching the conduct of appellant's attorney in regard to the bribery of a witness. If the circumstances were such as to impress the court with a suspicion that the witness had been tampered with, the investigation of the matter should have been conducted in the absence of the jury, in order that the jurors might not have been influenced in their verdict by any developments arising from such investigation; but no exception was noted to the course pursued by the court, and for that reason we are not authorized to pass upon the merits of the controversy. People v. Shen Ah Fook, 64 Cal. 382, 1 Pac. 347.

The court gave the jury the following instructions, which, it is claimed, do not state the true rule of law: "The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt." And again: "If the jury believe from the evidence that the property mentioned in evidence was stolen from the premises described in evidence, and received into possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt; and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose any such." These two instructions are in effect the same. The principle embodied therein covers the same ground, and we think the law is correctly declared. People v. Etting, 99 Cal. 577, 34 Pac. 237. "A circumstance tending to show guilt" would be a more appropriate expression than the phrase "a guilty circumstance," yet their manifest meaning is the same. The one is the equivalent of the other, and this court has so declared in People v. Rodundo, 44 Cal. 541. It is further claimed that these instructions, conceding them to be sound law, were not apropos to the case disclosed by the evidence. We think the circumstances of the case justified them. There was some direct evidence to the effect that the appellant was in possession of the property stolen from the house burglarized, at about the time the burglary was committed; and the mere fact that this evidence may have been contradicted by the defendant or other witnesses would not defeat the right of the people to have an instruction bearing upon the question of the possession of stolen property given to the jury. Of course, before the jury could apply that principle of law to the defendant, they should be satisfied that he in fact had possession of the stolen property; but, when so satisfied from the evidence, the legal principle should weigh against him.

There is nothing further in the record demanding our attention. It is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; McFARLAND, J.; FITZGERALD, J.

101 Cal. 651

HICKS et al. v. MASTEN, Judge. (No. 15,075.)

(Supreme Court of California. March 20, 1894.)

BILL OF EXCEPTIONS — SETTLEMENT—WAIVER OF NOTICE—MANDAMUS—WHEN LIES.

1. Where appellants took steps to have the bill of exceptions settled in time; the judge, in open court, in the presence of attorneys for both parties, fixed a date for settlement; and the attorney for appellee consented thereto, and stated he would "be on hand,"—such assent and statement were a waiver of the five-days written notice required by Code Civ. Proc. § 650.

2. A writ of mandamus is the proper remedy to compel a judge to settle a bill of exceptions, in a case not requiring the exercise of judicial discretion.

Commissioners' decision. Department 1.

Petition by L. Hicks and S. Hoffman for a writ of mandamus to compel W. T. Masten, udge of the superior court of Lassen county, o settle a bill of exceptions. Writ granted.

Goodwin & Goodwin, for petitioners. Spencer & Raker, for respondent.

HAYNES, C. This is an original application to this court for a writ of mandate requiring the respondent to settle a bill of exceptions. Petitioners were defendants in an action tried before respondent and a jury in said superior court, wherein one J. F. Sharp was plaintiff. A verdict was rendered against etitioners, and a judgment was entered hereon. Petitioners served upon Sharp's atorneys a proposed bill of exceptions, and on April 5, 1892, amendments thereto were served upon petitioners' attorneys. On April 9th the original proposed bill was left with the judge, at his chambers, and on the following day the proposed amendments and certain objections, which were served by Sharp's attorneys, were also left in the judge's chambers. On the 11th, in open court, one of Sharp's attorneys being present, counsel for etitioners requested the court to fix a time for the settlement of the bill of exceptions; "and the judge, from the bench, stated that the bill of exceptions, and objections to setlement, and proposed amendments to the ill, in the case of Sharp v. Hoffman et al., ad been left with him for settlement, and were in his chambers, and that he would proceed to settle the same on the 12th day of April, 1892, at 10 o'clock a. m., at his chambers, and requested both parties to be present at that time;" and Sharp's attorney then stated he would be "on hand." No written notice of the presentation of the proposed bill and amendments was served by the moving party. An inquiry was made by counsel for petitioners, of Sharp's attorney, at the time the amendments were served, whether they could settle the same some day that week, to which the reply was made by Sharp's attorney that "he didn't see how they could." At the time fixed by the court the attorneys of both parties were present, and Sharp's attorney then presented written objections to settling the bill, upon several grounds therein stated, but which in fact covered but two points, viz.: (1) That the proposed bill of exceptions was not prepared and served in time; and (2) that the five-days notice in writing required by the Code, of the presentation to the judge for settlement, had not been given. And upon the latter ground the judge made a written ruling or order sustaining the last objection, and refused to settle the bill. The attorney for the moving party then requested the judge to shorten the time of written notice to three days, so that the settlement of the bill might be had within the ten days named in the statute. This the judge refused to do, upon the ground "that he had no power to do so, and because he had no jurisdiction." The attorney for the moving party on the same day served a written notice that he would present said proposed bill and amendments to the judge on the 18th of the same month for settlement, and then asked the judge to continue the matter until that day, which request was also denied; and on the 18th, counsel for both parties being present, and the objections renewed, the judge refused to settle the bill. And hence this application for a writ of mandate.

It is clear that petitioners, within the time required, took steps, though irregularly, to have their bill of exceptions settled. Their fault was not delay, or an utter neglect to do anything towards securing the settlement, but in not taking the proper step. The written notice provided for in section 650, Code Civ. Proc., is for the benefit of the adverse party, and may be waived by him. No one would assert that if he appeared, and, without objection, participated in the settlement of the bill, he could be permitted afterwards to say that it was not properly settled, because written notice was not given; and therefore, if he consents to a time designated by the court or judge for the settlement, he should not be permitted, when that time arrives, to say that the bill should not be settled because a written notice had not been served. When the judge announced that he would proceed to settle the bill on the 12th, at an hour and place named, and requested counsel for both parties to attend, counsel for Sharp said he would be "on hand." It is true that, in the agreed statement of facts upon which the case is submitted to this court, it is said "that the attorneys for said Sharp did not appear before the said judge pursuant to said or any notice," but appeared specially to object to said settlement. The time at which the want of notice should have been urged was when the court fixed the time for the settlement, and requested him to be present; and his failure to object then, and his assent implied in the statement that he would "be on hand," should have been held a waiver of any other or different notice. Objections of this character should be made at the earliest opportunity, or at least when the party is first required to speak in relation to it. If he intended not to waive the notice, he should have objected to the judge proceeding to fix the time, and stated the grounds of his objection, and left the moving party to his application to the judge to shorten the time of notice, or such other course as he saw proper to adopt. The court should have proceeded to the settlement of the bill at the time designated. The party or attorney who seeks to avail himself of a technicality not affecting a substantial right must himself be held to a prompt, consistent, and exact assertion of such technical right. Counsel for respondent cites Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780, to the proposition that, "the judge having once refused to settle the statement, the matter was ended, so far as that officer was empowered to settle it." What was there said was upon facts which justified it. It was said of a statement presented long after the time for the service of a statement had passed, and after the court had refused to settle a prior statement, no complaint as to the refusal to settle the first statement appearing in the case.

It is further said that mandamus is not the proper remedy, as the remedy is by appeal; citing Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50, and Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332. In those cases the bill of exceptions was confessedly not prepared in time, and the moving party applied to the court below to be relieved upon the ground of mistake and excusable neglect; and, as that question was one requiring the exercise of judicial discretion, it is obvious that mandamus would not lie, requiring the court to relieve against the mistake or neglect, and that an appeal was the proper remedy. The circumstances requiring the one remedy rather than the other are quite clearly indicated in Careaga v. Fernald, 66 Cal. 351, 353, 5 Pac. 615. A writ of mandate should be issued, as prayed for.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. This cause having been regularly heard and fully considered, it is ordered that a peremptory writ of mandate do issue against the respondent, commanding him to proceed, and settle and certify the bill of exceptions, as prayed for in the petition herein.

(101 Cal. 576)

SHAFFER v. McCLOSKEY et al. (No. 18,219.)

(Supreme Court of California. March 13, 1894.)

Payment of Mortgage—Merger—Subrogation.

1. Where, before one joint tenant deeded his interest to the other, who then paid a mortgage against the land, he had deeded it to a trustee, without the other joint tenant's knowledge, the mortgage did not merge, and will be revived.

2. The joint tenant satisfying the mortgage will be subrogated to the rights of the mortgagee.

Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

Action by R. Shaffer against H. H. McCloskey and others. From a judgment for plaintiff, defendants appeal. Affirmed.

James F. Peck, for appellants. Farrar & Ostrander, for respondent.

McFARLAND, J. Plaintiff brought this action for a decree reviving a certain mortgage, and subrogating him to the rights of the assignee of said mortgage. Judgment went for plaintiff, and defendants appeal from the judgment upon the judgment roll, which includes findings, their general contention being that, upon the findings, the judgment should have been for defendants. The facts are, briefly, these: The plaintiff, Shaffer, and the defendant McClosky were on February 11, 1888, the owners, as tenants in common, by purchase from one Fahey, of certain land described in the complaint; and on that day, as the main part of the purchase money, they made to Fahey their promissory notes for certain sums of money to be due at different times, and also executed to him a mortgage upon the said land to secure said notes. Fahey assigned the notes and mortgage to the First National Bank of Merced. A part of the money secured by the mortgage was paid by plaintiff and McCloskey, but, when the whole amount became due,—$5,952.50 being unpaid,—McCloskey was unable to pay his share; and, as the holder of the mortgage was pressing for the money, the plaintiff was compelled to pay the whole amount in order to protect his own interest in the land. Under these circumstances, McCloskey promised verbally that he would assign his one-half interest in the land to plaintiff if the latter would pay the full amount due on the notes and mortgage. Plaintiff agreeing to this, McCloskey conveyed his half of the land to plaintiff, and plaintiff paid the full amount remaining due on the mortgage, and Fahey satisfied the same on the record. This occurred on February 1, 1890. McCloskey did not inform plaintiff that he (McCloskey) had created any other incumbrance on his half of the land, and plaintiff had no actual knowledge of any such incumbrance. He supposed, when he paid the amount due on the mortgage, and had it satisfied, that the land was then free of any lien; and he would not have paid off the mortgage, as aforesaid, if he had known of any other lien. It turned out, however, that, without plaintiff's knowledge, McCloskey, after the execution of said mortgage, and before its satisfaction as aforesaid, had executed a deed of trust of all his interest in the land to one John Ruddle for the benefit of the Merced Bank, a corporation made a defendant in the action, to secure a certain sum of money, and that said deed of trust had been recorded in the county recorder's office on November 10, 1888. (Certain proceedings were had under said deed of trust by which McCloskey's interest was, after this action was commenced, sold to the defendant Howell; but they do not affect the questions here involved.) Appellants contend that under these facts all rights of respondent under the mortgage were merged in the deed from McCloskey, and that he was bound by the constructive notice given by the recordation of the trust deed. Counsel for both sides have exercised great industry in presenting this case to the court, and they have argued it in their briefs with great learning and ability. If we do not notice in detail the many views which they have taken, and the numerous authorities which they have cited, it is not because we do not appreciate their efforts to aid the court, but because such a course would carry an opinion beyond reasonable length.

In our opinion the judgment should be affirmed. It will be noticed that the judgment in this case does not weaken any position which appellants were induced to take by any conduct of the respondent. It does not take away from them any money which they were induced to invest by any act or laches of respondent, nor does it lessen the value of any security which he in any way induced them to take. They did not acquire any lien after the mortgage had been marked "Satisfied," and were not led by a clear record to invest money in the land. They took the deed of trust while the mortgage was in full legal existence, recorded and unsatisfied, and with perfect understanding that it was a valid prior lien, and they are merely seeking to take an advantage offered by an inadvertence or mistake of respondent. This is what equity will not allow.

As to the question of merger, it must be remembered that, with respect to that subject, equity is not controlled by the rules of law. The case of Rumpp v. Gerkens, 59 Cal. 496, is very similar on this point to the case at bar. In that case, Rumpp brought suit to foreclose a mortgage executed to him by Gerkens, and Leonis was made a defendant, as claiming some interest in the land mortgaged. Leonis had a prior mortgage executed by Gerkens upon the same land, but he had taken a deed of the land from Gerkens upon his promise to discharge and cancel the mortgage. This was done, however, without any actual knowledge of the second mortgage to Rumpp. The court below decreed that the amount of the mortgage of Leonis should be first paid. Upon appeal here, plaintiff contended that the first mortgage had merged in the conveyance of the fee to Leonis, but this court affirmed the judgment. Thornton, J., in delivering the opinion of the court, said: "In law, a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater. But a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished when it would continue to exist in law, and sometimes preserve it when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united." The same principle was applied to Brooks v. Rice, 56 Cal. 428. There are many other authorities to the same effect. We do not think, therefore, that in the case at bar the doctrine of merger can be successfully invoked by appellants.

We are satisfied that the rule of equitable subrogation was properly applied by the court below in this case. Without referring to foreign authorities, the case at bar is fully within the principle declared in Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92; Rumpp v. Gerkens, supra; Swift v. Kraemer, 13 Cal. 526; Carpentier v. Brenham, 40 Cal. 221; Carr v. Caldwell, 10 Cal. 380; and Tolman v. Smith, 85 Cal. 280, 24 Pac. 743. In many of the cases cited by appellants the party seeking subrogation was a mere volunteer or intermeddler; but, in the case at bar, respondent was an original party to the transaction, and forced to the course taken by him in order to protect his own interests.

The fact that the deed of trust was recorded is of no value. In many of the cases cited by respondent, and particularly in Rumpp v. Gerkens and Brooks v. Rice, supra, the junior mortgage had been recorded. Respondent clearly intended that his payment of the mortgage should inure to his own benefit, and not to the benefit of appellants; and there is no equitable ground upon which appellants can object to it so inuring. They were not led astray by the payment of the prior mortgage, and are left in the exact position which they expected to occupy when the trust deed was taken. As was said by the supreme court of Oregon in Pearce v. Buell, 22 Or. 29, 29 Pac. 78 (a very interesting case on the subject): "The principle running through all cases of this class, says Barculo, J. (Barnes v. Camack, 1 Barb. 392), 'is that, when the legal rights of parties have been changed by mistake, equity restores them to their former conditions, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.'"

It is contended that respondent should have offered to reconvey one-half of the land to McCloskey. This appeal is evidently prosecuted in the interests of appellants other than McCloskey; but the whole decree is based upon the theory that the mortgage is revived, and the half interest in the land considered as belonging to McCloskey, and his undivided half is decreed to be sold to satisfy one-half of the mortgage debt. This protects the rights of every party, and remits each to his original status. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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101 Cal. 478

LOS ANGELES NAT. BANK v. WALLACE et al. (No. 19,293.)

(Supreme Court of California. March 1, 1894.)

DRAFT—DEMAND OF PAYMENT—WAIVER.

1. Three persons arranged to plant an orange grove, one furnishing the money to another (who was to manage the business on a salary) on drafts drawn by him on, and accepted by, the third, who, with the first, furnished the trees; the profits, if any, to be divided equally. *Held*, that the payee of a draft so drawn and accepted cannot hold the drawer, without demand upon the acceptor at maturity, as the bill was, as between the parties, a debt due the firm by the acceptor.

2. A statement by the drawer of a bill, to the holder, that, owing to the failure of the person who was to furnish the money, the acceptor could not pay it, but that he would, not made within 10 days of maturity, is not such a statement that it would be dishonored as would excuse presentment and notice, under Civ. Code, § 3156.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Los Angeles National Bank against J. Wiley Wallace and M. S. Babcock. From a judgment for plaintiff, defendant Wallace appeals. Reversed.

Stephen M. White and Wm. D. Stephens (Ben Goodrich, of counsel), for appellant. M. T. Allen and J. A. Donnell, for respondent

TEMPLE, C. Babcock and one Collins owned some nursery stock, which included a large number of orange trees. Wallace was an experienced horticulturist. The three purchased from Baldwin 300 acres of land, believed to be well adapted to the growth of oranges. Nothing was paid on account of the purchase of the land; but it was conveyed to Babcock and Wallace, who gave a mortgage upon it to secure the purchase money. Collins was a banker, and did not wish to be known in the transaction. Therefore, everything was in the name of Babcock and Wallace. Babcock and Collins were to put into the enterprise their nursery stock. The orange trees for planting the land purchased were to come from it, and the balance of stock to be sold, and proceeds applied to the enterprise. Collins was to advance further money to pay expenses, to the extent of $35,000. Wallace was to manage the properties, and to receive a salary of $60 per month. It was thought that it would take six years, or perhaps longer, to realize sufficient profit from the orchard to pay the purchase money ($60,000), to repay Collins the advances made by him, and to pay Babcock and Collins for the nursery stock. Payments were to be in the order above recited. As Collins did not wish to be known in the transaction, it was arranged that the money to be advanced by him should be obtained in this way: Wallace was to draw upon Babcock, payable as convenient. Collins would then cause the bills to be guarantied, and, when due, paid by the California National Bank of San Diego, of which he was an officer. When the land had been paid for, and the advances made by Collins refunded, and the value of the nursery stock paid, the orange orchard was to be equally divided between the three parties. On the 7th day of September, 1891, Wallace drew two bills upon Babcock, payable on December 1st to the plaintiff. They were duly presented to Babcock for acceptance, were accepted, and payment guarantied by the San Diego Bank. Some three weeks before the maturity of the bills, it was understood that Collins and the bank which had guarantied the bills were both insolvent, and Wallace informed plaintiff's cashier that he did not think Babcock had any means, or would be able to pay, but that he (Wallace) had means, and would pay the bills. At maturity of the bills, it was fully known that Collins and the bank were insolvent, and for that reason the bills were not presented to Babcock when they should have been. Plaintiff's officers knew of the arrangement between the parties when it advanced the money. This suit was brought on the bills against Babcock and Wallace. Judgment passed against both, and Wallace appeals from the judgment, and from an order refusing him a new trial.

The bills not having been presented to Babcock for payment when they became due, nor within a reasonable time thereafter, Wallace contends that he cannot be held as drawer. In reply, respondent contends that Babcock, Collins, and Wallace were partners; that the bills of exchange were drawn by a partner upon a partner, in the business of the partnership, in pursuance of an arrangement among themselves. Therefore, the drawer was not released for want of presentation and notice of dishonor. In the case of a bill drawn by a partner upon the firm, or upon a partnership fund in the hands of another partner, notice of dishonor is not required, because notice to either partner is notice to the firm; because, too, in such case the bill is really drawn by the firm upon itself, and dishonored by itself. Want of due demand is a different matter. That demand shall be made at maturity is a condition of the contract between the drawer and the payee. If, however, the drawer is the debtor, and the bill was drawn for his accommodation, failure to make due demand will not release him, but he may recoup for any damage he may have suffered by failure to make a demand. The question, therefore, is whether the bill was drawn for the firm. Did it create an indebtedness on the part of the partnership? Would Wallace have had recourse upon any one in the case of due presentment, and a refusal to pay? It seems evident that he would have had such recourse against Collins, who had agreed to pay the bills so drawn. Nor was Wallace or the firm liable for the indebtedness thus created. It is true, provision was made for the repayment of advancements to be made by Collins. But this was contingent, and in no event was Wallace to be held personally liable for it. He had an interest in it, for unless the adventure were a success he would get nothing, and, if the speculation were a success, Collins would be repaid. But Wallace had no other interest in the property than the chance that there might be a profit. Further than that, the risk was entirely that of Collins and Babcock. It cannot be said, therefore, that Wallace was the debtor. As between the parties, Wallace was entitled to require Collins to pay the bill. As between them, the bill was upon an indebtedness due the firm from Collins. It was for the share which he was to contribute to the business of the firm. Had the bills been drawn simply to obtain money to meet the current expenses of the adventure, it may be conceded that all parties would have been liable, if Wallace had the requisite authority to draw the bills, but no such claim can here be made. The payee knew of the arrangement between the parties, and the purpose for which bills were drawn. It was not a trading partnership, in which it is presumed that one partner has authority to bind the others in this way. In fact, it was not contemplated by the parties that any such thing should be done. Wallace was merely to expend the funds provided by Babcock and Collins. He had no authority to incur indebtedness. Nor can his authority be increased by calling the relation a partnership. The parties fixed by contract their own rights and obligations. They did not call themselves partners. If it be essential to a partnership that one should have the power to bind all by drawing bills of exchange, then this was not a partnership, for Wallace had no such power. If the speculation did not prove a success, then Babcock and Wallace were to have no interest in the property. The fund from which Collins was to be repaid might never exist. If not, Collins would take the property. In either event the firm—if we so speak of it—would not be liable to Collins. Wallace and Babcock had an interest, no doubt, in having the money repaid, for if it were not they would get nothing, but this is not saying that they were debtors. I think, therefore, Wallace had a right to insist upon due demand and notice.

Respondent also contends that demand was excused because Wallace represented to its cashier that, owing to the failure of the bank, Babcock could not pay, but that he (Wallace) would. The representation was not equivalent to the statement that the bill would be dishonored; but, had it been, the information was not given within 10 days of the maturity of the bill. It would not, therefore, excuse presentment and notice. Civ. Code, § 3156. This section works a change in the law applicable to the subject, the reason for which I do not comprehend. If the demand was not made because the person entitled to insist upon it as a condition to his own liability prevented it by representing that it would be unavailing, it ought to be held a valid excuse, whether the representation were within 10 days, or any longer period, before the maturity of the bill. But we cannot overrule the express statute. I think the judgment and order should be reversed and a new trial had.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

102 Cal. 202

MATHEWS et ux. v. DAVIS et al. (No. 18,253.)

(Supreme Court of California. March 30, 1894.)

Husband and Wife — Conveyance of Wife's Property — Validity — Homestead — Conveyance—Specific Performance.

1. Under Civ. Code, § 1093, providing that no estate in a married woman's lands shall pass except by instrument duly acknowledged by her, specific performance of her unacknowledged executory agreement to convey her land cannot be enforced. Jackson v. Torrence, 23 Pac. 695, 83 Cal. 521, followed.

2. Under Civ. Code, § 1242, providing that a married woman's homestead cannot be conveyed unless the deed of conveyance be executed and acknowledged by both husband and wife, an agreement executed by husband and wife to convey the homestead is invalid without their acknowledgment.

3. The fact that the husband and wife executed, acknowledged, and tendered a deed cannot avail the grantee, to compel a conveyance of the property, he having refused payment when the deed was tendered him, and many years having elapsed since the deed was tendered, during which time several thousand dollars were expended in improving the property.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by H. O. Mathews and wife against John T. Davis and another. There was judgment for plaintiffs, and defendant Eltinge appeals. Affirmed.

Daniel Titus, for appellant. John B. Hall and Scrivner & Schell, for respondents.

PER CURIAM. This action is brought by H. O. Mathews and Mary H. Mathews, his wife, to quiet their title; to obtain a decree that a certain agreement is a cloud upon their title to a lot of land by them owned and possessed, situate and being in the city of Stockton, county of San Joaquin; and to cancel and annul such agreement. Plaintiffs had a decree as prayed for, from which, and from an order denying a motion for a new trial, the defendant Josephine Eltinge appeals.

The facts, as found by the court, are not assailed, for want of evidence in their support, by the brief of appellant. They are too lengthy to be reproduced here, but may be epitomized thus: (1) Plaintiffs are, and since a date prior to July 16, 1875, have been, husband and wife, and have resided upon, owned, and occupied the land described in the complaint. (2) On the 16th day of July, 1875, the plaintiffs made their declaration of homestead, in due form, as by law required, acknowledged, filed, and had the same recorded; have never abandoned, and still retain, the same, as a homestead. (3) On the 1st day of August, 1878, plaintiffs and J. T. Davis, one of the defendants, and who made default herein, signed and delivered to said Davis an agreement which recited that Josie Davis (now Josie Eltinge), the daughter of defendant Davis, was in the care and custody of plaintiffs; that they had no children of their own, and entertained for her the affection of parents for a child, and have intended that their property shall, upon the death of the last of them, inure to her benefit; and whereas the property described in the complaint was subject to a mortgage of about $3,500,—in consideration of all of which, and of a promissory note made to them by John T. Davis for $3,500, payable to them on or before September 12, 1878, to enable them, with said amount, to remove the lien upon their property, the plaintiffs agreed that, upon the payment of said promissory note according to its terms, they would execute and deliver to said Josie Davis a deed, to take effect and become absolute upon the death of the survivor of the plaintiffs, until which time plaintiffs, or the survivor of them, were or was to have possession, control, and use of the property, and were to keep the same in repair, etc. If the property came to the possession and ownership of Josie Davis during the lifetime of her father, John T. Davis, she was not to have the right or power of alienation without his consent and joinder in the same. (4) The foregoing agreement was not acknowledged or certified so as to entitle it to record by plaintiffs, or either of them, but was acknowledged and recorded by Davis on the 13th day of April, 1892. (5) Davis made and delivered his promissory note, as specified in the agreement, but on or about the 6th day of August, 1878, and before the note became due, he repudiated the whole agreement, so notified the plaintiffs, and demanded a return of the note. (6) Davis has never retracted his notice to plaintiffs, has never paid the note, or complied with any part of the agreement. (7) Defendant Josie Eltinge, the defendant herein, is the Josie Davis mentioned in the agreement. (8) Neither of the defendants demanded the deed or conveyance from plaintiffs to Josie Davis until May 3, 1892, when they made such demand. (9) The real property has enhanced in value since August, 1878, and is now worth $20,000, as against $5,000 at said date. (10) Plaintiffs have paid all taxes on the property, and have expended thereon more than $10,000. (11) Plaintiffs have suffered detriment by the failure of Davis to pay the note. (12) In 1879 plaintiffs obtained a judgment against John T. Davis on said note, issued execution, which was levied upon certain wheat, the property of one Vancil, the wheat sold, and the execution returned satisfied. No property of defendant Davis was ever levied upon, and none was taken from his possession. (13, 14, 15, 16) On the 7th day of October, 1878, plaintiffs executed a deed, as provided for in the agreement; placed it in the hands of A. Hewel, who had guarantied their compliance with the agreement, for the sole purpose of having a tender made, with demand of payment of the note, all of which was done by Hewel. Davis never offered to pay the note, or demanded a deed. It was subsequent to such tender that the action was brought on the note. (17, 18) After the tender of the deed, demand of payment of the note, and refusal, Hewel had no authority to deliver the deed. (19) In 1892 Charles S. Eltinge, representing himself as the husband of defendant Eltinge, demanded the deed of Hewel, which demand was refused. The findings further show: That the real estate in question, before it became a homestead, was the separate property of Mary H. Mathews, and was never community property. That a prominent object of plaintiffs, in entering into the agreement, was to clear their homestead from the lien thereon, which, by the refusal of Davis to pay the note, they were not only prevented from doing, but, by the litigation which followed, they were involved in costs to the amount of $5,000. That the agreement was not mutually beneficial to the parties, and was of no benefit, but the occasion of loss and injury, to them, etc. That defendant Davis did not make the agreement or note in good faith, and never at any time intended to perform or pay the same. That defendant Eltinge had notice of the facts connected with the suit upon the note, and the result thereof, about the time they occurred, etc.

Defendant Eltinge, in her cross complaint filed by leave of the court, asks that the deed executed by plaintiffs, and tendered by them at the date of the demand of payment of the promissory note, be decreed to be delivered to her, etc. As defendant John T. Davis made default, plaintiffs were entitled to a decree, as against him; and the only question involved is as to the right of defendant Josie Eltinge to the relief demanded in her cross complaint. The property in question being the separate property of Mary H. Mathews, and a homestead, under the laws of the state of California, at the date of the agreement signed by them, in 1878, and that agreement not having been acknowledged by them, or by either of them, we fail to see how it can be specifically enforced.

1. "No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." Civ. Code, § 1093. A married woman can only be divested of her estate in the manner prescribed by statute; and, under the requirements of the statute, the acknowledgment by her is an essential part of the execution of the conveyance, without which it has no validity. Leonis v. Lazzarovich, 55 Cal. 52, and cases there cited. In Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695, we held "that specific performance of the unacknowledged executory contract of a married woman to convey her real property cannot be compelled." The reasoning of that case is conclusive here. Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; Carlton v. Williams, 77 Cal. 89, 19 Pac. 185.

2. Like considerations apply to the agreement in its relation to the homestead of the parties. "The homestead of a married woman cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Civ. Code, § 1242. The homestead can only be conveyed in the mode prescribed by the statute. Flege v. Garvey, 47 Cal. 371. The husband, alone, cannot sell it. The husband and wife, jointly, can only convey it by an instrument executed and acknowledged by both husband and wife. The agreement of plaintiffs to convey the homestead, as a basis upon which to decree a specific performance of the contract, was invalid without an acknowledgment of the parties. The contention that the plaintiffs in fact executed, acknowledged, and tendered a deed in 1878 cannot avail the appellant. It may well be that, although their contract to convey was invalid, they were

willing to execute it in 1878; but, when payment was refused, it does not follow that after a lapse of 12 to 14 years, during which time, as appears, they had expended many thousand dollars in improvements upon the premises, they should be compelled to convey the property. The specific performance of contracts to convey real property will not be decreed, even upon a valid agreement, where, upon all the equities presented, such decree would be promotive of injustice; and there is much in the findings of the court going to indicate that the decree here should be denied, irrespective of the invalidity of the agreement, and the parties left to assert their rights, if any they have, at law. These views are conclusive of the case, and the errors complained of in the admission and rejection of evidence, conceding them to be well founded, cannot change the result. Upon the undisputed facts, we are of opinion the judgment and order appealed from should be affirmed, and it is so ordered.

102 Cal. 6

BUCKLEY v. SUPERIOR COURT OF SAN FRANCISCO COUNTY. (No. 15,555.)

(Supreme Court of California. March 26, 1894.)

PROBATE COURTS—JURISDICTION—PARTITION.

1. A partition of property of which deceased was a tenant in common cannot be made by the probate court, as the subject-matter of its jurisdiction is the property of the deceased only, and this cannot be extended even by consent.

2. In order that a probate court under Code Civ. Proc. § 1675 et seq., may have jurisdiction to make a partition of deceased's property after the decree of distribution, the petition for the partition must have been filed before the decree.

In bank.

Petition by one Buckley for a writ of prohibition against the superior court of San Francisco county. Writ granted.

Freeman & Bates, for applicant. Blake, Williams & Harrison, for respondent.

PER CURIAM. This is an application for a writ of prohibition commanding respondent to refrain from further proceedings in the estate of Catherine M. A. Buckley, deceased, respecting the partition of certain real estate. The petition shows that, at the time of her death, C. M. A. Buckley was the owner of undivided interests in certain real property situated in the counties of Napa, Marin, and San Francisco; that on May 12, 1893, the final account of the executor was allowed and approved; that on the same day the decree of final distribution of the estate was entered, distributing one-half of the interest of decedent to Vincent P. Buckley, and the remaining one-half interest to E. J., Paul K., and Margaret G. Buckley. No petition for the partition of the estate of the decedent had been filed by any person at the time when the order of distribution was made, nor at any time prior to June 17, 1893. On the day last named, Vincent P. Buckley presented a petition praying that commissioners be appointed to make a partition of all the estate of decedent, including said undivided interests. Thereafter, August 30, 1893, the court made an order directing that partition of the estate be made among said persons entitled thereto in proportion to their respective rights, and that William E. White, Martin J. Burke, and Frank W. Lawlor be appointed commissioners to make the partition.

It is claimed by petitioner that the court below did not have jurisdiction in the proceedings sought to be prohibited—First, because the proceeding is for the partition in probate of property of which the decedent was a tenant in common; and, second, because jurisdiction cannot exist in any case to make partition in probate proceedings, unless the petition therefor is filed before the entry of the final decree of distribution. We see no escape from the conclusions contended for by the petitioner. Proceedings for the administration of the estates of deceased persons, and for their distribution, are purely statutory. The court, while sitting as a court of probate, has no other powers than those given to it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction which is conferred upon it. It has no power to determine disputes between heirs or devisees and strangers as to the title to property. Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206; In re Haas, 97 Cal. 232, 31 Pac. 893. Section 1675, Code Civ. Proc., conferring upon the probate department of the superior court power to partition estates held in common and undivided, applies only to cases before the court in which it is possible to set aside property to be held in severalty. Partition necessarily results in the termination of the cotenancy, and vests in each person a sole estate in a specific purparty or allotment of the lands; but here any one of the parcels which may be set aside to the minor heirs could not be finally held in severalty, under the decree, because of the title of the other cotenants not before the court. Another partition would follow, which might result in setting aside to the cotenants not now before the court the same land which the probate court had set aside to the minors. That partition cannot be made in probate unless the interest of the decedent is an estate in severalty we think is clear. Richardson v. Loupe, 80 Cal. 496, 22 Pac. 227. The subject-matter of the jurisdiction is the property of the deceased only, and this jurisdiction cannot be extended, even by the consent of all parties interested in the property. The probate court is authorized to make partition only in certain cases of joint tenure. Its action must be confined to a single estate. Under statutes like ours, partition is had only because the land was the property of the decedent, not because it is the land of heirs. The fact that jurisdiction of all undivided interests of a decedent is given does not evince a purpose to intrust the court with the power to make partition or allotment of property in which strangers have an interest. Snyder's Appeal, 36 Pa. St. 168. See, also, In re Walker, 136 N. Y. 28, 32 N. E. 633; Romig's Appeal, 8 Watts, 415. The cotenants not before the court could not be affected by the partition. Section 1686, Code Civ. Proc., makes the decree binding only "on all parties interested in the estate." The court may recognize the interests of grantees of the heirs or devisees, and the simple fact that the Code (section 1678) makes special provision for such grantees indicates that it was not intended to extend the rule any further. Sections 1676 and 1683 require that notice be given to all parties interested residing in the state before the commissioners are appointed, or partition is ordered, stating the time and place where the commissioners will proceed to make the partition; but the probate court can inquire only as to who are parties in interest claiming under the decedent, and whether the proper notice has been given to them. As it has no jurisdiction of any one except those interested in the estate, it is clear that it cannot determine whether proper notice has been given to the latter, or bring them within its jurisdiction. The authorities cited by counsel for respondent, we think, do not sustain his contention. Brennan v. Hill, which is reported in Gates v. Irick, 2 Rich. Law, 599, note, was decided upon the provisions of the acts of 1824 and 1839, referred to in the opinion, and the court said that these acts were intended "to save the delay and expense to these proceedings in equity by giving to the judges of the courts of ordinary jurisdiction to make partition of the real estates of deceased persons, by sale or division, in certain cases. * * * When a judge of the court of equity was required incidentally to decide upon questions of title, he, according to his discretion, determined for himself, or sent an issue to be tried at law. The act of 1824 transferred cases of a limited amount, within this branch of equity jurisdiction, to the courts of ordinary, thus making them, as to such matters, inferior courts of equity; and, by the right of appeal to the court of common pleas, a trial by jury was saved to any party who desired it." No such intention on the part of the legislature is manifested in our statutes. In Earl v. Rowe, 35 Me. 421, it appears that the statute authorized partition after settlement The parties were all heirs or devisees.

2. Section 1666, Code Civ. Proc., provides that in the decree of distribution the court must name the persons, and the proportions or parts to which each shall be entitled, and that such decree is conclusive; subject only to be reversed, set aside, or modified on appeal. Ordinarily, after the entry of this decree the court has no power over the property or the rights of the distributees (Wheeler v. Bolton, 54 Cal. 302), and courts of equity alone can afford relief. Estate of Hudson, 63 Cal. 454. Sections 1675 and 1676, Code Civ. Proc., however, provide for an exception, viz.: that when the estate assigned by the decree to two or more heirs, devisees, or legatees is common, and the respective shares are not separated, partition may be made by three disinterested persons. The partition can be ordered on the petition of any person interested in the estate, but said petition must be filed, and the attorneys, guardians, and agents representing absent parties must be appointed, and notice given, before the order or decree of distribution is made. It is claimed by counsel for respondent that the section as to time is merely permissive. It says the petition may be filed and notice given at any time before the decree, but we think the intention was that it must be filed before the decree of distribution. There is every reason for so holding. As stated before, ordinarily the court loses jurisdiction over the property after the entry of the decree of distribution, except to compel delivery. The section gives to the court the power to reserve its jurisdiction to proceed beyond the making of the decree. For this purpose the parties in interest must be kept before the court, and must be given an opportunity to protect themselves in the proceedings looking to a division of their property. If a petition may be filed at any time after the decree of distribution is entered, how are the parties to have notice of the intended proceedings? Must they watch the record for years at their peril? The notice required by section 1676 is confined to "all persons interested who reside in this state, or to their guardians, and to the agents, attorneys or guardians if any, in this state, of such as reside out of this state." Every one interested in the settlement of an estate is supposed to be before the court, and to take notice its proceedings, but, when the estate has been settled and the interests of all parties have been ascertained by the decree of distribution, and the property has been set over to them absolutely and unconditionally, without any previous proceedings indicating an intention to divide the property, the jurisdiction of the court is exhausted. We think that the court below ought not to proceed any further towards the partitioning of the undivided interests described in the affidavit filed herein. The rights of the parties should be settled by a suit for partition, in which all persons having any interest in the lands may be made parties, and in which the commissioners will not be required to divide the property in each county separately, as they would have

to do under section 1677. It is ordered that the writ issue as prayed for.

BEATTY, C. J., being disqualified, did not participate in the foregoing decision.

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102 Cal. 38

SPIEKER v. LASH et al. (No. 18,195.)

(Supreme Court of California. March 28, 1894.)

TRADE-MARK — WHAT THE SUBJECT OF — INJUNCTION — SALE OF GOOD WILL.

1. Though the words "Kidney and Liver Bitters" are not the subject of a trade-mark, being merely descriptive, yet the name of the maker, and every device in the form and contents of a label and wrapper to denote that the goods are made by him, are proper subjects.

2. The label issued by L. & Co., manufacturers of a medicine, and filed with the secretary of state, indicated that the firm was the manufacturer and seller of the medicine, and stated that "none was genuine without the fac simile signature, L. & Co." L. transferred all his rights to his partner, and afterwards formed a partnership with his wife under the same name as the former firm, for the purpose of selling similar medicine. *Held*, that he might be enjoined from the use of any label indicating that such medicine was prepared and sold by L. & Co., or that L. was the original compounder of it.

3. Where a partnership, manufacturer of a medicine, is not a patentee thereof, one partner, who sells his interest to the other, cannot be restrained from manufacturing and selling similar medicine.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

Action by J. J. Spieker against T. M. Lash and others. From a judgment for plaintiff, defendants appeal. Judgment modified.

A. L. Hart and C. H. Oatman, for appellants. Johnson, Johnson & Johnson, for respondent.

VANCLIEF, C. Suit in equity to enjoin the infringement of a trade-mark and the diversion of the trade or custom of the plaintiff, to whom was transferred the good will of the business in which the trade-mark had been acquired and used. The complaint contains two counts, the first alleging an infringement of plaintiff's trade-mark and proprietary name, "Lash's Kidney and Liver Bitters," and the second, a cause of action for breach of warranty implied in a sale of the good will of the business, which included the manufacture and sale of said bitters. In the year 1884 the plaintiff and defendant formed a partnership at Sacramento under the firm name of T. M. Lash & Co., in the purchase and sale of drugs and medicines, and the manufacture and sale of medicinal preparations. In 1886 they made up a formula for a medicinal preparation of bitters, principally intended to benefit the kidneys and liver, and gave it the name "Lash's Kidney and Liver Bitters," and thereafter the partnership of T. M. Lash & Co. built up a large and profitable business in the manufacture and sale of that preparation. The preparation was not patented, but the firm registered a trade-mark thereof in the office of the secretary of state. In carrying on the business of the firm, Spieker remained at the store and attended to the business of manufacturing and filling orders for the bitters, while Lash traveled over the country, advertising the bitters and securing orders therefor. On November 9, 1889, the firm of T. M. Lash & Co. was dissolved by consent of the partners, and all the interest of Lash in the property of the firm was transferred by him to Spieker. It is alleged in the complaint and admitted by the answer, and found as a fact by the court, that this transfer included the good will of the business. On October 31, 1889, T. M. Lash and his wife, Jennie Lash, transferred to Spieker the trade-mark of "Lash's Kidney and Liver Bitters," together with the right to use the same, and covenanted to warrant and defend the same. In July, 1890, T. M. Lash commenced, at Sacramento, to manufacture a preparation similar to Lash's Kidney and Liver Bitters, which he called "Dr. Web's Liver and Kidney Bitters," and soon afterwards formed a partnership with his wife under the name "T. M. Lash & Co." for the purpose of manufacturing and selling the same. On the back label of this preparation he thereafter described himself as "T. M. Lash, Manufacturer of Dr. Web's, the Only Genuine Liver and Kidney Bitters," and notified the public to address all orders, "T. M. Lash & Co., Proprietors, 923 K Street, Sacramento, Cal." The court found, substantially, that the defendant began the manufacture and sale of Web's Bitters with intent to injure the plaintiff's business, and to detract from the reputation of Lash's Kidney and Liver Bitters; that the preparations are very similar, and composed mainly of the same ingredients, and that Web's Bitters, sold in the name of T. M. Lash & Co., were put up in bottles closely resembling the bottles in which plaintiff was accustomed to put up Lash's Kidney and Liver Bitters, and that defendant placed upon the bottles containing Web's Bitters labels which, in size and general appearance, very nearly resemble the labels placed by plaintiff on the bottles containing said Lash's Bitters; that by these acts the defendants intentionally deceived the general public into the belief that the manufacture of the original Lash's Kidney and Liver Bitters had been superseded by the same preparation under the name of "Web's, the Only Genuine Liver and Kidney Bitters," manufactured by T. M. Lash and sold by T. M. Lash & Co.; that defendants, with intent to injure the good will of plaintiff's business, and to prevent the sale of Lash's Kidney and Liver Bitters, as manufactured and sold by plaintiff, and to induce the customers of plaintiff and of the former firm of T. M. Lash & Co. to patronize them under the same firm name, formed a pretended partnership under that name, and sought to supplant the Lash Bitters manufactured by plaintiff with the Web's Bitters manufactured by T. M. Lash, and sold in the firm name of T. M. Lash & Co. to the patrons and customers of plaintiff, and sought to exchange Web's Bitters for Lash's Bitters, and to induce the public to believe that Web's Bitters was the only genuine Kidney and Liver Bitters, and have thereby intentionally drawn off from plaintiff to themselves a large number of plaintiff's patrons and customers.

The judgment of the court was in favor of plaintiff, enjoining the defendants as prayed for in the complaint; and defendants have appealed from the judgment, and from an order denying their motion for a new trial. While it is true that the words "Kidney and Liver Bitters" are merely descriptive of the thing manufactured, and therefore not the proper subject of a trade-mark, yet the name of the maker, and every device in the form and contents of a label or wrapper affixed to denote that goods are manufactured, produced, compounded, or sold by him, other than a name, word, or expression denoting that the goods are of some particular class or description, are proper subjects of a trade-mark; and any person may secure the exclusive right to the use of such trade mark or name by filing with the secretary of state his claim to the same, and otherwise complying with section 3197 of the Political Code; and, when the claimant has thus secured a trade mark or name, he may transfer the same, and the right to the exclusive use thereof, to another, and the property right so transferred will be protected from infringement by injunction. Id. § 3199.

The label filed with the secretary of state by the original firm of T. M. Lash & Co. clearly indicated that that firm was the proprietor, manufacturer, and seller of a medicinal preparation named "Lash's Kidney and Liver Bitters," which was described as compounded from the bark rhamnus purshianus, for use as a mild cathartic and regulator of the stomach, bowels, and liver, and as "helpful in all affections of kidneys and liver," and as sold by them for the price of $1 per bottle, and stated that "none is genuine without the fac simile signature, 'T. M. Lash & Co.'" Both the front and the back labels, while containing words which could not have been exclusively appropriated as a trade-mark, yet contained characteristics and devices indicative of original manufacture, compounding, and sale of the preparation by T. M. Lash & Co. The exclusive use of these labels, in so far as thus indicative, became the property of the original firm of T. M. Lash & Co., subject to transfer as personal property by the express terms of the statute; and the defendants, T. M. Lash and wife, expressly transferred all their rights in that trade-mark to the plaintiff, and, therefore, may properly be enjoined from the use of any label which indicates that medicine of the same nature is prepared and compounded or sold by T. M. Lash & Co., or that Lash is the original author or compounder of it. Schmidt v. Brieg (Cal.) 35 Pac. 623. And, apart from the infringement of a valid trade-mark, as said by this court in Schmidt v. Brieg: "A competing business firm is bound to deal fairly in placing its rival article upon the market; and if it clearly appears that the defendant has closely imitated the plaintiff's labels and style, and has done obvious damage to the latter's business through the unlawful business methods employed, the plaintiff is entitled to relief upon the ground of fraud. Sperry v. Milling Co., 81 Cal. 258, 22 Pac. 651; Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645. Cases are not wanting of injunctions issued to restrain the use even of one's own name, where such use is made with such additions as to intentionally deceive the public, and make them believe he is selling the goods of another. McLean v. Fleming, 96 U. S. 251; Chemical Co. v. Meyer, 139 U. S. 542, 11 Sup. Ct. 625. See, also, Food Co. v. Baumbach, 32 Fed. 212; California Fig Syrup Co. v. Improved Fig Syrup Co., 51 Fed. 297; Stone Co. v. Wallace, 52 Fed. 438." It would seem, a fortiori, that the improper use of one's own name may be enjoined where, for a valuable consideration, he has voluntarily sold a trademark of which his name forms an essential part, and the good will of a partnership business wherein his own name was the leading and characteristic designation of the firm, as in this case. The evidence shows that the defendants' labels, while differing in some respects from those of the plaintiff, are a colorable imitation of them, the resemblance being such as to justify the conclusion that they were intended and adapted to lead the public generally to the belief that the manufacture of the original Lash's Kidney and Liver Bitters had been superseded by the same preparation under the name of "Web's, the Only Genuine Liver and Kidney Bitters," manufactured by T. M. Lash, and sold by T. M. Lash & Co. The evidence fully sustains the finding to the effect that defendants intended and endeavored to injure the plaintiff's business, and had effected that purpose by drawing off from plaintiff to themselves a large number of plaintiff's patrons and customers, and the facts found warrant equitable relief.

But the injunction as granted is too broad. The plaintiff is not a patentee of the preparation manufactured and sold by him, and defendants cannot be enjoined from the manufacture and sale of that or any similar preparation.

I think the order denying a new trial should be affirmed, but that the perpetual injunction granted by the judgment should be modified by striking out the words, "and from manufacturing and selling the said 'Dr. Web's, the Only Genuine Liver and Kidney Bitters,'" and inserting in lieu thereof the following: "And from using the name 'T. M. Lash,' or 'T. M. Lash & Co.,' to designate the business of manufacturing or selling any liver and kidney, or kidney and liver, bitters, and from any infringement of the trade-mark of 'Lash's Kidney and Liver Bitters,' and from any imitation of the form or appearance of the labels used by the plaintiff upon bottles in which he stores or sells Lash's Kidney and Liver Bitters"—and that in all other respects the judgment should be affirmed. Costs of appeal to be taxed to respondent.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed; the judgment is modified as indicated in the opinion, and, as so modified, is affirmed. Costs of appeal taxed to respondent.

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102 Cal. 50

GREGORY et al. v. GREGORY et al. (No. 18,154.)

(Supreme Court of California. March 28, 1894.)

ADVERSE POSSESSION — TENANTS IN COMMON — AGREED CASE—APPEAL — EFFECT—MOTION FOR NEW TRIAL—JUDGMENT ROLL.

1. Where one tenant in common enters into possession of the property under color of title, and remains in possession, exercising acts of ownership, openly and notoriously, claiming the same adversely to all the world, and paying all the taxes, his possession is sufficient notice to the other tenants to put the statute of limitation in motion. In re Grider, 22 Pac. 908, 81 Cal. 571, distinguished.

2. An appeal from an unappealable order does not stay proceedings, and deprive the court of power to hear other motions.

3. Where a case is submitted on an agreed statement, a finding of facts by the court is unnecessary.

4. An order denying a motion for a new trial cannot be reviewed on appeal, where the case was submitted under an agreed statement of facts, as a new trial is an examination of an issue of fact.

5. Where the agreed statement of facts is set out in the record, and the judgment recites that a statement of facts was submitted by the parties, and that the court files its decision based thereon, the statement may be considered a part of the judgment roll.

6. Where the judgment roll does not show when the action was commenced, but the brief of one of the parties states, without contradiction by the other, that it was commenced at a certain time, the statement will be considered as true.

Department 2. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by James W. Gregory and others against John H. Gregory and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

James Gartlan, for appellants. Tuttle & Tuttle, for respondents.

PER CURIAM. This is an action to quiet the plaintiffs' title to an undivided four-fifths interest in certain real property situate in the county of Placer. The case was submitted to the court below for decision upon an agreed statement of facts, from which the court drew certain conclusions of law, and, in accordance therewith, rendered judgment in favor of the defendants. From this judgment, and an order denying their motion for a new trial, the plaintiffs appeal.

1. After the judgment was entered the plaintiffs moved the court to set it aside, upon the ground that findings had not been waived, and there were no findings of fact to support it. This motion was denied, and the plaintiffs appealed from the order. Appellants now contend that, after that appeal was perfected, it stayed all further proceedings in the court below, and, therefore, that court had no power to hear and deny the plaintiffs' motion for new trial. A sufficient answer to this contention is that on March 9, 1893, the appeal referred to was dismissed by this court upon the ground that the order appealed from was not an appealable order. 32 Pac. 531.

2. Appellants also contend that the judgment should be reversed because findings of fact were not waived, and none were filed by the court below. This contention cannot be sustained. The agreed statement covered all the facts of the case, and, if findings had been made, they would have been simply a restatement of facts already agreed upon, and about which there was no controversy. But it is well settled that findings are never necessary upon questions about which there is no dispute. For example, findings are not necessary where the allegations of the complaint are not denied, or as to facts admitted by the pleadings. Pomeroy v. Gregory, 66 Cal. 572, 6 Pac. 492, 493; Taylor v. Railroad Co., 67 Cal. 615, 8 Pac. 436. And, where a finding made is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary to support the judgment against him. Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589. So a judgment will not be reversed, for want of a finding upon a particular issue, where it is apparent that the omission in no way prejudiced the appellant. Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738. So an issue raised by a defense upon which no evidence is offered at the trial, and no finding made, is deemed immaterial, and the judgment will not be reversed for want of a finding. Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836.

3. The order denying the plaintiffs' motion for new trial cannot be reviewed here on appeal, for two reasons: (1) A new trial is a re-examination of an issue of fact in the same court. Code Civ. Proc. § 656. In this case, as all the facts were agreed upon, there was no issue of fact to be re-examined, the only question being as to what was the law applicable to those facts. (2) The statement contains no specifications of the par-

ticulars in which the evidence was insufficient to justify the decision, or of any errors in law occurring at the trial.

4. The only remaining question to be considered is, does the agreed statement of facts support the judgment? Objection is made that the statement does not constitute a part of the judgment roll; but it is set out in full in the record, and the judgment recites that: "This cause came on regularly to be heard. * * * And the respective parties thereto having stipulated that an agreed statement of all the facts of the said action would be by them submitted to the court for its decision, and the same having been thereafter * * * regularly filed, and submitted to the court for consideration and its decision, and after due deliberation thereon, the court files its decision and conclusions of law, based upon said agreed statement, in writing, and orders that judgment be entered herein in favor of defendants, in accordance therewith." Under these circumstances, we think the statement may be considered, whether it in fact constitutes a part of the judgment roll or not.

One of the defenses interposed by the answer is that the cause of action was barred by the statute of limitations; and as to this the court found, as a conclusion of law: "That defendants have acquired full and perfect title to said land, and to the respective portions thereof hereinbefore mentioned, under and by virtue of the statute of limitations." The record does not show when this action was commenced, but a second amended complaint was filed May 22, 1891, and it is stated in the brief for respondents that the original complaint was filed in 1891. This statement is not denied in the reply brief for appellants, and we shall therefore accept it as true. It would subserve no useful purpose to set out the facts agreed upon at length. It appears therefrom that as early as 1877 the appellants were all of age, and were then, and ever since have been, residents of this state. It also appears that the respondents and their predecessors in interest entered into the actual possession of the parcels of land respectively claimed by them under claim and color of title, and thereafter continued to maintain such possession, and to exercise acts of ownership over the said parcels, openly and notoriously, claiming the same adversely to the plaintiffs and all the world, and paying all taxes assessed thereon, for more than five years before this action was commenced. Under the circumstances shown, we think the possession so taken and held was sufficient to give the appellants notice of respondents' adverse claims, and to put the statute of limitations in motion in their favor, though appellants were owners of interests in the said lands as tenants in common with respondents. In support of their contention that their rights were not barred by the statute, appellants rely mainly upon the case of In re Grider, 81 Cal. 571, 22 Pac. 908. That case is clearly distinguishable from this. In that case the proceeding was inaugurated in the superior court, sitting in probate, for the distribution of an estate, the administration of which had never been closed. It was held that, so long as the administration of an estate remains unclosed, the successor in interest of one of the distributees, who enters into possession of land under a decree of partial distribution, cannot acquire title by limitation or adverse possession, as against those who are legally entitled to claim an interest in the land as tenants in common, though he claims title to the whole of the land, and pays all taxes thereon, and also that a tenant in common cannot show title by adverse possession against his cotenant, in a case where such title is possible, without bringing himself within the rule that notice of his adverse claim must be brought home, actually or constructively, to the cotenant. And it was said that the party claiming adversely in that case had not brought himself within the rule declared. In this case, under orders of the probate court, a part of the land in controversy was sold, the sale approved, and a deed therefor executed to the purchaser. The deed was thereupon recorded, and under it the purchaser took possession of the property, and thereafter held and claimed the same adversely. The balance of the land was distributed by the court, by decrees regular on their face, to two of the respondents, who, under the decrees, entered into the possession of the same, and thereafter they and their grantees held and claimed it adversely; and here the facts were quite sufficient to bring the case within the rule declared in the Grider Case as to adverse possession by one tenant in common against his cotenant. It results that the court below did not err in its conclusion of law, and that the judgment and order must be affirmed. So ordered.

(4 Cal. Unrep. 554)

HOLBROOKE v. HARRINGTON. (No. 18,198.)

(Supreme Court of California. March 28, 1894.)

MINING CLAIMS—TENANTS IN COMMON—ACCOUNTING—APPEAL—HARMLESS ERROR.

1. One tenant in common of a mining claim is bound to contribute his proportion of the value of the yearly work required to be done thereon to perfect title, and performed by his cotenant, unless he abandons his interest in the unpatented claim, or offers to perform the work.

2. Where, in partition by one tenant in common of a mining claim, on an accounting for money spent upon the land in excess of her share, no personal judgment is rendered against the other tenant, but the property is ordered to be sold, plaintiff should be allowed the full amount of the sums properly paid out, instead of only one-half, before the residue is divided.

3. Where, in such an action, the amount allowed is less than plaintiff is entitled to, being for one-half the amount paid out, error in allowing improper credits is harmless.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Ellen E. Holbrooke against Caleb Harrington. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Walling, for appellant. P. F. Simonds, for respondent.

VANCLIEF, C. Action for partition of a tract of placer mineral land containing about 25½ acres, situate in Nevada county, in which the plaintiff and defendant are tenants in common, in equal portions, and for an accounting as to expenditures by plaintiff upon and for the benefit of the land, in excess of her share. It appears that prior to the year 1883 the land was owned and mined in equal shares by defendant and the husband of plaintiff, Daniel P. Holbrooke; that upon the death of Daniel P. Holbrooke, in 1883, his share and interest in the land descended to plaintiff, as his only heir, and was afterwards distributed to her by the probate court. And there is no question that she and defendant have been tenants in common, as aforesaid, since the death of her husband, though the defendant denied that they were ever partners in the working or mining of the land; nor does it appear that defendant opposed a partition. The only questions presented here relate to the accounting. The court found that it was impracticable to partition the land by metes and bounds. and therefore ordered a sale thereof. The court found that plaintiff had expended "in acquiring the title to said premises, and in necessary expenditures for taxes and annual labor and improvement on said claim since March 1, 1883, the sum of $1,005.75, and defendant no sum whatever, and that defendant refuses to repay to plaintiff any portion of said sum of $1,005.75 so expended by her, or to account to her for any portion thereof.' In the order of sale the court directed the proceeds of the sale to be applied as follows: "(1) To the payment of the costs and expenses of said sale and of this action, including attorney's fees allowed. (2) That there next be paid to said plaintiff, out of the proceeds of said sale, the sum of $502.85; being one-half of said sum of $1,005.75 paid by said plaintiff as aforesaid, in acquiring the title to said premises, and in necessary expenditures for taxes and annual labor and improvements on said claims. (3) That the rest and residue of the proceeds of said sale be divided equally between plaintiff and defendant." The defendant appeals from the judgment, and from an order denying his motion for a new trial.

There seems to be no merit in the appeal, though appellant claims a reversal of the judgment on two grounds:

1. It is contended that "the judgment is against law," because, it is said, the sum of $502.85 allowed to plaintiff from the proceeds of the sale improperly includes $200 for annual labor done by plaintiff on the unpatented portion (10 acres) of the land for the years 1890 and 1891. The evidence, without conflict, shows that plaintiff did the annual labor required by the laws of the United States—$100 a year—for each of the nine years immediately preceding the commencement of this action, amounting to $900, and is amply sufficient to prove that she did such work, during the first seven of said nine years, under an express agreement with defendant that he would pay her for one-half of the work. In 1890 plaintiff, for the purpose of working and mining the claims for a profit, in addition to the annual labor required by law, erected thereon hoisting works and machinery of the value of $3,500, and sunk or repaired a shaft. At or about the time this work was commenced, the defendant caused a written notice to be posted on the mine, stating that he was the owner of an undivided one-half of the mine, and that he would not be "responsible for the payment of any sum or sums due, or hereafter to become due, for any labor done upon, or materials furnished, to be or actually used upon said mine, by any person whatever; that E. E. Holbrooke, who is now working said mine, is not authorized to incur any obligation for or on my behalf, nor in any way to incumber or to cause to be incumbered, or taken as security, my interest in said mine, or any part thereof, for any labor done for her, or at her instance, or for any materials of any kind or supplies furnished at her instance, and used on said mine." It is claimed that this notice absolved the defendant from all obligation to contribute to the annual labor required by law to be done on the unpatented 10 acres for the years 1890 and 1891, but I think this is a mistake. The defendant was bound to contribute one-half of the value of that work, unless he preferred and offered to do his portion of the work, or abandon his interest in the unpatented portion of the claims, neither of which he did, as appears by the notice, and his answer to the complaint. Besides, under the circumstances, the obvious object of the notice was merely to prevent his liability for the proposed work or improvements by plaintiff in excess of the annual labor required by law; and it seems the plaintiff so understood the notice, for she has charged him nothing for the improvements made for the purpose of working the mine, and by the decree she is allowed to remove the hoisting works, valued at $3,500.

2. It is claimed that $106.50, for money expended by plaintiff in proceedings to obtain a patent for the unpatented 10 acres, is improperly included in the $502.85 allowed to plaintiff by the decree. These expenses were incurred and paid by plaintiff under an agreement between her and an agent

of the defendant (defendant being out of this state), authorized in writing "to look after and defend my [defendant's] interest" in the whole of said mining claim, and having "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I [defendant] might or could do if personally present." It is contended that this instrument did not authorize the agent to make the agreement for defendant to join plaintiff in the application for a patent, and to pay half the expenses thereof. But it is unnecessary to decide this question, since the $502.85 allowed to plaintiff from the proceeds of the sale is $195.40 less than she was entitled to, according to the findings of fact, which are not excepted to; that is, after deducting the $200 for annual labor in 1890 and 1891, and the $106.50 for expenses of proceedings for patent from the sum of $1,005.75, which she is found to have expended altogether, there remains $698.25, which should have been paid her from the proceeds of the sale before a division of the residue. As there was no personal judgment against the defendant, the plaintiff should have been allowed from the proceeds of the sale all she had properly and necessarily expended for the preservation of the claims, before any division of the residue. But, instead of this, the court, after having found that she had properly expended $1,005.75, ordered that she be paid only $502.85, "being one-half of said sum of $1,005.75 paid by said plaintiff as aforesaid." By this mistake in the judgment the plaintiff is allowed nothing for what she is found to have expended on defendant's account. It is not denied that she did the annual labor required by law for each of the seven years prior to 1890, and all the taxes. For this she was entitled to retain from the proceeds of the sale over $700. It is very plain that there is no error in the judgment, to the prejudice of defendant, and, therefore, that the order and judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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102 Cal. 174

PEOPLE v. CREWS. (No. 20,993.)

(Supreme Court of California. March 29, 1894.)

DYING DECLARATIONS—EXPECTATION OF DEATH.

Deceased, the morning after he was shot, not then expecting to die, made, signed, and verified a statement. The same evening his doctor told him he could not recover. He was then reminded of the statement, and said that he did not wish to change it, and signed an appended clause, affirming that he made the statement with full knowledge and sense of his impending death. The statement was not re-read to him, but it appeared that he clearly remembered its contents. *Held*, that this was a good dying declaration.

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Charles M. Crews, convicted of murder in the second degree, appeals. Affirmed.

Ross & Campbell and J. T. Campbell, for appellant. Attorney General Hart, for the People.

DE HAVEN, J. This is an appeal by the defendant from a judgment convicting him of the crime of murder in the second degree, and sentencing him to imprisonment for life, and also from an order denying his motion for a new trial.

The deceased, M. H. Byrn, was shot by the defendant during the evening of July 5, 1892, and early in the morning of the next day made a statement of the circumstances attending the shooting, which was reduced to writing, and signed and verified by the affidavit of the deceased. At the time this statement was made the deceased was not impressed with a sense of his impending dissolution; but, about 10 o'clock of the evening of the same day, he was informed by the attending physician that his wound was mortal, and of the impossibility of his recovery, and his attention was called to the statement previously made by him. He then said that he did not wish to make any change therein. There was then appended to the statement the following, which was read to the deceased, and signed by him: "The above and foregoing statement I have made as a true and correct account of the facts relative to my being shot by Charles M. Crews, and I make said statement with full knowledge that my recovery is impossible, and under the sense of impending death." Upon proof of the foregoing facts, the written statement was admitted in evidence as the dying declaration of the deceased. The defendant objected thereto, and this ruling of the court is assigned as error. The defendant contends that the declaration was not made under a belief of immediate death, and that the subsequent ratification was not sufficient to entitle it to be admitted as a dying declaration, especially in view of the fact that the statement was not read to the deceased at the time of such ratification.

We think the paper was properly received as a dying declaration, although, when originally given, the statement was not made under a belief by the deceased that he was in the immediate presence of death; still, his subsequent reaffirmation of the matters therein stated when all hope had gone was sufficient to constitute a repetition or restatement of the same matters and with the same effect as if such matters had then been reduced to writing and signed. Mockabee v. Com., 78 Ky. 380; Whart. Cr. Ev. (8th Ed.) § 287. The evidence leaves it entirely clear that, when the deceased reaffirmed the correctness of the prior statement, he had a clear recollection of its contents, and, under those circumstances, the fact that it was not then re-read to him becomes immaterial. The court did not err in any of the instructions given, or in refusing or modifying certain instructions requested by the defendant, nor in any of its rulings relating to the admissibility of evidence. The trial of the superior court seems to have been entirely fair to the defendant, and he has no legal reason to complain of the result. This conclusion renders it unnecessary to consider the motion of the assistant counsel for the people to strike out the bill of exceptions found in the record, or the motion to dismiss the appeal from the order denying a new trial. Judgment and order affirmed.

We concur: GAROUTTE, J.; FITZGERALD, J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.

(102 Cal. 55)

MARTIN et al. v. DEETZ et al. (No. 18,131.)

(Supreme Court of California. March 28, 1894.)

CORPORATIONS—CORPORATE EXISTENCE—ACTIONS—DAMAGES.

1. Where articles of incorporation state one county to be the principal place of business, and instead of being filed in that county, as required by the statute, are filed in another county, the corporation does not become one de jure.

2. If, after such an attempt at incorporation, the directors named in the articles never meet, and no stock is issued nor corporate act done, the corporation is not one de facto.

3. The corporate existence of a company which is neither a de facto nor de jure corporation may be questioned in a private action to which it is a party.

4. Damages arising from the act of a director named in the articles of incorporation, whereby the formation of the corporation was prevented, cannot be recovered in an action by the alleged corporation, as it is not in esse.

5. In an action for damages against a director of a corporation for the prevention of a directors' meeting, whereby the operation of its sawmill was prevented, it is error to consider as damages the prospective profits on the amount of lumber which could have been cut, as they are too remote.

In bank. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by H. P. Martin and another against Alva Jacob Deetz and others. M. A. Harding and the Deetz Mill & Lumber Company having been made defendants by order of the court, the latter filed a cross complaint, and the former filed an answer thereto. From the judgment rendered in the action, plaintiffs and the said Harding appeal. Reversed.

T. M. Osmont, Warren & Taylor, Geo. A. Proctor, and D. I. Mahony, for appellants. Maxwell & McEnerney, Gillis & Tapsott, Brown & Farraher, Whitworth & Shurtlefe, J. F. Lodge, and L. F. Coburn, for respondents.

McFARLAND, J. This action was brought by the plaintiffs against Alva Jacob Deetz, George Lewis Deetz, Susannah D. Hathaway, Mary Polly Metcalf, Mary Elizabeth Deetz, and Henry John Deetz, who are called in the papers the "Deetz Family," upon a note and mortgage made by them on April 15, 1891, for $22,000, to M. A. Harding, and assigned by the latter to the Bank of California, and by said bank to the plaintiffs herein. The mortgage was upon certain timber lands, with a sawmill thereon, owned by said Deetz family. The Deetz family, in their answer, set up certain defenses, and upon certain allegations made therein the court ordered that the said M. A. Harding and an alleged corporation called the Deetz Mill & Lumber Company be made parties to the action. Thereupon the said Deetz Mill & Lumber Company filed a cross complaint, to which answers were made by the plaintiffs, and also by said M. A. Harding. The court first heard the issues made by the cross complaint and answers thereto. It then considered the defenses set up by the Deetz family in their answer, and gave judgment in their favor, that the plaintiff take nothing by this action. The principal contest here is made upon the cross complaint of the said Deetz Mill & Lumber Company, and upon the findings made by the court upon the issues made by said cross complaint and the said answers thereto. The court found that said Harding had done certain acts which caused damage to the said mill and lumber company to the extent of $20,000, gave judgment for said amount in favor of said cross complainant, and against said Harding, for said amount of $20,000, and ordered that said damages should be substantially applied to, and deducted from, the amount of said mortgage. The court found that the acts of said Harding upon which it based said damages were known to the plaintiffs at the time they acquired said note and mortgage, and therefore the case was treated practically as if the suit had been brought by said Harding himself. The plaintiffs and said Harding appeal from the judgment upon the judgment roll, which includes findings. The findings follow, in the main, the averments of the cross complaint, and appellants contend that their demurrer to the cross complaint should have been sustained, and that the findings are not sufficient to warrant the judgment. The facts alleged and found are numerous and complicated, and it would be impossible to state them all here without exceeding all reasonable length. We will confine ourselves to those which are absolutely necessary to an understanding of the case.

The note and mortgage sued on were given in lieu of, and to take up, two other notes of the Deetz family,—one given to F. N. Handy for $10,000, and another to said M. A. Harding for $7,785,—which were secured by mortgages on the land covered by the mortgage here in suit. The Deetz family had been operating a sawmill on the mortgaged premises, and were very much involved in debt; and being thus embarrassed, on or about February 20, 1891, they applied to one George F. Day for aid and assistance, and a certain written contract was entered into between them and the said Day, which is called in the pleadings and findings "Exhibit A." This Exhibit A was made by said Day, party of the first part, and the said persons called the "Deetz Family," as aforesaid, parties of the second part; and by said contract it was agreed that they should organize a corporation to be called the Deetz Mill & Lumber Company, for the purpose of carrying on the manufacturing of lumber, the capital stock to consist of $20,000, divided into 200 shares of $100 a share, and that one-half of said shares should be issued to said Day, and the other half to said Deetz family; and the said Deetz family were to convey the premises described in the complaint herein to said corporation. It was further provided that Day was to give his time and attention to the business, and to act as superintendent, and his said one-half of the stock should be placed in the possession of George H. Maxwell, in escrow, as security for his performance of the contract; but it was further provided that said stock might be hypothecated as security for any money borrowed by Day and advanced to said company. It was further provided, also, that any profits which the stockholders would be otherwise entitled to as dividends should be first applied to said mortgages given to Handy and to Harding, as aforesaid. (It was also agreed by the said Deetz family, in another instrument executed about the same time, that Harding might substitute the $22,000 note and mortgage sued on in this action for the said other two mortgages given to Handy and Harding as aforesaid; and it was agreed by said Day, in another instrument of writing, that the note and mortgage herein sued on should precede and take precedence over any rights of the parties accruing under said Exhibit A.) In pursuance of said Exhibit A, the parties thereto undertook to form a corporation; and said Harding agreed to become a director of said corporation for the first year, and for that purpose was to have a share of stock, and he did sign the articles of incorporation, which provided that he should be one of five directors for the first year. The property above described, belonging to the Deetz family, and mortgaged as aforesaid, was situated in the county of Siskiyou, in which county the business of the said corporation to be formed was to be carried on. Articles of incorporation were prepared and properly signed, showing that the principal place of business of the intended corporation was in the county of Siskiyou; but the said articles were not filed, and never were filed, in the clerk's office of said county of Siskiyou. They were filed in the clerk's office of the city and county of San Francisco, and a copy thereof was certified by the clerk of said city and county to the secretary of state, who issued a certificate of incorporation, reciting that they were certified by the county clerk of Siskiyou. Afterwards, a copy of the certificate of the secretary of state was filed with the county clerk of Siskiyou county. The other four directors were said Day, one J. O. Whitney, and Alva J. D. Deetz and George L. Deetz, two of the said Deetz family. But nothing more was done towards organizing the corporation, and the Deetz family never conveyed the property to said company.

It is alleged in the cross complaint, and found by the court, that, after the filing of the articles of incorporation, Harding conceived the fraudulent purpose of preventing the organization of the corporation, and of throwing its business into confusion and injuring its credit, so that it could not continue its business, and he would be able to foreclose his mortgage and secure the whole property, "the value of which greatly exceeded the amount of said mortgage;" and for this purpose (as is averred and found) he refused to meet or act as a director, or in any way to participate in the organization of the corporation; and he also, as averred, falsely represented to the Deetz family that Day intended to rob said family of all interest in the corporation and in said property, and to "ruin them all," and that the only way for the Deetzes to protect themselves was for George and Alva Deetz, who were named as directors, to refuse to act as directors, and prevent the organization of the corporation. The Deetz family were thus induced to act as advised by Harding; and George and Alva refused to meet or act as directors, and in this way they and Harding prevented the organization of the corporation. However, after the filing of the articles of incorporation, the Deetzes and Day commenced, and for several weeks continued, the business of manufacturing lumber at the mill; but at the end of that time, owing to their unpaid liabilities, and particularly to their pressing need of $3,000, they were compelled to quit, and the business and property went into the hands of a receiver. The court attributes the failure of the corporation to organize entirely to Harding; and finds that the failure to organize prevented the borrowing of said $3,000, which would have enabled the company to go on with its business. It is found that "arrangements had been made by said Day" to advance $3,000 to the company, provided shares of stock had been issued to him which he could have hypothecated as security for a loan; but, as the directors would not meet or organize, there could be no certificates of stock, and therefore no loan, and so the business was thus stopped by the said acts of Harding, to the great damage, as is alleged and found, of said alleged corporation. As damages it is found that for four months after the mill stopped it could have cut 1,000,000 feet of lumber per month at a cost of $6.50 per thousand; that the stumpage would have been $2 per thousand; that there could have been realized therefor $13 per thousand; and that, therefore, the net profit for the four months would have been $18,000. Other alleged damages for the forced sale of certain green lumber and injuries to logs from exposure to the weather are found to be $2,000—making in all $20,000; and for this $20,000 judgment is rendered for the said mill and lumber company against Harding, and it is decreed that it be applied as payment on the amount of principal and interest due on said mortgage for $22,000, upon which this action was brought.

The first contention made by appellants is that the Deetz Mill & Lumber Company, the cross complainant, never was a corporation either de jure or de facto, and therefore cannot maintain this or any action. This contention is, in our opinion, a sound one. It is quite clear that the cross complainant was never a corporation de jure. Under our system of incorporation through general laws, a corporation de jure is an artificial body created by operation of law upon the execution, filing, and certification of certain written instruments by persons desirous of incorporating, and certain public officers, in accordance with the provisions of such general laws. When these instruments are executed, filed, and certified as required, the corporation, eo instante, comes into legal existence. Its corporate life is then complete, without any further act or user; and it can be destroyed only by some subsequent act of forfeiture. The corporation is then regularly formed. But this result can be accomplished only by compliance with the prerequisites of the statute. It may be conceded that a substantial compliance is sufficient; but it is clear that a necessary prerequisite cannot be omitted. Under our Code, the first necessary thing to be done, after signing and acknowledging the "articles of incorporation," by the parties, is to file that instrument "in the office of the county clerk of the county in which the principal place of business of the company is to be transacted," and to have a certified copy thereof made by said clerk, and sent to the secretary of state. Civ. Code, § 296. These are conditions precedent in that statutory process by which an artificial person existing only in legal contemplation can be created. We are dealing now entirely with the notion of a corporation de jure, and leaving out of view the rights which an irregularly formed body may acquire as a corporation de facto; and we have been referred to no case where a corporation has been held to have been regularly and legally created without filing its original articles in the office of the clerk of the proper county. No doubt, in such a case, subsequent acts might give the body rights as a corporation de facto. We have nothing to do with the reason why the legislature made this requirement, although it may be said that a fundamental characteristic of a corporation has always been that it must have a place (Ang. & A. Corp. § 103); and it is quite reasonable that the articles should be filed at that place. At all events, the whole process is an artificial one; and the requirement mentioned is an essential part of that process by which an imaginary, invisible, intangible, legal entity is brought into contemplative existence. As to the necessity of filing the articles with the proper county clerk, the law, as deduced from the authorities cited, is thus stated in Morawitz on Corporations (section 27): "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate, or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed the association will have no right whatever to assume corporate franchises." And, again, the same author says: "In order to prove the existence of a corporation de jure, i. e. a corporation having a legal right to exist, it is necessary to prove not only the existence of the corporation de facto, but also the legislative authorization of its existence. A public law authorizing the formation of a corporation will be judicially recognized without proof; but proof would be necessary to establish that a corporation was formed pursuant to the law, and that any conditions precedent to the legal right of forming a corporation have been fulfilled." Our Code provides that the original articles of incorporation shall designate the place where its principal business is to be transacted (Civ. Code, § 290), and that they shall be filed with the clerk of the county where such business is to be done. In the case at bar the articles set forth the principal place of business as in Siskiyou county; and they were filed not in Siskiyou county, but in the city and county of San Francisco. This was an entire failure to comply with the necessary prerequisite of the statute, and the cross complainant never became a corporation de jure.

But respondents also rely upon the doctrine that the existence and acts of a corporation de facto can be inquired into only by the state. This is, no doubt, true. The rule is stated in the second sentence of section 358 of the Civil Code. The whole section is as follows: "If a corporation does not organize, and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers shall cease. The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, in any private action to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general." This does not mean, however, that whenever a pleading is signed and filed in an action by an attorney at law, in which some named company whom he appears for is averred to be a corporation, all the world except the state is at once estopped from denying the existence of such a corporation. In referring to this section, this court, in Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 360, per Rhodes, J., said: "This provision does not go to the extent of precluding a private person from denying the existence, de jure or de facto, of an alleged corporation. It cannot be true that the mere allegation that a party is a corporation puts the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either de jure or de facto, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action by a corporation that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation. * * * To say that the 'due incorporation' cannot be inquired into does not mean that no inquiry can be made as to whether it is a corporation."

An averment of the existence of a de facto corporation is as issuable as an averment of the existence of a corporation de jure; and its existence does not consist in the mere assertion of its existence in a pleading. What is a corporation de facto? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs, to some extent at least, by the methods, and through the officers, usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body. Nothing of this kind was done by the Deetz Mill & Lumber Company. The court finds, it is true, in general terms, that said company became and is a corporation, and has claimed in good faith to be such, and has done business as such, and, "under and in pursuance of said contract (Exhibit A), entered into the possession of the mill," and manufactured lumber "under the management of said Day, as provided in said contract;" but this general finding is inconsistent with the specific findings and averments, which show what was, and what was not, done in the premises. And it is clear from those other findings, and from the averments of the cross complaint, that said Deetz Mill & Lumber Company never did any corporate act, or exercised any corporate power. Indeed, it was impossible, under the circumstances, for it to have done so, for it was never so organized that it could have acted, or could have pretended to act, as a corporate body. The directors named in the articles for the first year never met or acted, but deliberately refused to do so; no stock was ever issued; no by-laws were ever passed; no seal was adopted; no persons ever met, or pretended to meet, in corporate body assembled; no officers were ever elected; no person was ever appointed by the asserted corporation to represent it in any way, or to act as its agent; no journal or record of the proceedings of the body corporate was ever kept; and it was never in a position to exercise, or to pretend to exercise, any of the powers granted to corporations by title 1, pt. 4, of the first division of the Civil Code. The first sentence of section 358, above quoted, provides that, if a corporation does not "organize" within a certain time, its corporate powers shall cease; and the second sentence, which provides that the "due incorporation" of a company and "its right to exercise corporate powers" shall not be inquired into by a private party in a suit to which "such de facto corporation" is a party, evidently refers to a corporation which has not failed to "organize," and which does "exercise corporate powers," and thus becomes and is a de facto corporation. In all the cases where a party to a suit has been held to be a de facto corporation, it has appeared that such party had assumed in some way the appearance of a corporation, and had pretended to act as a corporate body. For instance, in Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76, Mr. Justice Paterson, in delivering the opinion of the court, says: "We think that the evidence in support of the finding that the plaintiff was a corporation, acting in good faith as such, is sufficient. It was recognized in the community as a corporation, the records of its proceedings show that it was so acting, and in all its dealings it was styled as a corporation. It has pursued corporate forms of action, held corporate meetings, and, we think, comes within the provisions of section 358 of the Civil Code." No part of this language would apply to the cross complainant in the case at bar. Indeed, a thorough consideration of the cross complaint itself shows that the burden of the grievance alleged is that Harding prevented the Deetz Mill & Lumber Company from acting or being a corporation de facto, or at all. But, if any legal damage arose from such act of Harding, it could be recovered only by some of the natural persons whom he prevented from forming such corporation; it could not be recovered by an alleged artificial person not in esse.

The foregoing views are determinative of the case against the cross complainant, and make necessary a reversal of the judgment. The judgment in favor of the cross complainant, however, would have to be reversed on other grounds. The legal wrong which Harding did, if he did any, consisted in his refusal to meet and act as a director. The averment that he persuaded the Deetz family to help to prevent the organization of the corporation can hardly be considered as of any value. It is averred that he did this "by false and fraudulent misrepresentations to said Deetz family as to the purposes and intentions of said Day;" but there are no facts stated as to the nature of said misrepresentations. The finding is that the misrepresentations were that "Day intended to, and would, if said company was organized, deprive and rob said Deetz family of all interest in said corporation and in said Deetz property, and ruin them all." This is very general, and it amounts to little more than mere business advice as to a matter about which the Deetzes had as good opportunity as Harding to form an opinion. But if we were to waive all other points, and assume that it was Harding's duty to assist in the formation of a mere de facto corporation, and that his refusal to meet with the other directors, and his advice to the Deetzes not to so meet, were wrongful acts, and the cross complainant could recover for any damages resulting from said acts, still we see no just basis for the measure of damages by which the amount of the judgment was arrived at. Of course, prospective profits are sometimes allowed as damages for breach of contract or tort; but they must be the clear, proximate, and natural results of the wrong, and must be confined to the principal thing complained of, and to its naturally attendant consequences. 2 Greenl. Ev. § 256; Anderson v. Taylor, 56 Cal. 132. The rule stated by our Code is that for a breach of a contract the measure of damages is "the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom" (Civ. Code, § 3300), and, for a tort, "the amount which will compensate for all detriment proximately caused thereby." Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages. Lumber Co. v. Miller, 67 Cal. 464, 8 Pac. 40. "Each cause produces results that in time, alone or by combination with other causes, produce other effects, and so on ad infinitum." Field, Dam. § 10. And in the case at bar, between the alleged wrong of Harding in refusing to act as director, and the final damages alleged to have been caused by the results of the financial embarrassment of the Deetz company, there is a series of consecutive causes and effects which carries those alleged damages so far away from the alleged wrong as to make them entirely too remote to be called in any sense "proximate." They are entirely too contingent, speculative, indirect, and uncertain to come within any legal measure of damages. The judgment allows full prospective profits that might possibly have been made out of the timber and the mill during four months, while the timber and the mill still remain with the same possibility of making, in the future, the very profits for which the judgment was rendered. And it is a curious result that the Deetzes reap the main advantage of an alleged wrong which they themselves helped to perpetrate, and which they could easily have prevented. By the judgment they get their note and mortgage for $22,000 almost entirely wiped out, merely because Harding refused to act as director, when, if they had acted with the other two directors, Day and Whitney, the corporation would have been organized, and the alleged consequent calamities averted, despite the action of Harding. The excuse that the latter tempted them is not very cogent.

Our conclusion is that upon the cross complaint and findings the judgment should have been against the cross complainant, and in favor of plaintiffs and defendant Harding. The case has been argued on both sides almost entirely upon the issues made by the cross complaint and the answers thereto, and as if the determination of those issues would be determinative of the whole case. Appellants contend that, upon a reversal of the judgment in favor of the cross complainant, the court below should be directed to give judgment foreclosing the mortgage, as prayed for in the complaint. The judgment as a whole, no doubt, so involves the rights of all parties that it must stand or fall as an entirety, and its reversal will perhaps practically end the litigation; but upon the record we do not see our way clear to direct the court below to at once enter a judgment in favor of plaintiffs, and against the Deetzes, foreclosing the mortgage. Upon that branch of the litigation the cause must be remanded for further proceedings. The entire judgment is reversed, with directions to the court below to dismiss the cross complaint of the so-called "Deetz Mill & Lumber Company," with costs to plaintiffs and defendant Harding; and, with respect to the defendants Alva Jacob Deetz, George Lewis Deetz, Susannah D. Hathaway (formerly Deetz), Mary Polly Metcalf (formerly Deetz), Mary Elizabeth Deetz, and Henry Deetz, the cause is remanded for further proceedings in accordance with this opinion.

We concur: DE HAVEN, J.; FITZGERALD, J.; PATERSON, J.; GAROUTTE, J.; HARRISON, J.

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5 Cal. Unrep. 769

LORD v. THOMAS et ux. (No. 18,220.)

(Supreme Court of California. March 29, 1894.)

RES JUDICATA—EJECTMENT—EVIDENCE.

1. In ejectment against several defendants a judgment in a former action between plaintiff and one of the defendants, offered generally against all, is inadmissible, unless they are privy in estate and bound by such judgment.

2. A prior judgment is conclusive upon the parties only as to matters actually and necessarily decided therein.

3. Upon an issue that plaintiff's grantor had taken title for the joint benefit of himself and defendants, and that plaintiff took title from him with notice of defendants' rights, it is competent to show the circumstances of the purchase by such grantor, and his declarations at that time, as tending to show defendants' interest.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action in ejectment by William J. Lord against Stephen Thomas and Annie Thomas. From a judgment for defendants, plaintiff appeals. Affirmed.

R. C. Minor and Eastin & Griffin, for appellant. P. J. Hazen, for respondents.

HAYNES, C. Action in ejectment to recover possession of two acres of land in Stanislaus county. The complaint is in the usual form. The answer, after denying the allegations of the complaint, for a second defense alleged that defendants were tenants in common with the plaintiff, and were entitled to possession as such, and that they did and always had permitted plaintiff to have possession as such cotenant. For a third defense, they alleged that in April, 1885, Joseph Lord, the father of the plaintiff, agreed with defendant Stephen Thomas to purchase the demanded premises (which were then about to be sold at administrator's sale), for himself and Thomas, each to have an undivided one-half interest therein; that Joseph Lord bought the premises pursuant to said agreement, that Thomas paid a part of his proportion of the purchase money, and Lord advanced the remainder, and took a conveyance thereof in his own name for the benefit of himself and Thomas, and thereafter held the title in trust for the benefit of both; that defendant went into possession as such cotenant in his own right, and had ever since occupied the premises as such cotenant; and that plaintiff took a conveyance of the whole of the premises from his father, Joseph Lord, with full knowledge of said facts and of the rights of defendants therein. Special issues were submitted to the jury covering the controlling facts alleged in the third defense, all of which were found in favor of defendants, and those were adopted by the court, and full findings on all the issues were added, and defendants had judgment. The plaintiff's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

The principal question arises upon the exclusion of certain evidence offered by the plaintiff. On January 25, 1890, the plaintiff, William J. Lord, commenced an action in the superior court against Stephen Thomas, one of the defendants herein, upon two causes of action; one for the recovery of rent for the same premises involved in this action from April 28, 1888, to January 20, 1890, at $9 per month, amounting to $183, and in the second cause of action, which was for unlawful detainer, sought to recover possession of the same premises, alleging a written lease made January 20, 1890, for three months at $10 per month, and that notice to quit was served April 22, 1890. The answer of defendants in that case, in addition to denials, alleged substantially the same facts set up in the third defense in this action, and, as to the written lease alleged in the complaint, answered that it was intended as an acknowledgment of plaintiff's interest in the premises as tenant in common, and an agreement to pay rent for such interest, and that under said lease he paid the rent up to May 20, 1890. That action was tried by the court without a jury, and resulted in a judgment for plaintiff for $183 upon the first cause of action, and against the plaintiff on the second, upon the ground that the lease had been extended by receiving rent beyond the term, and for want of the proper notice. The findings were very full, and to the effect that the defendant never had any ownership as tenant in common or otherwise, that he had always occupied the premises as the tenant of the plaintiff and his grantor, at a monthly rental of $9 up to the date of the written lease, and that said lease was of the entire property, and not of an undivided interest.

Upon the trial of the present action, the plaintiff offered in evidence in chief the judgment roll in said first action, upon the ground that it was an estoppel. Defendants objected that, if relied upon as an estoppel, it should have been pleaded, and made the further objection that it was irrelevant, immaterial, and incompetent, and that the judgment in that case is not inconsistent with the defense in this. I think the evidence was properly excluded. The judgment roll offered in evidence was in a case against Stephen Thomas alone. In this action his wife was made a defendant, and the complaint alleged that "the defendants are in possession, * * * and wrongfully withhold," etc. The offer was general, and was not restricted to the defendant Stephen Thomas. It constituted no estoppel as against Annie Thomas. It does not appear that she claimed by title acquired subsequently to that judgment, or that she is in any sense a privy in estate affected in any manner by the judgment offered in evidence. The effect of a judgment as an estoppel is declared by subdivision 2, § 1908, Code Civ. Proc. The plaintiff was not required to plead the former judgment in bar, but the form of the plea, if it had been pleaded, would have indicated the circumstances under which he could use it in evidence. If pleaded, it must appear, not only that it was upon the same cause of action, but between the same parties or their privies; and hence, where it is pleaded against one not a party to the former record, the facts showing that such party is bound must be pleaded, and, if used in evidence against such party without being pleaded, the facts showing that such party is bound or estopped by the judgment must first be given in evidence. There is nothing in the record to rebut or contradict the supposition that Thomas may have conveyed his entire equitable interest in the property to his wife before the former action was commenced. But, were it otherwise, we think the evidence was properly excluded. Two causes of action were stated in the complaint in the first suit. Upon the second cause of action, which was in forcible detainer, the judgment was not upon the merits, and it must have been against the plaintiff, whatever the facts as to the ownership may have been; and no findings as to ownership were necessary to support the judgment, or were in any manner pertinent. The first cause of action was for the recovery of rent under an alleged verbal lease. Some uncertainty as to what the issues were upon the first cause of action arises from the failure of defendant to specify the causes of action to which his defenses were intended to apply. Under the first cause of action, the right to the possession of the premises was not involved, and under the evidence disclosed by the record in the present case, and consistently with the facts alleged by the defendant in his second defense in the former case, and in his answer in this, that judgment upon the first cause of action was sustainable, even if the facts as to the tenancy in common had been found to be as alleged by defendant. He had been in the sole possession of the premises, conducting a saloon business thereon in which the plaintiff had no interest, and also occupied the premises with his family; and, whether there had been an express leasing or not, the plaintiff was entitled to compensation for the use of his undivided interest in the property. The fact there directly decided was that the plaintiff was entitled to rent at the rate of $9 per month for the time claimed; and, as to that fact, and as to facts which it was necessary to decide as the groundwork or foundation of the fact directly adjudged, the judgment is conclusive as between the parties thereto and their privies (Reg. v. Inhabitants of Hartington Middle Quarter, 4 El. & Bl. 793); or, as stated in Code Civ. Proc. § 1911: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually and necessarily included therein, or necessary thereto." "The true doctrine is that facts found sufficient to uphold the decree conclude the parties and nothing else." Coit v. Tracy, 8 Conn. 268. See, also, Bosquett v. Crane, 51 Cal. 507; People v. Johnson, 38 N. Y. 63.

Some other exceptions were taken by appellant which are noticed in his brief, one of which is that the court erred in permitting the witness Joseph Lord to testify on cross-examination as to when and how he obtained title to the demanded premises. This witness, when examined in chief, produced, and there was read in evidence, a deed from himself to the plaintiff, evidently for the purpose of showing title in the plaintiff, and this was followed by the introduction of a lease from the plaintiff to defendant Stephen Thomas, made after the conveyance. The witness had testified without objection that defendants were in possession before the execution of the lease, which bore date January 20, 1890. I think it was entirely proper on cross-examination to show, as was shown by the answers of the witness, that he acquired the title in 1885, and that defendants went into possession a month or two thereafter; thus showing that their entry was not under the lease given in evidence, and was prior to the title shown in the plaintiff. The witnesses John Roberts, Capt. James, and Annie Thomas were properly permitted to testify to statements made by Joseph Lord at the time he bid off the property in question, tending to show that the purchase was made for himself and Thomas. The plaintiff acquired his title from Joseph Lord, and it was alleged that he had full knowledge of the circumstances under which his grantor obtained title; and the testimony of these witnesses tended strongly to show, by the statements and admissions of Joseph Lord at the time of the transaction, that defendants had an interest in the purchase to the extent of an undivided one-half of the property.

I have examined the other exceptions taken, but find no prejudicial error in any of them. The point that the evidence is insufficient to justify the findings is not well taken. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 93

WITTENBROCK v. PARKER et al. (No. 18,194.)

(Supreme Court of California. March 29, 1894.)

RELEASE OF MORTGAGE—CONSTRUCTIVE NOTICE OF MISTAKE—KNOWLEDGE OF ATTORNEY.

1. Where a mortgagee's attorney drew a full, instead of a partial, release of his mortgage, and he executed it without reading, the constructive knowledge of such attorney's partner of the mistake does not bind a subsequent mortgagee, by whom such partner was employed to examine the title to the same property, and who accepted a mortgage thereon upon his opinion that the former mortgage was fully released of record.

2. Where a mortgagee's attorney drew a full, instead of a partial, release of his mortgage, and he executed it without reading, his lien is inferior to that of a subsequent mortgagee relying upon the record of the release.

3. Where a person by mistake executed a full, instead of a partial, release of his mort-

gage, in an action to set it aside and foreclose the mortgage the burden is upon him to show that a subsequent mortgagee had notice of the mistake.

4. An attorney employed by a person to examine the title to real estate upon which he contemplates loaning money is his agent, although he is paid by the person seeking the loan.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by Henry Wittenbrock against John Parker, James Bithell, G. W. Harlow, and others. From a decree in favor of defendants James Bithell and G. W. Harlow, and an order denying his motion for new trial, plaintiff appeals. Affirmed.

Armstrong & Platnauer and P. H. Coffman, for appellant. A. L. Hart, S. Solon Holl, Robert T. Devlin, and Isaac Josephs, for respondents.

SEARLS, C. This was an action by Henry Wittenbrock, as plaintiff, to have a satisfaction of a mortgage set aside and canceled, and to foreclose said mortgage, which was executed by the defendant John A. Parker. Defendants Bithell and Harlow were made defendants, and set up mortgages in their favor, which, by the decree of the court, were adjudged valid and subsisting against the defendant Parker, and the liens thereof prior to the lien of plaintiff's mortgage. Plaintiff appeals from the decree, and from an order denying a motion for a new trial.

The following facts illustrate the important question in the case: Plaintiff's mortgage was executed May 22, 1885, by the defendant John A. Parker, upon certain real property in the county of Tehama, to secure the payment of his certain promissory note for $6,000, and interest, payable two years after date to the Union Building & Loan Association or order. The mortgage was duly recorded May 23, 1885. L. S. Taylor and S. Solon Holl were attorneys at law and copartners under the firm name of Taylor & Holl, and engaged as such firm in the practice of law in all its various branches, including the examination of land titles, giving opinions as to the validity thereof, and drawing deeds, mortgages, assignments, and other instruments in writing. In February, 1888, the note of Parker was due and unpaid, and the Union Building & Loan Association was pressing him for payment, whereupon L. S. Taylor, the senior member of the firm of Taylor & Holl, at the request of Parker, negotiated with plaintiff for the purchase by him of said note and mortgage, and to grant further time for the payment thereof. To this plaintiff agreed, and in February, 1888, the holder of the note and mortgage, in consideration of $7,000, which plaintiff paid, assigned to him, the said plaintiff, the note and mortgage. This assignment was drawn by Taylor, and at his request recorded March 5, 1888. Holl knew nothing of the assignment. On or about October 4, 1888, John A. Parker, the maker of the note and mortgage, had contracted to sell a portion of the mortgaged premises, and applied to plaintiff through said Taylor for a release of the lien of his mortgage upon the land to be sold upon his payment of $4,000 upon the note, the mortgage to remain upon the residue of the land as security for the balance due on the note. Plaintiff agreed to this, and said L. S. Taylor then prepared a release, which he represented to plaintiff and Parker was a release of the land to be sold, and plaintiff, believing this to be true, executed and acknowledged the release, but which in fact was, as the court finds, by mistake and inadvertence so drawn as to read "that said mortgage was fully paid and satisfied." Plaintiff did not himself read the release, but took the statement of Taylor that it was all right. This release came into the hands of W. F. Huntoon, at whose request it was duly recorded on the 22d day of October, 1888. The copartnership between Taylor and Holl was formed January 1, 1885, prior to which time Taylor had been an attorney for plaintiff and defendant Parker; his services consisting mainly in preparing deeds, mortgages, assignments, and releases, and examining abstracts. That, after the formation of said copartnership, plaintiff and Parker continued to employ his services in like manner, and his partner, Holl, who occupied a separate office or room, knew little or nothing of their business, and knew nothing of the mortgage in question, its assignment, or the release thereof, or of any of the agreements relating thereto, nothing in relation thereto having been in fact imparted to him. For some years prior to 1888 defendant Bithell was accustomed to loan money on real-estate security, and was accustomed to require the borrower to furnish an abstract of title to the land offered as security, and to submit such abstract to an attorney selected by him, the said defendant, and to pay said attorney for his opinion as to title, and for preparing mortgages, etc., where the loans were consummated. Bithell had for some years selected S. Solon Holl as the attorney to examine and report upon titles in all such cases, and to prepare all necessary papers, to which said Holl gave his individual attention. On the 24th day of October, 1888, defendant John A. Parker applied to defendant Bithell for a loan of $6,000, and offered real estate as security therefor. Bithell applied to Holl to examine the abstract of title of the real estate offered, and to prepare notes and mortgages if he approved the title. The title was approved by Holl, and the notes and mortgages prepared and executed by Parker on the same day, and the money, $6,000, was then and there received by said Parker. The mortgages, four in number, covered the property mortgaged to plaintiff. Neither Bithell nor Holl knew of the plaintiff's mortgage, or the assignment or release thereof, except as shown by the abstract, and had no actual notice or knowledge of any mistake in the release. The record showed plaintiff's mortgage to have been released. Holl advised Bithell that the land was clear of incumbrance, and Bithell relied upon and acted upon this belief in making his loan, and neither he nor Holl had in fact any information as to the mistake in plaintiff's release until January, 1891.

Upon this state of facts, the question arises, had Bithell such constructive notice of the mistake in the release of the mortgage of plaintiff that the lien of his own mortgages upon the same land was postponed and rendered subject and subordinate to that of plaintiff under his mortgage, so by mistake released? Taylor and Holl being engaged as copartners in the practice of the law, including business of the character transacted for the several parties to this controversy, the knowledge acquired by one member of the firm, obtained while transacting such business and relating thereto, was constructive notice to the firm as to such knowledge. An attorney is an agent for his client within the scope of his employment, and two or more attorneys practicing together as copartners are joint agents as to the business transacted for their clients as such copartners. Notice to one of two or more joint agents is notice to all. Wade, Notice, § 681; Fulton Bank v. New York & S. Canal Co., 4 Paige, 127; Bank v. Aymar, 3 Hill, 262; Bank v. Davis, 2 Hill, 451; Bank v. Cushman, 121 Mass. 490. Like other copartners, each is at the same time a principal and an agent for all the others.

The important branch of the question relates to the situation of defendant Bithell as affected by the knowledge imputed to Holl, who was his attorney and agent in passing upon the abstract of title to the land and in preparing the mortgages. We say he was the attorney and agent of Bithell in the transaction, because he was employed by him, and it was to and for him the services were rendered, and the fact that his employer required the mortgagor to furnish an abstract and pay Holl for his services did not constitute him the attorney of the latter. The burden cast upon the mortgagor of paying for the services of the attorney selected by Bithell to guard his interests was simply a condition of the loan, and did not alter the status of such attorney, or diminish the duty or responsibility which he owed to his employer. Holl was, then, the agent of Bithell. It was not a general and continuing agency, extending to a range as comprehensive as the functions of an attorney, but limited to the particular business in hand, for the transaction of which he was specially employed. It is not sought to charge Bithell with any actual notice of plaintiff's mortgage or of any knowledge of facts to put him upon inquiry as to the mistake in its satisfaction or cancellation of record. The case turns upon the point of the constructive notice to the principal of the facts within the knowledge of the agent. This question presents a broad field of inquiry. A somewhat careful examination of its several phases awakens a desire to discuss it at length, and to review some of the many authorities converging and diverging in relation to its several branches, but economy of time and space forbids, and I content myself with a concise statement of what seem to be the settled propositions on the subject, so far as applicable to this case, which may be briefly stated thus: A principal is bound by the knowledge of his agent, and will in law be deemed to have constructive notice of such knowledge. In order to thus bind the principal by knowledge possessed by the agent, it is, as a general rule, essential that the information "be obtained by or imparted to the agent while he is in fact acting as agent,—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent." Pom. Eq. Jur. § 670. Within these limits and to this extent there has been but little divergence of opinion on the part of the courts, either in England or this country, and the doctrine is elementary. Connelly v. Peck, 6 Cal. 348; May v. Borel, 12 Cal. 91; Stanley v. Green, Id. 148; Hunter v. Watson, Id. 363; Bierce v. Hotel Co., 31 Cal. 161; Donald v. Beals, 57 Cal. 399; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, and 25 Pac. 64. It is the duty of an attorney at law, or other agent, to communicate to his client or principal whatever information he acquires in relation to the subject-matter involved in the transaction, and he will be presumed to have performed his duty in that respect; and notice to him is constructive notice to his client or principal. Bierce v. Hotel Co., supra; The Distilled Spirits, 11 Wall. 356; Watson v. Sutro, supra. The facts constituting knowledge, or want of it, on the part of the agent, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but, when ascertained, the constructive notice thereof to the principal is conclusive, and cannot be rebutted by showing that the agent did not in fact impart the information so acquired. Watson v. Sutro, supra. In the present case it does not appear that Holl, who acted as the attorney of Bithell, acquired any knowledge in relation to plaintiff's mortgage, or the mistake in its satisfaction, during the time he was engaged in effecting the Bithell loan. Whatever notice he had of the mistake in such satisfaction of plaintiff's mortgage, if any, was constructive and previously obtained. There is abundant authority to the point that notice to an agent, to be notice to his principal, must be given to him while acting in the course of his employment. Weisser v. Denison, 10 N. Y. 68; Doe v. Ingersoll, 49 Am. Dec. 57; Russell v. Sweezey, 22 Mich. 235; Smith v. Dunton, 42 Iowa, 48; Goodwin v. Dean, 50 Conn. 517; Pringle v.

Dunn, 37 Wis. 449. Lord Hardwicke, in discussing this rule, remarked that a different rule "would make purchasers' and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." In Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, Mitchell, J., in referring to the question, expresses like views in the following language: "If a party who employs an attorney for the special purpose of examining an abstract, and passing upon the record title, is to be charged with notice of all knowledge which the attorney may have previously acquired from other transactions for other parties, it would be very dangerous to employ an attorney at all for any such purpose; and the one whom it would be most dangerous to employ would be the attorney having the most experience and the most extensive practice." The authorities in this state have, so far as observed, confined the limits of constructive notice to the bounds hereinbefore stated. It must be admitted, however, that the rule has in many instances and by eminent jurists been extended so as to deem the principal to have constructive notice of information acquired by the agent prior to and independent of the scope of the agency. A synopsis of the rule as thus indicated, taken from the syllabi of The Distilled Spirits, 11 Wall. 356, indicates fairly well the result of the reasoning of the court in that case: "The rule that notice to the agent is notice to the principal applies, not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence." Pom. Eq. Jur. § 672, states the general rule to be limited by cases in which the transaction in question closely follows, and is intimately connected with, a prior transaction in which the agent was also engaged, and in which he acquired material information, or where the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory in the second transaction; then such information operates as constructive notice to the principal in such second transaction. The same author adds that, "while this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits."

It seems conceded on all hands that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent, at the time of the second transaction, is necessary in order to bind the principal in such second transaction by constructive notice of the prior information of the agent. Conceding, then, this enlargement of the rule of notice, which in a few cases may prove a salutary one, but which needs to be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application, and it is not perceived how appellant's case is strengthened. The constructive notice to a principal comes from information—knowledge—possessed by his agent. Holl, as the attorney and agent of Bithell, had no knowledge or information to put him upon inquiry as to the prior mortgage of plaintiff, its assignment, or the mistake in its satisfaction. His only information was that furnished by the abstract and satisfaction, all of which showed the property clear of incumbrance. Constructive notice to the principal springs from actual knowledge, or such information as should awaken inquiry in a reasonable man, imparted to or acquired by the agent. The reason of the rule is that the agent has acquired knowledge which it was his duty to impart to his principal, and the presumption is that he has performed that duty. The knowledge of the agent is a prerequisite to the presumption, and, where the former fails, the latter has no application. The knowledge which Taylor possessed that plaintiff's mortgage was not to be satisfied in full, and which constructively bound his law partner, Holl, applied to their then principal, the plaintiff, and to their liabilities to each other. When Holl came to act in another capacity for a new principal and in a different matter, the notice to him which constructively bound such new principal was actual notice, founded upon knowledge or information which it was in his power to impart, the facts constituting which it was necessary to prove, and which, when proven, would raise an irrebuttable or conclusive presumption against such principal. The evidence and findings show that the mistake in the satisfaction of plaintiff's mortgage was a separate and distinct transaction, and that, so far from being in the mind of the attorney, Holl, at the date of the execution of the Bithell mortgage, he had not previously been aware of any fact in the matter, and did not become aware of the mistake in satisfying plaintiff's mortgage for many months thereafter. The case presented is this: Plaintiff and Bithell are both innocent parties. Plaintiff had a prior mortgage, which he, by mistake, satisfied in full without reading the satisfaction. This was negligence on his part, and, as one of two innocent parties must suffer as a consequence of such negligence, it is equitable and just that the loss should fall upon the plaintiff, by whose negligence the mishap was brought about. Schultz v. McLean, 93 Cal. 356, 28 Pac. 1053; Somes v. Brewer, 2 Pick. 201; Mundorff v. Wickersham, 3 Am. Rep. 531; Civil Code, § 3543.

The argument of appellant directed to the allegations of the pleadings, and the issues formed thereby, does not call for special notice, for the reason that, so far as any doubt is left as to the matters discussed, it is upon questions not going to the merits of the case.

The several objections made to the introduction of evidence, and the errors assigned upon the rulings relating thereto, do not require special notice, beyond the remark that, as between plaintiff and Bithell, they involved no error, and, as between them, the judgment and order appealed from should be affirmed. G. W. Harlow, administrator with the will annexed of the estate of David Fuhrman, deceased, was made a party defendant, who, it was alleged, claimed "some estate or interest in said mortgaged land, but that said estate or interest therein is subsequent to said mortgage lien (of plaintiff) thereon, and should be postponed thereto," etc. Harlow answered, denying that his estate or interest in certain of the mortgaged land, which he described, was subsequent to the alleged mortgage lien of plaintiff, but alleged that plaintiff's mortgage lien was inferior and subject to the mortgage lien of defendant thereinafter set forth. Defendant then proceeds, as it is expressed, in "further answering said amended complaint," to set out in an orderly and usual manner, as in a complaint or cross complaint, and to aver that on the 23d day of January, 1889, the defendant Parker made to David Fuhrman his promissory note for $2,000, payable one year after date, with interest at 10 per cent. per annum; the execution of a mortgage, to secure the payment thereof, upon certain described land, being upon a part of the land described in plaintiff's mortgage; the due recording of the mortgage on the 24th day of January, 1889; that the note is due and unpaid; the death of Fuhrman February 22, 1889; probate of his will; appointment of Harlow as administrator with the will annexed; that he duly qualified, etc.; that plaintiff and certain other named parties claim some interest in the premises, or some part thereof, as purchasers, mortgagees, or otherwise, all of which interests and claims, except that of the defendant Bithell, are subsequent to the lien of defendant's mortgage. The prayer is in the usual form for foreclosure of the mortgage, sale of the property, etc. In other words, although denominated an answer, it is in fact a cross complaint. The court in its findings and decree designates it as a cross complaint, and such in point of law it was and is. So treating it, the court found as follows: "I find all the allegations of the defendant Harlow's cross complaint true." There is in the complaint no allusion to the mortgage of Fuhrman or to Harlow, except that, as administrator, etc., he, in common with others, claimed some interest in the mortgaged premises, which was averred to be subsequent and subject to the lien of the plaintiff's mortgage, and should be foreclosed. Harlow denied that the lien of plaintiff's mortgage was prior to his, as above set forth. This was all there was in the complaint for him to deny. Having set out the mortgage of his testator, and asked for its foreclosure, he was entitled to make proof, as was done. of its due execution, etc. There was neither allegation nor proof that he had notice of plaintiff's mortgage. When Harlow's mortgage was recorded, it was constructive notice to the world; and, as against the prior mortgage of plaintiff, which had before that time been discharged of record, it is, in the absence of proof of actual notice, to be deemed prior in lien. If there was actual notice of plaintiff's mortgage imparted to Harlow, it was an affirmative matter, the proof of which devolved upon plaintiff; failing in which, he cannot complain. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 83

BEVERLY v. BLACKWOOD. (No. 18,185.)

(Supreme Court of California. March 29, 1894.)

CONSTRUCTION OF CONTRACT—EXCHANGE OF LANDS—GUARANTY OF PROFITS — AGREEMENT TO PAY MORTGAGE.

1. Defendant traded 840 acres of land to plaintiff for 95 acres; plaintiff giving a mortgage of $9,000 on the 840 acres to secure a guaranty that the 95 acres would sell for $23,000. Defendant agreed to place the property with certain persons to sell; the mortgage for $9,000 to be held "as collateral security until the" $23,000 was paid defendant from sales, and to be released "at any time" he received said $23,000. The agreement also provided that "the time of such sale is to be made on or before the first day of December, 1890." *Held*, that time was not of the essence of the contract, so that a failure to make sale of the 95 acres by December 1, 1890, would relieve defendant from any obligation to thereafter release the mortgage of $9,000.

2. Defendant having had an opportunity to sell the 95 acres for more than the $23,000 guarantied by plaintiff, the mortgage securing the guaranty was properly canceled.

3. Where the vendee of land agrees to "take up certain mortgages" thereon, provided the mortgagee will accept his money, he is bound to pay the principal, with interest to the maturity of the mortgage, if demanded by the mortgagee, and his offer of principal with accrued interest is insufficient.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by Frank P. Beverly against William C. Blackwood to cancel a certain note and mortgage, in which defendant filed a cross complaint asking a foreclosure of such mortgage. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

N. P. Chipman, for appellant. Spencer & Burchard and Johnson & Chase, for respondent.

VANCLIEF, C. Action to cancel a note and mortgage made and executed by plaintiff to defendant March 15, 1890, in connection with, and as part of, a transaction by which an exchange of lands between the parties was effected. The judgment of the trial court was in favor of the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial.

The material facts, as found by the lower court, are substantially as follows: The plaintiff owned 95 acres of land in Santa Clara county, subject to two mortgages,—one to Roach, for $10,000, drawing interest at 8½ per cent. per annum, payable semiannually, to mature November 14, 1892; and the other to Frink, for $1,000, to become due May 15, 1890. The defendant owned a tract of 840 acres of unincumbered land situate in Tehama county. On March 15, 1890, an exchange of these lands was effected, in the following manner: Each executed to the other a deed of his land; the conveyance of the Santa Clara land to defendant being subject to, and defendant assuming the payment of, the said mortgages thereon. The plaintiff having represented that his 95 acres of land was worth $225 per acre, aggregating $21,375, and defendant desiring to realize that price, it was agreed that the land should be sold for a sum not less than $21,375 ($225 per acre), and that defendant should pay out of that sum the Roach and Frink mortgages, and that he would advance to plaintiff $1,000 at the time of the trade, which he did, and that this advancement of $1,000 should be considered a loan, in case the land should not sell for the price of $21,375; otherwise, to be considered paid from the proceeds of the sale. The plaintiff, on his part, agreed to guaranty that the land would sell for $21,375 if put upon the market according to the agreement; and as collateral security for the performance of this guaranty, and for no other purpose or consideration, plaintiff, contemporaneously with the execution of the exchange deeds, and as a part of the same transaction, executed the mortgage in question, for the sum of $9,550, upon the land in Tehama county conveyed to him by defendant. On the same day, and as part of the same transaction, the parties executed the following written agreement: "This agreement, made and entered into this 15th day of March, 1890, between Wm. C. Blackwood and Frank P. Beverly, that the said Wm. C. Blackwood is to allow the said tract of ninety-five acres near the town of Old Mountain View, deeded to him this day by Frank P. Beverly, to be sold in tracts to suit, and, should any cash payments be made on such sales, then the same shall be applied on the mortgage now held by Wm. C. Blackwood against the said Frank P. Beverly, as said mortgage is to be paid out of the sale of the said ninety-five acres of land; the price of said land to be two hundred and twenty-five dollars per acre, and such portion as may be sold on deferred approved payments, wherein the same shall draw a rate of interest, then said interest received from such sales shall be applied to the interest on the mortgage now held by Wm. C. Blackwood from Frank P. Beverly. The time of making such sale to the first day of December, 1890. Said Beverly agrees to keep place in good order and repair during the existence of this contract. [Seal.] Wm. C. Blackwood. [Seal.] F. P. Beverly. Witness: N. K. Spect." Two days later the defendant complained to plaintiff that this agreement was imperfect, as not expressing the understanding of the parties, and asked that it be modified. To this request the plaintiff assented, and thereupon the following, drawn by or for the defendant, was substituted: "This agreement, made and entered into the 17th day of March, 1890, between Wm. C. Blackwood, the party of the first part, and Frank P. Beverly, the party of the second part: That, for and in consideration of a certain sale and exchange made between the within-named parties, the said party of the first part agrees to take up certain mortgages, of $11,500, now standing against the lands deeded to him by the said party of the second part, provided the party holding the same will accept his money. Then the said party of the first part is to place said tract of ninety-five acres in the hands of W. R. Mathews and N. K. Spect, to at once place on the market, in tracts to suit purchasers, at not less than $250 per acre, or as much more as they may obtain on said sale per acre; and in the event of any sales the said party of the first part shall receive the sum of $23,000; simply holding as collateral security, until the within-named $23,000 is paid, a mortgage on the 840 acres of the party of the second part, of $9,550. But at any time that the party of the first part shall receive the within-named $23,000, with interest on $11,500 of that amount, with interest at eight and one-half per cent. per annum, the mortgage holding [holden] against the lands of the party of the second part shall be released by the holder of the same. The terms of such sale shall be one-third cash, and the balance secured by mortgage on said land at eight per cent. per annum, said interest payable annually; and when the said party of the first part shall receive the sum of eight thousand dollars cash, and a mortgage for balance on said tract of land, drawing interest at the rate of eight per cent. per annum, then he is to release the mortgage of $9,550, which he now holds against said party of the second part. The time of such sale is to be made on or before the 1st day of December, 1890, unless otherwise agreed to by both parties. All former contracts between said parties are this day canceled. Wm. C. Blackwood. F. P. Beverly. Witness: N. K. Spect."

It will be observed that this modified agreement is not only more explicit than the first, but materially differs from it, in that the Santa Clara land is to be sold for the price of $250 per acre, from the proceeds of which defendant was to receive $23,000, with interest on $11,500 thereof, out of which he was to satisfy the mortgage in question. The court found that the defendant could have sold the Santa Clara land within the period specified in the agreement for a much larger sum than $23,000, to wit, $25,000, and was requested and urged by plaintiff to do so, but that he refused to sell, or to permit a sale, at that price, and that his only excuse for so refusing to sell was that Roach would not accept the principal and the then accrued interest as satisfaction of his mortgage, but demanded interest up to the date at which the note and mortgage would mature,—November 14, 1892. It is claimed for appellant that he was not bound to sell the Santa Clara land unless, before December 1, 1890, Roach would accept as satisfaction of his mortgage a sum equal to the principal and accrued interest; and it is further contended that the time mentioned in the agreement, within which the sale should be made, was of the essence of the contract, and therefore defendant was not bound to sell at any price after December 1, 1890, but was at liberty to keep the land, and yet hold and enforce his mortgage for $9,500 on plaintiff's land in Tehama county. This is the theory of his defense and of his cross complaint, by which he seeks to foreclose his mortgage on the Tehama county land in this action; and, accordingly, it is found that before the trial of the action he conveyed the Santa Clara land to his daughters by deeds of gift, and thus put it out of his power to sell that land at any price. That the conclusion drawn from this theory works a gross injustice upon the plaintiff is not denied, but counsel for appellant say in their brief that the apparent injustice results from the facts that the Tehama land has greatly depreciated in value, while the value of the Santa Clara land has increased, since the exchange; but this is negatived by the findings of the court, amply justified by the evidence. The court found that at the date of the exchange the market value of the Tehama land was only $4,200, and that it has never since been of any greater value, and that the Santa Clara land, at the time of the exchange, had a market value of $25,000, and has continued to be of that value ever since. It does not appear that there was any express estimate of the value of the Tehama land at the time of the exchange, but it may fairly be inferred that it was estimated to be worth about $9,500.

The point that the time mentioned in the contract within which the Santa Clara land should be sold was of the essence of the contract is not supported by the language of the contract, besides being inconsistent with the extrinsic facts and circumstances, which may be properly considered as helps to the construction of that language. It is not declared in the contract that time shall be of the essence of the contract, and there is no limitation of the time within which the contract for the release of the mortgage on the Tehama land must be performed, and no provision that it should become an independent charge upon the Tehama land if the Santa Clara land was not sold within a limited period. On the contrary, the contract expressly provides that that mortgage was held simply "as collateral security until the within-named $23,000 is paid," and that "at any time the party of the first part shall receive the within-named $23,000, with interest on $11,500 of that amount at the agreed rate of eight and one-half per cent. per annum," or "when the said party of the first part shall receive the sum of eight thousand dollars cash, and a mortgage for the balance, on said tract of land, drawing interest at the rate of eight per cent. per annum, then he is to release the mortgage of $9,500 which he now holds against the said party of the first part." The general rule of equity is that time is not of the essence of the contract, unless it clearly appears from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties. Steele v. Branch, 40 Cal. 11. But, if time was of the essence of the contract, the defendant was the only party in default, and can take no advantage from his own wrong. Newton v. Hull, 90 Cal. 493, 27 Pac. 429.

But it is claimed that the defendant was not in default, because he was not bound to sell unless Roach would accept the principal and the accrued interest as satisfaction of his mortgage. But I think this is a mistake. Roach demanded only what he was entitled to by the terms of his mortgage, which terms were known to defendant at the date of his agreement with plaintiff, of March 17, 1890, the language of which is: "The said party of the first part agrees to take up certain mortgages of $11,500 now standing against the lands deeded to him by the said party of the second part, provided the party holding the same will accept his money." How much money? Undoubtedly, so much as he was entitled to receive. There is no pretense that Roach refused to accept, as satisfaction of his mortgage, what he was entitled to receive, or that he demanded more. The difference between what Roach asked and what defendant offered was the interest on the interest to be paid in advance, which was more than compensated by the increased price which plaintiff was offered for the land over and above the price named in the contract. The judgment rests firmly upon the equitable maxim that "that which ought to have been done is to be regarded as done, in favor of him to whom and against him from whom performance is due" (Civ. Code, § 3529), as applied in Daggett v. Rankin, 31 Cal. 327, where it is said that "equity looks upon things agreed to be done as actually performed; the true meaning of which is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." The defendant could and ought to have sold the Santa Clara lands for the price and within the time contemplated by the parties, and satisfied the mortgage in question from the proceeds of the sale, as he agreed to do; but, instead of doing so, he elected to hold the lands, and to give them to his daughters, and thereby to put it out of his power to perform his contract. Therefore, the mortgage on the Tehama lands should be deemed satisfied, as it ought to have been; and the judgment, being to this effect, is clearly right.

Some points are made upon the admissibility of evidence, on the ground of irrelevancy; but all the evidence objected to, if not relevant to the issues upon the decision of which the judgment depends, were relevant to the issue of fraud, upon which the court found for defendant. Evidence as to the value of the lands at the time of the exchange was most earnestly objected to, but it was not only relevant to the issue of fraud, but was relevant as a circumstance to be considered in construing the contract. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 543

JACOB v. CARTER. (No. 18,214.)

(Supreme Court of California. March 26, 1894.)

EJECTMENT—DEFENSES — PLEADING AND PROOF—NEW TRIAL.

1. Where, in ejectment, the complaint merely alleges plaintiff's ownership and right to possession, and that defendant is in possession, and refuses to surrender the same, and the answer denies the ownership and right to possession, defendant may prove any facts showing that plaintiff had no right of entry or possession when the action was commenced.

2. Where, in ejectment, the defense is possession under contract of purchase, indebtedness of plaintiff to defendant for salary and money paid in excess of the payments required may be considered as a performance of the contract, under Code Civ. Proc. § 440, which provides that, where cross demands have existed between persons under such circumstances, that, if one sued the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other.

3. A new trial may be granted as to the issues raised by a cross complaint without granting one as to those raised by the complaint and answer.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Kent, Judge.

Action by Elias Jacob against D. F. Carter. From a judgment for defendant, plaintiff appeals. Affirmed.

Bradley & Farnsworth, for appellant. Daggett & Adams, for respondent.

VANCLIEF, C. Action of ejectment to recover a tract of land in Tulare county. The complaint alleges, generally, the plaintiff's ownership and right of possession, and that defendant was in possession, and refused to surrender possession to plaintiff on demand therefor. The answer denies plaintiff's title and his right to possession, and avers defendant's right of possession. The defendant also filed a cross complaint, in which he alleged that on October 18, 1888, the plaintiff and defendant entered into a written agreement, whereby plaintiff agreed to sell, and the defendant to purchase, the land in controversy, at the price of $2,500, upon which $250 was paid and credited at the date of the contract, and whereby it was agreed that the balance of the principal should be payable on or before October 18, 1893, with interest at 8 per cent. per annum, payable annually in advance on or before October 18th of each year, and, if not punctually so paid, then the said party of the first part "shall have the right to enter upon and take possession of said premises, with all the improvements thereon;" that from the date of said agreement until May 4, 1890, the defendant was in the employ of plaintiff as general agent at a salary of $50 per month, and during that period paid and expended money for the plaintiff, and boarded his employes, for which plaintiff agreed to compensate him, over and above said salary; and that it was understood and agreed, at the date of said written agreement, that plaintiff should credit said salary and all other indebtedness of plaintiff to defendant for money paid and for board of employes which might accrue, as payments on the purchase price of said land; and that on May 4, 1890, plaintiff and defendant had a settlement, upon which it was found and agreed that the land had been fully paid for, and that plaintiff would make defendant a deed therefor, as soon as he received a deed for the same from the Southern Pacific Railroad Company, which, it is averred, he has received since the date of said settlement. Upon these facts the defendant, by his cross complaint, seeks to enforce a conveyance of the land from plaintiff to himself. Plaintiff, in answer to the cross complaint, denied all the averments thereof, except that he had received a deed from the railroad company since the date of the alleged settlement. By agreement of the parties all the issues raised by the complaint and answer thereto and by the cross complaint and answer thereto were tried together by the court and a jury, it being agreed that the jury should render a general verdict upon the issues raised by the complaint and answer thereto, and a special verdict upon such of the issues raised by the cross complaint and answer thereto as might be submitted by the court. The verdict of the jury, both on the general issue and on the special issues submitted, was in favor of the defendant. The court adopted the verdict on the special issues, and made some additional findings upon issues in the cross suit, and rendered judgment in favor of defendant upon the whole case, including a decree that plaintiff convey the land in question to defendant. The plaintiff moved for a new trial, which was denied as to the issues arising on plaintiff's complaint and the answer thereto, but granted upon the issues in the cross suit. The plaintiff appeals from the judgment, and from an order denying his motion for new trial upon the issues raised by his complaint and the answer thereto.

1. There can be no doubt as to the power of the court to refuse to disturb the general verdict upon the issues raised by the complaint and answer thereto, and, at the same time, to grant a new trial as to the equity part of the case. Duff v. Duff, 35 Pac. 437, and cases cited. The cross suit is distinct from the action of ejectment, and might have been separately tried; but, since the plaintiff expressly stipulated that the two actions should be tried together, as they were, he would not be heard to object, and cannot be allowed any advantage on this ground; nor have his counsel made any such point.

2. The order denying a new trial in the ejectment suit is not, as contended by appellant, inconsistent with the order granting a new trial in the cross suit. The complaint is extremely general, alleging merely plaintiff's ownership and right of possession, and that defendant wrongfully withholds the possession; and the answer of the defendant is quite as general. It denies plaintiff's ownership, and his alleged right of possession, and affirmatively avers "that on the 18th day of October, 1888, he was, and that he ever since has been, and that he still is, entitled to the possession of all the real property described in said complaint." Under this answer defendant was entitled to prove any facts showing that plaintiff had no right of entry or possession at the time the action was commenced (Semple v. Cook, 50 Cal. 29; Roberts v. Columbet, 63 Cal. 22); and, even if this were not so, I think those facts alleged in the cross complaint which constitute a defense to the action at law, if proved, might have been properly considered as such defense, whether sufficient to entitle defendant to equitable relief or not; namely, the alleged facts that defendant was in possession by plaintiff's consent, under a contract to purchase which defendant had fully performed on his part, up to the time of the commencement of the action of ejectment. Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764. The evidence, though conflicting, is amply sufficient to justify a finding by the jury that the indebtedness of plaintiff to defendant for money paid and for salary accrued prior to the commencement of the action more than equaled the interest on the purchase money and the taxes on the land up to that time; and, if not, technical payment of such interest and taxes was more than compensation therefor, by the effect of section 440 of the Code of Civil Procedure, which provides: "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by assignment or death of the other." The only default on the part of defendant claimed by counsel for appellant is the failure to pay $360 interest on the purchase money which had become due before the commencement of the action, for they admit that, by the true construction of the contract, the principal was not to be paid until October 18, 1893, but insist that the interest was to be paid on or before October 18th of each year, and, if not so paid, the plaintiff was entitled to the possession. Therefore, the evidence being sufficient to justify the jury in finding that the $360 interest had been paid or compensated before the commencement of the action, a new trial of the action of ejectment was properly denied. At the same time the evidence may not have been sufficient to justify a finding that the principal of the purchase money had been fully paid, or a finding of the settlement alleged to have been made on May 4, 1890; and, if such was the case, a new trial of the cross suit was properly granted. But whether properly or not is immaterial, as there is no appeal from the order granting a new trial. It is considered only so far as necessary to show that it is not inconsistent with the order denying a new trial of action of ejectment. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(4 Cal. Unrep. 547)

CLARKSON v. HOYT. (No. 14,716.)

(Supreme Court of California. March 26, 1894.)

ACTION ON NOTE—PLEADING AND PROOF—AMENDMENT—ACCOUNT STATED—EFFECT.

1. In an action on a note given for services for managing defendant's cattle ranch, where plaintiff simply introduced his note and rested his case, defendant's motion thereupon to have the court appoint a referee under Code Civ. Proc. § 639, subsec. 1, providing that, when an issue of fact requires the examination of a long account, the court may appoint a referee to decide the issue, was properly denied, the note implying a settlement of the account between the parties, and it not then appearing that the examination of a long account was necessary.

2. In an action on a note given to settle a balance found due on a statement of accounts, the overruling of defendant's motion to amend his answer so as to attack the statement of accounts on the ground of fraud is not an abuse

of discretion where the proposed amendment alleges the fraud only in general terms, without pointing out the facts which constitute it.

3. In an action on a note given for a balance found due on a settlement of accounts, where defendant failed to allege fraud in the account, his offer to show that plaintiff received money as his agent, for which he failed to account, was properly overruled.

Commissioners' decision. Department 1.

Appeal from superior court, Siskiyou county; Edward Sweeny, Judge.

Action by James F. Clarkson against Perry Hoyt on a promissory note. From a judgment for plaintiff and order denying defendant's motion for a new trial, defendant appeals. Affirmed.

H. B. Warren and Mesick & Maxwell, for appellant. John V. Brown and H. B. Gillis, for respondent.

BELCHER, C. This is an action to recover the amount due on a promissory note for $1,969, given by defendant to plaintiff, and dated "Lakeview, Or., May 25, 1888."

The material parts of the answer are as follows: It is alleged that in 1880 defendant was a resident in Siskiyou county, Cal., and was the owner of two fully-equipped stock ranches in Lake county, Or., and also of a large number of cattle, horses, mares, and mules, and was then engaged in the business of stock-raising in that county and state; that in September, 1880, he employed the plaintiff, at an agreed salary of $40 per month, to take the sole care, management, and control of all said real and personal property in Oregon, as the agent of defendant, and in his name and for his benefit to conduct the business of raising, caring for, and managing the stock of cattle, horses, and mules aforesaid, and to preserve and keep in good repair the said ranches, machinery, and all appliances used in said business, to purchase all necessary supplies and hire all necessary labor that should be required in conducting the said business, and to market, from time to time, as the same should become salable, said cattle, horses, and mules; that, pursuant to such employment, the plaintiff, on September 15, 1880, received into his possession, and took the entire and sole control, care, and management of, said real and personal property, and thereafter continued to have and exercise such control, care, and management until December 15, 1888, when he resigned his position; that from time to time during his employment plaintiff informed defendant that he did not wish to draw all of his salary, but preferred to leave the same in defendant's hands, drawing interest at the rate of 7 per cent. per annum, and that a portion of his salary did remain in defendant's hands until the 25th of May, 1888; that on said last-mentioned day, and while defendant was temporarily on a visit to plaintiff at Lakeview, Or., plaintiff demanded of defendant a settlement of all of his salary then unpaid, and defendant, then believing that he had faithfully discharged his duties as agent, and upon his representation that the full amount of $1,969 was due him on account of his salary and interest thereon to that date, executed and delivered to him the promissory note sued upon; "that said promissory note was so executed and delivered without any accounting or settlement between plaintiff and defendant as to the general business of plaintiff's said agency, and under the said representations by plaintiff to defendant that his said business was all in good condition, and under the belief by defendant that all of plaintiff's said representations were true;" that early in the summer of 1888, and after the execution of the said note, defendant commenced to investigate the true condition of his said property and business, and upon such investigation he for the first time learned that all of plaintiff's statements and representations were false, and "that the plaintiff had fraudulently and in violation of his said trust spent large sums of money belonging to the defendant for matters and things personal to himself, and entirely foreign to the necessary management and care of defendant's said property and business, and that he had from time to time sold and otherwise disposed of a large number of defendant's said cattle, horses, and mules, and rendered no account whatever thereof to the defendant, nor paid to defendant any of the profits of said sales;" that at the time of the execution of the said note the defendant was not indebted to the plaintiff in the sum named therein, or in any other sum or amount whatever, for salary due plaintiff, or the interest thereon, or otherwise, but that, on the contrary, the plaintiff was then, and now is, indebted to the defendant in the sum of fully $6,000; and that the said note was made, executed, and delivered as aforesaid without any consideration whatever. And the prayer was that plaintiff take nothing by his action. The court below found against the defendant upon all the issues raised, and rendered judgment in favor of the plaintiff according to the prayer of his complaint, from which, and from an order denying his motion for a new trial, defendant appeals.

When the plaintiff had introduced in evidence his note and rested his case, the defendant moved the court to appoint a referee to take and report an accounting between plaintiff and defendant. The plaintiff objected, upon the ground, among others, that the parties had settled their accounts in full up to the date of the note, and the note was given for the balance then found due. The court denied the motion, and held that it was premature at that stage of the case; that under section 639, subsec. 1, Code Civ. Proc., a referee should not be appointed until it is made to appear that there is an issue of fact which requires the examination of a long account; and, also, that the execution of the note by defendant to plaintiff implied a settlement at that time. This ruling is assigned as error, but we think it clearly correct. The defendant was then called and sworn as a witness in his own behalf. It appears from his testimony that there were three settlements between the parties,—one in November, 1883, one in October, 1885, and one in May, 1888,—and that in making the last settlement plaintiff and defendant spent about a week in going over and examining all plaintiff's accounts concerning his agency business; that, as a result of such examination, a balance of $1,969 was found due from defendant to plaintiff, for which the note in suit was then given; and that defendant then understood that the accounting was full and complete. At the conclusion of defendant's testimony, he renewed his motion for the appointment of a referee. The plaintiff again objected, and the court denied the motion, holding that it could not be granted under the pleadings as they then stood. The court said "that defendant, having alleged that there had been no account stated, embracing the matters entrusted to plaintiff as agent, which allegation set forth in the answer is deemed in law to be denied, might have an accounting of those matters, if such allegation should be found to be true. But the evidence introduced by the defendant, pertinent to said matter, conclusively shows that there was an account stated, embracing the agency business, as well as plaintiff's claim for wages, that there was a balance struck, and that defendant gave the note sued on for the exact amount of such balance, whereby he promised to pay it." There was obviously no error in this ruling. Thereafter the defendant moved the court for leave to amend his answer by striking out the part thereof which alleged that the said note was executed and delivered without any accounting or settlement between plaintiff and defendant as to the general business of plaintiff's said agency, and by inserting the following: "That settlements between these parties plaintiff and defendant in regard to the transactions of plaintiff's agency were had as follows: One about October 1, 1883, the next about October 1, 1885, and the last one about May 25, 1888. That defendant kept no books of account of the transactions of plaintiff's agency, and that said settlements were made upon such books and papers as plaintiff produced at such settlements, and that plaintiff at such settlements stated to defendant that such books and papers so presented by him at such settlements contained all the items of accounts of receipts and expenditures touching his transactions as such agent. That defendant, shortly after said last-mentioned settlement, ascertained that the said statements of plaintiff were false, and that plaintiff's books of account and papers so presented at said settlement, and upon which said settlements were had and made, did not contain a full and complete statement of the items of such receipts and expenditures, and that plaintiff had received large amounts of money as herein stated, and which did not appear on plaintiff's said books or other papers at the times of such settlements, and of which defendant at such time and times had no knowledge, and that plaintiff had charged this defendant with large sums of money in said settlements, which were never received by said defendant, and of which defendant at such time and times had no knowledge."

The plaintiff objected to the amendment on the ground, in substance, that it admitted that there were three settled and stated accounts between the parties, the last settlement resulting in the giving the note sued on, and that, while it attempted to set up fraud on the part of the plaintiff for the purpose of having the account opened and reexamined, it failed to state the facts constituting the fraud specifically or sufficiently, but charged it only in general terms. The court sustained the objection, and this ruling is also assigned as error. The Code provides that "the court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding." Code Civ. Proc. § 473. Applications to amend pleadings are addressed to the discretion of the trial court, and, while that discretion should be liberally and freely exercised to effect the ends of justice, orders granting or refusing such applications will not be disturbed on appeal unless it appears that the court abused its discretion. Emeric v. Alvarado, 90 Cal. 448, 27 Pac. 356; Wixon v. Devine, 91 Cal. 477, 27 Pac. 777. An account stated may be impeached for fraud or mistake (Green v. Thornton, 96 Cal. 67, 30 Pac. 965), but the burden is upon the party seeking to impeach it to set out in his pleading the particular facts constituting the fraud or mistake relied on. "It is not sufficient to aver fraud in general terms; the facts constituting the fraud must be alleged. This is held in many cases decided by this court. This course of decision commenced at an early date in this state." Spring Valley Waterworks v. City of San Francisco, 82 Cal. 321, 22 Pac. 910, 1046, and see cases cited. "In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud." Gushee v. Leavitt, 5 Cal. 160. Here the offered amendment fails to point out particularly the facts constituting the alleged fraud of the plaintiff. It charges that the plaintiff, at the time of the settlements, made statements that the books and papers presented by him contained all the items of accounts of receipts and expenditures touching his transactions as such agent, and that defendant shortly after the last settlement ascertained that these statements were false, but it wholly fails to point out wherein or in what particulars they were false. It also charges that plaintiff had received large amounts of money which did not appear in his books or papers, and of which defendant at that time had no knowledge, but it does not say what amounts, or when or from what source they were received. It also charges that plaintiff had charged defendant with large sums of money which were never received by him, and of which at such time or times he had no knowledge, but does not state what the sums were, nor under what dates they were charged, nor how defendant could have been ignorant at the time of the settlement as to the money charged to have been paid to himself. Such being the character of the proposed amendment, we do not think it can be said that the court abused its discretion in refusing to allow it to be filed.

The defendant next offered "to introduce evidence to prove that plaintiff in the month of July or August, 1883, as the agent of the defendant, sold and delivered to one J. H. Sherez twelve head of mules, the property of the defendant, at the price of one hundred dollars per head; that the said sale was never accounted for or included in the settlements made by plaintiff and defendant, and that said plaintiff represented to defendant that no such sale was made." The plaintiff objected to the offered evidence upon the ground that it appeared from the defendant's testimony that there had been three settlements between the parties since the date of the alleged transaction, and that, under the pleadings, the evidence was inadmissible to impeach and open up the settlements so made. The court sustained the objection, and the plaintiff excepted to this ruling. We think the ruling proper. The evidence was manifestly offered for the purpose of impeaching and reopening a settled and stated account on the ground of fraud. But this, as we have seen, could not be done under the answer as it was framed and stood when the offer was made. In our opinion the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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102 Cal. 107

CITY OF SACRAMENTO v. DILLMAN.

(No. 18,165.)

(Supreme Court of California. March 29, 1894.)

MUNICIPAL CORPORATIONS—PUBLICATION OF ORDINANCE — NECESSITY — ACTION TO COLLECT LICENSE.

1. St. 1863, p. 415, § 16, providing that the city of Sacramento shall publish all ordinances for 10 days in a newspaper published in said city, is directory merely, and such publication is not a condition precedent to their taking effect.

2. A civil action may be maintained to collect a saloon keeper's license, under a charter provision giving the city a remedy by civil action where a person required by ordinance to take out a license, and pay therefor, shall fail to do so.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by city of Sacramento against H. F. Dillman to recover a tax for keeping a saloon. From a judgment for plaintiff, defendant appeals. Affirmed.

W. A. Anderson and Grove L. Johnson, for appellant. Clinton L. White, for respondent.

PER CURIAM. On June 22, 1891, an ordinance "regulating saloons, barrooms," etc., "and providing the amounts of city licenses to be paid by keepers of saloons, barrooms and other places where wines and liquors are sold," was passed by the board of trustees of the city of Sacramento. The ordinance provided that every person within the limits of the city who keeps a barroom, saloon, or other place where liquors are sold by the glass or bottle, to be drank on the premises, shall pay quarterly in advance "a city license for pursuing said business of $45 for each and every quarter," and that all licenses collectible under the ordinance should become due and payable on the 1st days of January, April, July, and October of each year. It also provided that it should be in force from and after June 30, 1891, and all ordinances and parts of ordinances in conflict with its provisions were repealed. The only action taken by the board in reference to the publication of the ordinance was an order made on the day of its passage "that the matter be referred to the mayor for publication or not, as he saw fit." It was, however, by direction of the mayor, published in the Daily Bee, a newspaper published and having a general circulation in the city, for the period of 10 days, commencing June 22 and ending July 2, 1891. Prior to the time of the passage of the said ordinance, an ordinance regulating saloons, and fixing a different sum to be paid as a license for that business, was in force in the city. On July 1, 1891, and thereafter, until this action was commenced, defendant kept a saloon in the city, where liquors were sold by the glass, to be drank on the premises. He tendered the quarterly amount which was due under the old ordinance, but refused to pay the $45 required by the new one. On July 24, 1891, the plaintiff, by order of its city collector, commenced this action against the defendant, alleging the passage of the said ordinance, and that $45 became due from defendant thereunder on July 1st; and also that, under the provisions of plaintiff's charter, $1 should be added for defendant's failure to pay the license money within five days after it became due, and $15 for liquidated damages; and praying judgment for the said several sums. The defendant answered, denying all the averments of the complaint, and alleging that the "action was not brought by the proper person, namely, city collector of the city of Sacramento." The case was tried by the court without a jury, and the findings and judgment were in favor of the plaintiff, from which judgment, and an order denying his motion for a new trial, defendant appeals.

1. The charter of the city provided that the board of trustees "shall publish all ordinances for ten days in some newspaper published in said city." St. 1863, p. 415, § 16. Appellant contends that this required all ordinances to be published by order of the board, and that, as the ordinance in hand was not so published, it never became valid and effective. In support of this position several decisions of this court are cited, but they were all made in cases for the enforcement of street assessments, where publication was declared necessary to give the boards jurisdiction to make orders for the proposed improvements. Those cases are not in point here. In this case there was no provision that the ordinance should not take effect till after its publication, and, in our opinion, it took effect on its passage, and publication thereafter was a ministerial act to give the people notice of its requirements, like the publication of statutes after they are passed by the legislature. See People v. Cole, 70 Cal. 59, 11 Pac. 481, where it was held that, although there was express direction that the ordinance should be recorded, yet the recording was not a condition precedent to its taking effect. And see, also, Com. v. Davis, 140 Mass. 485, 4 N. E. 577, where it was held that a requirement that a city ordinance should be published was directory merely.

2. It is next contended that the ordinance and section 50 of the city charter, under which the action was brought, are unconstitutional, because in conflict with section 12 of article 11 of the constitution; and in support of this contention People v. Martin, 60 Cal. 153, is cited. The constitutional provision is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The case cited was an action to recover the amount of license tax claimed to be due from the defendant under certain sections of the Political Code, because he was carrying on the business of selling goods, wares, and merchandise at a fixed place of business. It was held that, such taxes being imposed for county purposes, the sections of the Code imposing them were clearly inconsistent with the section of the constitution above quoted, and therefore no longer in force. That case has obviously no bearing upon the question in hand, for here the license was not imposed by the legislature, but by a municipal ordinance which was authorized.

3. It is further contended that the ordinance under which the action was brought was a police regulation simply, and hence a civil action cannot be maintained for the collection of a license fee imposed by it. Section 50 of the city charter gives to the city a remedy by civil action in any case where a person, required by any ordinance to take out a license and pay therefor, shall fail to do so. No distinction is made as to the object for which the license is required, but the licenses which may be collected by civil action are such as are required of a person to authorize him to "transact, do, or carry on any business, trade, or occupation, matter or thing." And, as said in a similar case (County of San Luis Obispo v. Hendricks, 71 Cal. 245, 11 Pac. 682): "The license tax sought to be recovered in this action is not a penalty, but in the nature of a debt due from the defendant to the county [city], or, what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county [city] to pay such sum of money [citing cases]. A penalty is in the nature of a punishment for the nonperformance of an act, or for the performance of an unlawful act, and in the former case stands in lieu of the act to be performed. Here the action is to enforce the precise duty."

4. Some other points are made for a reversal, but we see no particular merit in any of them, and they need not be specially noticed. It follows that the judgment and order must be affirmed, and it is so ordered.

101 Cal. 644

BRAVERMAN v. FRESNO CANAL & IRRIGATION CO. (No. 18,210.)

(Supreme Court of California. March 15, 1894.)

Review on Appeal—Instructions.

An assignment of error to the giving of an instruction recited must be supported by a statement in the substantive part of the bill of exceptions showing that such instruction was given.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Louis Braverman against the Fresno Canal & Irrigation Company for damages. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. E. Church, for appellant. L. L. Cory, for respondent.

FITZGERALD, J. This is an action for damages caused to plaintiff's vineyard by an overflow of water from the canal of defendant, through its alleged negligence. The case was tried by a jury, with a verdict and judgment for plaintiff. Defendant appeals from the judgment and the order denying its motion for a new trial.

The principal ground relied on by appellant for a reversal of the judgment is the alleged error of the court in giving to the jury, against its objection, a certain instruction relating to exemplary damages. This point cannot be considered, for the reason that the stating or substantive part of the statement contains no such instruction. The incorporation of the instruction complained of in the assignment of errors, coupled with the statement that it was given against the objection of appellant, is not sufficient to show that such instruction was given or excepted to. The specification of the particular errors upon which the moving party will rely, although an essential part of the statement, is, as was said by Mr. Justice Harrison in People v. Faulke, 96 Cal. 17, 30 Pac. 837, "the act of the attorney annexed to the bill of exceptions after the trial, and for the purpose of pointing out the particulars in which errors were committed at the trial. The matters to which such specifications point must be found in the substantive portion of the bill of exceptions; otherwise, they cannot be considered." With reference to the remaining errors complained of, it is sufficient to say that they are either immaterial or untenable. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

101 Cal. 673

SECULOVICH v. MORTON. (No. 15,393.)

(Supreme Court of California. March 24, 1894.)

SPECIFIC PERFORMANCE—LACHES.

A bill for specific performance of a parol agreement to convey land on demand, after the happening of a contingency, alleging a demand 24 years thereafter, and defendant's continued absence from the state, is demurrable, as, in spite of defendant's absence, plaintiff could have had a commissioner appointed to convey the land to him, and the demand was not made within a reasonable time.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Peter T. Seculovich against Samuel P. Morton for specific performance. From a judgment for defendant, plaintiff appeals. Affirmed.

Moses G. Cobb, for appellant. A. C. Freeman, for respondent.

PATERSON, J. On January 16, 1862, plaintiff purchased and caused to be conveyed to George H. Morton, infant son of defendant, a certain lot of land in the city and county of San Francisco, upon the parol agreement that if the child should die unmarried, and without issue, before he arrived at the age of 21 years, defendant, after distribution of the property to him as heir, would, on demand of plaintiff, immediately convey the same to the latter. The child died when a little over five years of age,—December 16, 1866,—but no demand was made by plaintiff for a conveyance until February 14, 1890. In February, 1891, this action was brought for a judgment declaring that defendant holds the land in trust for plaintiff, and requiring him to convey the same. A demurrer to the complaint was sustained, and, plaintiff failing to amend, judgment was entered in favor of defendant.

It is claimed that the cause of action stated is not stale, or barred by the statute of limitations, because it is alleged in the complaint that within six months after the death of George H., defendant left this state, and has ever since resided in the state of Maryland, where the demand above referred to was made upon him February 14, 1890. We think the demurrer was properly sustained. The defendant's absence from the state did not deprive the plaintiff of a remedy. He might have invoked the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of a commissioner to convey the property to him. Perkins v. Wakeham, 86 Cal. 580, 25 Pac. 51; Applegate v. Mining Co., 117 U. S. 266, 6 Sup. Ct. 742; Arndt v. Griggs, 134 U. S. 320, 10 Sup. Ct. 557; Adams v. Cowles, 95 Mo. 501, 8 S. W. 711; Felch v. Hooper, 119 Mass. 52. Irrespective of the question whether the defendant's absence from the state prevented the running of the statute of limitations, we think the judgment of the court below was right, because the plaintiff did not make a demand within a reasonable time. Failing to do so, his cause of action became barred by his laches. True, it is a general rule that the statute does not run against an express trust where there is concealed fraud; but when the injured party has been guilty of great laches in the prosecution of his remedy he will be barred in equity, on account of the paramount importance of having titles settled. Godden v. Kimmell, 99 U. S. 202; Hume v. Beale's Ex'x, 17 Wall. 348; Bell v. Hudson, 73 Cal. 287, 14 Pac. 791; West v. Russell, 74 Cal. 544, 16 Pac. 392; Chapman v. Bank, 97 Cal. 159, 31 Pac. 896.

Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

SAN DIEGO SAV. BANK v. LOWENSTEIN.
(No. 19,371.)

(Supreme Court of California. April 12, 1894.)

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the San Diego Savings Bank against one Lowenstein. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Luce & McDonald, for appellant. Conklin & Hughes, for respondent.

PER CURIAM. The questions involved in this case were determined in the case of Clemens v. Luce (Cal.) 35 Pac. 1032, and upon the authority of that case the judgment herein must be modified by striking out the amount allowed for attorney's fees. There is also a clerical error in the judgment, by which the sheriff is directed to pay to the plaintiff out of the proceeds of the sale the sum of $8,861.64, instead of $7,861.94, the amount found due upon the promissory note, and the respondent consents that the proper correction may be made. The court below is directed to modify the judgment as herein indicated, and, as thus modified, the judgment and order will stand affirmed.

(102 Cal. 134)

WILLIAMS et al. v. MOUNTAINEER GOLD MIN. CO. et al. (No. 18,123.)

(Supreme Court of California. March 29, 1894.)

In bank.

On rehearing. Affirmed.

PER CURIAM. Upon further consideration of this cause in bank, we are satisfied with the conclusion which was reached by department 1 in its opinion filed November 8, 1893 (34 Pac. 702), and for the reasons stated in said opinion the judgment and order appealed from are affirmed.

DE HAVEN, J., did not participate.

(4 Cal. Unrep. 601)

CAFFREY v. OMILAK GOLD & SILVER MIN. CO. (No. 15,441.)[1]

(Supreme Court of California. April 11, 1894.)

ACTION FOR SERVICES—EVIDENCE—CONTRACT BY AGENT—FINDING OF JURY.

1. In an action for services rendered by plaintiff's assignor, the complaint alleged that they were rendered at the special request of defendant. Defendant, in its answer, admitted that the services were rendered, and set out a copy of the agreement between such assignor and its manager. *Held*, that it was not error to admit such agreement in evidence against an objection by the defendant.

2. In setting forth the agreement, defendant alleged that it was made by G. "as" manager of defendant corporation. The agreement purported to have been made on defendant's behalf, and G. testified that he made it on behalf of defendant. *Held*, that an objection by defendant that it was on its face not its agreement, but the agreement of G., its manager, was not tenable.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by one Caffrey against the Omilak Gold & Silver Mining Company to recover for services rendered defendant by one Taggart, plaintiff's assignor. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Estee & Miller, for appellant. A. Morgenthal, for respondent.

HARRISON, J. The plaintiff brought this action to recover for services rendered to the defendant in Alaska by his assignor, Taggart, between September 7, 1889, and September 22, 1891, for which he alleged that the defendant had agreed to pay the sum of $75 per month for a portion of the time, and $100 per month for the remainder. The defendant, in its answer, admitted that Taggart, the plaintiff's assignor, had rendered services to it, as specified in the complaint, during a portion of this period, and set forth a copy of the agreement between him and its manager, under which the services had been rendered, and alleged that by reason of the failure of Taggart to perform his part of said agreement it had suffered damage in excess of the amount claimed by the plaintiff for said services. The case was tried by a jury, which rendered a verdict in favor of the plaintiff. A new trial was denied by the court, and from this order and the judgment the defendant has appealed.

Upon the issue whether the services had been rendered by Taggart during the period claimed in the complaint, as well as upon the issue whether he had been faithful in such service, the evidence is conflicting, and the verdict of the jury must be accepted as conclusive against the contention of the defendant. The claim in the answer that the defendant had suffered damage by reason of the acts of Taggart in an amount greater than the alleged value of the services was an affirmative defense, in which the burden of proof was upon the defendant, and we cannot say that the jury was not authorized in finding that this defense was unsustained by the evidence. The court left to the jury the determination of these questions of fact, and no exception was taken to its instructions. The court did not err in admitting in evidence the written agreement between Taggart and the manager of the defendant. The allegation in the complaint that the services had been rendered at the special instance and request of the defendant did not preclude the plaintiff from showing that such request, or the promise to pay for such services, had been in writing, or that a written agreement therefor had been made on behalf of the defendant with his assignor. The defendant had set forth a copy of the agreement in its answer, so that it could not have been misled as to the character of the averments, or as to the proof by which they were to be sustained; nor could the defendant object that the instrument contained other conditions to be observed by Taggart in the rendering of such services.

The objection by the defendant that the agreement was, upon its face, not its own agreement, but an agreement of Green, its manager, is not tenable. The defendant, in setting forth the agreement, had alleged that it had been made by Green "as manager of the defendant corporation." The agreement itself purports to have been on behalf of the defendant, and recites that the consideration for the agreement to render the services is the agreement by Green, "as manager of the said mining company, to pay me the sum of seventy-five dollars per month," etc. If there was any ambiguity in the instrument itself, it was made clear at the trial by the testimony of Green that it was executed by him on behalf of the defendant, and the jury was authorized in finding that it was the agreement of the defendant. The judgment and order are affirmed.

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[1] For order modifying judgment, see 36 Pac. 652.

We concur: PATERSON, J.; GAROUTTE, J.

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4 Cal. Unrep. 569

HOPPE et al. v. HOPPE et al.

FOUNTAIN v. HOPPE (HOPPE et al., Interveners). (No. 18,225.)

(Supreme Court of California. March 29, 1894.)

PROBATE HOMESTEAD — MORTGAGE BY WIDOW — RIGHTS OF MINOR CHILDREN.

1. Where a complaint to foreclose a mortgage prays a receiver to take and hold the premises, and collect and apply the rents and profits, third persons may intervene to assert an adverse title to the possession, and an interest in the rents.

2. Code Civ. Proc. § 1465, requires the court, if no homestead has been declared in decedent's life, to set one apart out of the common property for the use of the surviving spouse and the minor children. Section 1468 provides that such homestead is the property of the survivor, if there be no minor children; otherwise, it belongs half to such survivor, and half to such children. *Held*, that an order setting apart such homestead, made without notice to the minor children, cannot vest title in the widow alone, so divesting the children's interest both in the homestead use and in the inheritable fee.

3. Though the proceeding is in rem, the widow, as administratrix, cannot represent the children, further than to withdraw the premises from administration.

4. The judgment setting apart a homestead to the widow, though it recite the names of the children, does not necessarily imply that these, or any of them, are minors, nor adjudicate their interests in the premises.

5. If the effect of the order were to vest the fee in the widow, still she would be estopped to deny her trusteeship, as to the minors' half interest.

6. A homestead set apart by the probate court under Code Civ. Proc. § 1465, for the benefit of the widow and minor children, will not be partitioned until the youngest child comes of age, unless the interests of the minors clearly demand it.

7. That the minor joins in the petition, and is represented by a guardian ad litem, makes no difference, as the court will interpose sua sponte.

8. A widow's mortgage of a homestead set apart to her by the probate court for the use of the family is not void, as such homestead involves a joint use merely.

9. Such mortgage attaches to the widow's interest, subject to the homestead use; and there being minor children entitled, with her, to such use, as well as to an undivided half of the fee, foreclosure is postponed till partition may be had, viz. when the youngest comes of age, and meantime the homestead use includes both possession and the rents and profits.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Suit by Herman W. Hoppe and others against Julia Hoppe and W. A. Fountain for partition, consolidated with suit by W. A. Fountain against Julia Hoppe (Herman W. Hoppe and others intervening), to foreclose a mortgage. Partition suit dismissed, and foreclosure decreed. Julia Hoppe and Herman W. Hoppe and others, separately, appeal. The dismissal was affirmed, and the judgment of foreclosure reversed.

Armstrong & Platnauer and Henry C. Ross, Jr., for appellants. Clinton L. White, for respondent.

HAYNES, C. The first of these actions (Herman W. Hoppe et al. v. Julia Hoppe and W. A. Fountain), was to obtain a partition of the lands described in the complaint, between the plaintiffs and Julia Hoppe; Fountain being made a party defendant because he claimed to be a mortgagee of the whole of the premises under a mortgage executed by the defendant Julia Hoppe. The second of these actions was afterwards brought by Fountain against Julia Hoppe to foreclose said mortgage, and the plaintiffs in the first action intervened in the second, and by order of the court these actions were consolidated. Fountain demurred to the complaint in partition, and also to the complaint in intervention, and to the answer of Julia Hoppe in the foreclosure case; and these demurrers were each sustained, and judgment dismissing the action for partition, and the complaint in intervention, and foreclosing the mortgage, was entered. The interveners and Julia Hoppe separately appeal from the judgment upon the judgment roll, and a bill of exceptions setting out the order consolidating the actions, and excepting to the rulings upon demurrer. The facts set out in the several pleadings demurred to are substantially the same, and show the following facts: F. W. Hoppe died August 10, 1881, leaving the appellant Julia, his widow, and nine children, of whom these interveners were minors, the others being of full age. At the time of his death he was possessed of a tract of land, upon which he and his family resided, containing about 160 acres, situated in Sacramento county, the same being community property. The widow was appointed administratrix, and on October 1, 1881, filed an inventory and appraisement of the estate, wherein said land was appraised at $4,000. She also filed a petition praying for an order setting aside said land, with the dwelling house thereon, "for the use of the family of deceased," and alleged that the family consisted of herself and nine children, all of whom were named therein, but their ages were not given, nor was it alleged that any of them were minors. Upon this petition, on the 7th day of October, 1881, the court made an order, of which the following is a copy: "In the Matter of the Estate of F. W. Hoppe, Deceased. Julia Hoppe, the administratrix of the estate of F. W. Hoppe, deceased, having on the 21st day of September, 1881, made application to the court, by petition, for an order setting apart, for the use and benefit of the family of said deceased, the real estate mentioned in said petition, together with the improvements thereon, as a homestead, and it duly appearing to the satisfaction of the court, from the papers on file in the matter of said estate, and other evidence, that said deceased was a resident of Sacramento county at his death, and left estate therein; that letters of administration were duly issued to said Julia Hoppe on the 5th day of September, 1881, and said administratrix duly returned an inventory and appraisement of said estate that the family of said deceased consist of said Julia Hoppe, his widow, and Emma, Frank, Edward, Othelie, Clara, Robert, Herman, Louis, and Lena Hoppe, his children; and that said applicant, Julia Hoppe, is entitled to have the said premises set apart to her for a homestead, and that the same does not exceed in value five thousand dollars,—it is hereby ordered, adjudged, and decreed that all that certain piece or quantity of land lying and being in the county of Sacramento and state of California, and particularly described as follows, to wit, the east ½ of the northwest ¼ of section 34, township 8 north, range 5 east, and the west ½ of the northeast ¼ of section 34, township 8 north, range 5 east, Mt. Diablo base and meridian, containing about 160 acres, together with the dwelling house thereon, and its appurtenances, be, and the same is hereby, set apart to the widow of said F. W. Hoppe, deceased, as a homestead, and shall not be subject to administration, and it is further ordered that a certified copy of this decree be duly recorded in the office of the county recorder of Sacramento county. Done in open court this 7th day of October, 1881. Robt. C. Clark, Judge of the Superior Court." The complaint in intervention further alleged that in the application for letters of administration the names of the interveners were stated, together with their respective ages; that no homestead had been selected, declared, or recorded by F. W. Hoppe and his wife, or either of them, prior to his death, that at the time said homestead was set apart they were minors, the eldest being then 14 years old and the youngest 5; that the court did not fix a day for the hearing of said petition; that no notice was given, in any manner, of the hearing; that they had no notice of the hearing; that they had no guardian, general or special; and that they were not represented at the hearing by attorney appointed by the court, or by any person. On December 20, 1888, Julia Hoppe executed a mortgage upon the whole of the homestead to respondent, Fountain, to secure the sum of $5,000, and it was this mortgage which was foreclosed; and, in regard to the mortgage, it was alleged that Fountain took it with full knowledge of all the facts.

Appellants contend that the order setting apart the homestead, rightly construed, was an order for their benefit, and vested title to an undivided one-half thereof in them in accordance with section 1468 of the Code of Civil Procedure; and, if that proposition cannot be sustained, that the order must be held void, as, if sustained, it would have the effect of divesting them, not only of their homestead rights under the statute, but also of their inheritance as heirs, without notice, or any opportunity of protecting their interests; while respondent contends that the order was simply erroneous; that it was appealable, and, not having been appealed from, it is a final judgment, and vested the title in the widow, and, being a proceeding in rem, no notice was required; and that, therefore, his mortgage is valid as against the interveners, as well as the widow.

1. As to the complaint in intervention, respondent insists that the demurrer was properly overruled, for the reason that the interveners assert a hostile title, and that such title cannot be litigated in an action to foreclose the mortgage. It was so held in Ord v. Bartlett, 83 Cal. 428, 23 Pac. 705, and Cody v. Bean, 93 Cal. 579, 29 Pac. 223, and in other cases cited therein. So far as the foreclosure proceeding is concerned, it can have no effect upon the title of the adverse claimant, unless he is made a party. It is only such title as the mortgagor may have that would be acquired by the purchaser at a foreclosure sale, and the title of the adverse claimant may be afterwards litigated with the purchaser, unaffected by the decree in foreclosure. But this case presents a feature distinguishing it from the cases above cited, though it is true in this case, as well as in those, that the title of the interveners would not be affected by the foreclosure. Respondent's complaint alleged that the mortgage contained a covenant that, in any proceeding to foreclose it, the court should, upon the filing of the complaint, or at any time thereafter, if requested by the plaintiffs, name some disinterested person as receiver, and authorize such receiver to at once take possession of the mortgaged premises, and collect the rents and profits thereof, and apply them to the satisfaction of the judgment, and to continue in the use and possession of the premises, and collect the rents and profits, until the premises should be redeemed, or title vested in the purchaser, and prayed that, upon the filing of the complaint, such receiver be appointed by the court. Here it is apparent there was an attack upon the right of the interveners to the possession of their interests in the homestead, and a demand that the rents and profits of the whole of the land, including their shares, should be taken, and applied towards the satisfaction of the plaintiffs' mortgage. To such issue the interveners had

a right to come in, and plead their title, and thus protect their possession and their interest in the rents and profits of the land, whether any part of such rents and profits accrued to the adults, personally, or pertained generally to the homestead right. The demurrer to their complaint in intervention should therefore have been overruled, unless the facts stated therein failed to show that they had an interest in the land which would be affected by the relief sought in plaintiffs' complaint. It therefore becomes necessary to consider the principal question in the case, viz. whether the order setting apart the homestead had the effect of vesting the entire title to the homestead in the widow, and barring the minor children of all right therein.

At the time of the death of F. W. Hoppe, and at the time the homestead was set apart, section 1465, Code Civ. Proc., as amended in 1880, and section 1468, as amended in February, 1881, were in force. 3 Deering's Codes. Under section 1465, where no homestead had been declared in the lifetime of decedent, it is made the imperative duty of the court, either of its own motion, or upon petition, to set apart a homestead out of the common property for the use of the surviving husband or wife "and the minor children;" and section 1468 provides that: "When property is set apart to the use of the family in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one." The questions arising upon the order of the court setting apart the homestead, and relieving the land from administration, must be solved in the light of the Code provisions above mentioned, and the law relating to the jurisdiction of courts and the conclusiveness of judgments; the ultimate questions being: (1) In whom did the order vest the title to the homestead? And (2) if it vested the entire title in the widow, are the interveners estopped by the judgment or order from now asserting the right which the demurrer concedes they were entitled to under the statute, and which should have been secured to them by the order? As against the interveners, respondent's rights must rest upon the fact that a homestead was set apart, as otherwise the land was not released from administration, and in such case the mortgage could only affect such interest as the widow might have in the land subject to administration. Clearly, it could not affect the rights of creditors, nor the interests of the children, as heirs of their deceased father, unless the land was released from administration. To sustain his judgment as against the interveners, he must therefore go a step further, and show that the order in question not only relieved the land from administration, and took away from the minors their right to an undivided one-half of the homestead, but also the rights of all the children as heirs. That all this could be accomplished without notice to the children, and without being in any manner represented or heard, is sufficiently startling to challenge our most careful consideration. It is doubtless the general rule that no one is concluded or bound by a judgment, in the absence of notice, actual or constructive. It is said, however, that the legislature may authorize a judgment to be rendered against a party without notice. But, "if the expression used in the statute will admit of a doubt, it will not then be presumed that a construction dispensing with notice can be agreeable to the intention of the legislature, the consequences of which are so unreasonable. But, where the signification is manifest, there is no power of dispensation in the courts." Steamboat Co. v. Foster, 5 Ga. 194. See, also, Meade v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372, where a similar statement of the law is made by Chief Justice Marshall. Assuming, as respondent contends, that the statute does not require notice of a proceeding to set apart a "probate homestead," under the principles laid down by the cases above cited, it follows that the action of the court, in the absence of notice to the minors, can go no further than the statute expressly authorizes; and, if it assumes to take away from any one not before the court a right given by the statute, such person cannot be bound by the judgment. This also results from a principle applicable to all judgments, viz. that no one, not even a party with notice, is bound by the adjudication of a fact not necessary to be adjudicated in the proceeding. Greenl. Ev. § 534. That a proceeding to set apart a probate homestead is in rem is conceded; but the question to be solved is, how far, and as to what matters, a judgment in rem is conclusive. A judgment strictly in rem is binding and conclusive on all the world, while a judgment inter partes only concludes parties and privies; and hence it is that, in setting apart a homestead, only those facts which are essential to the determination of the status of the property are conclusively adjudged. For such purpose the executor or administrator represents all persons affected by the order, but it is obvious that he cannot represent adverse interests in the homestead so set apart, so as to bind them, nor litigate for them a controversy as to whether A. is or is not a minor, his age being disputed. The probate of a will, for example, does not establish the fact that the dispositions therein were not beyond the power of the testator. The result is that it is the judgment of the probate court on the will, as distinguished from specific findings, or facts necessarily involved therein, that is binding on all persons.

Bigelow, Estop. p. 222. The case of De Mora v. Concha, 29 Ch. Div. 268 (decided in 1885), is a most instructive case upon this subject. A native of Chile made his will in London, and shortly thereafter died there. A caveat having been entered on behalf of the testator's daughter, the will was propounded by the executors, they alleging that the testator was domiciled in England. The daughter alleged that the testator was domiciled in Chile, and that his will was not executed according to Chilean law. The judge of the probate court made a decree declaring the will valid, found that the testator was domiciled in England, and decreed probate to the executors. The daughter afterwards filed a bill against the executors, alleging that the testator was a domiciled Chilean, that his will, being executed in England according to English law, was good by the law of Chile, but only so far as the testator could, by the law of Chile, dispose of his property by will; that, according to that law, he could only dispose by will of one-fourth of his personal estate; and that the other three-fourths belonged to the plaintiff. The executors set up the decree of the probate court, that he was domiciled in England, as a bar. It was held that the decree of the probate court was not conclusive in rem as to the domicile, for that it did not appear that the decree was necessarily based on the finding as to domicile; and held, further, that the finding by the probate court as to domicile was not binding inter partes, as between the daughter and the legatee, for that it was a finding between the daughter and the executors; that the executors could not, by litigating a question of domicile, which it was not necessary to decide for the purposes of the suit, conclude the legatee, and as the legatee was not bound the daughter could not be bound. So far as the power of the court to declare a homestead was concerned, the existence or nonexistence of minor children was a wholly immaterial fact, not necessary to be either considered or decided, since it could not affect either the character, extent, duration, or value of the homestead. Nor was it in the power of the widow, as administratrix, to represent the minor children, or any one interested in the estate, whether heir or creditor, further than the proceeding was strictly in rem, viz. to withdraw or relieve the land from administration, and devote it to homestead purposes for those whom the statute declared to be entitled to it. The proceeding, in the absence of parties duly notified, could go no further than to give effect to the legislative provision, leaving the parties so entitled to assert their interests in the homestead whenever a hostile claim should make it necessary.

Respondent further contends that the order in question was appealable, and, not having been appealed from, is final and conclusive. This question was considered in the recent case of In re Moore, 96 Cal. 530 (par. 7) 31 Pac. 584, where it was held that an order setting apart a homestead, "the undivided one-half thereof to the widow," and the undivided one-sixth to each of three children named, out of the separate property of the deceased, though erroneous, in that it should have been set apart for a limited time, only, and not in fee, no appeal having been taken therefrom, the title was in the persons named in the decree, as against the heirs of the deceased. Mr. Justice Paterson dissented upon this point, while concurring in the reversal upon other grounds, and placed his dissent squarely upon the ground that the court "could not—had no power to—set aside a homestead in fee," out of the separate property of the deceased, and that no appeal from the order was necessary. But that case is clearly distinguishable from this. There the minor children were adverse parties. The widow in that case petitioned for a homestead. The children appeared by their guardian, and filed objections to granting the prayer of the petitioner. Their objections prevailed, the petition was denied, the petitioner appealed, and the supreme court reversed the order, and remanded the case for further proceedings. See Estate of Moore, 57 Cal. 437. After the case was remanded the superior court made the order referred to, and that order was not appealed from. In that case the minor children were before the court, and were represented by their guardian, and had an opportunity to litigate every question relating to the homestead, and to make a record upon which this court could have reviewed any alleged error, while in this case the minor children were not in fact before the court, nor constructively present for any purpose, except in so far as the proceeding was in rem. For that purpose they were represented by the administratrix, who was the petitioner, but who certainly was not authorized to represent them in a proceeding by which she acquired, as respondent contends, their interest in the homestead. Besides, neither the petition nor the order disclosed the fact that these interveners were minors, and it is at least questionable whether an appeal upon that record would not have been fruitless. But the rights of the minors were not adjudicated. The statute is mandatory. The judge must set apart the homestead; the word "may" in section 1465, Code Civ. Proc., being used for "shall." In re Ballentine, 45 Cal. 696. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually or necessarily included therein, or necessary thereto." Code Civ. Proc. § 1911. That there were children is recited in the order, but it does not appear that the court investigated or decided as to the age of any of them, for such investigation was not necessary to the validity of the order setting apart a homestead; and, as the minors were not parties to the proceedings for the purpose of litigating their right to an interest in the homestead, the order should not be construed as having excluded them. The order does not necessarily affirm or deny that any of the children were minors. If the homestead could not have been set apart unless there were minor children, the inference that the court found that there were minor children would be inevitable; but, as the homestead must have been set aside if there had been no minor children, there being a widow, an inference that the ages of the children were adjudicated can only be drawn by argument, and such adjudication cannot be inferred by argument or construction. Freem. Judgm. § 258, and cases there cited. This proceeding being in rem, and without notice, all that could be properly adjudged was the status of the property, viz. that it was a homestead, and was relieved from administration; and the order should be so read and construed, if its language will permit it. In Watson v. His Creditors, 58 Cal. 558, speaking of a homestead declared before the death of either spouse, this court said: "The law fixes the rights of the parties, and the title by which the property shall be held; and, when the statute declares that the title shall vest absolutely in the survivor, no order of the probate court could make it the joint property of the husband and the children of the husband and wife." And in Rich v. Tubbs, 41 Cal. 34, in relation to the same character of homestead, it was said: "The purpose and effect of the order is merely that the property be relieved from administration. The question of title, as between claimants, is to be determined in another forum." We think that only that effect should be given to an order setting apart a probate homestead. If it be true that the statute does not require notice, such ought to be the only effect of the order. If, however, the effect of the order was to vest the title in the widow, she is estopped to deny the right of the minors therein, and, if necessary for their protection, would be held a trustee of that title for them, to the extent of their interest; for, as they are not estopped by the judgment from asserting their interest, nothing more than the legal title could pass to her by the judgment. If the mortgage to Fountain had not been executed, I apprehend that no one would contend but that the interveners could successfully assert their right to an undivided one-half of the land. Whether an incumbrancer without notice other than that imparted by the record in the proceeding to set apart the homestead, seeing therein the names of the children, their ages not being stated, would not be obliged to presume that they were all minors, and so interested in the homestead, it is not necessary to decide, inasmuch as the demurrer admits that he took the mortgage with knowledge or notice of the fact that the interveners were all minors, and in such case he could be in no better position than his mortgagor.

2. The demurrer to the complaint for partition was properly sustained. For the purposes of this demurrer, we assume that the facts stated show that the petitioners have an interest in the homestead to the extent claimed; but we think that a homestead cannot be partitioned, at least until the youngest child attains his majority. There are many instances in which the right to partition must be denied because the property has been charged with some trust, or dedicated to some purpose which would be defeated or impaired by the division of such property. In Outcalt v. Appleby, 36 N. J. Eq. 81, among other reasons for refusing a partition, it was specified that the testator did not contemplate a division of the residuary estate as then proposed; that by his will he expressed his wish that the trustees hold the improved property unsold for 10 years, unless, in their judgment, it would not be advisable to do so. In Gerard v. Buckley, 137 Mass. 478, the intention of the testator was also held to control the right of partition. See, also, Hill v. Jones, 65 Ala. 214. In Missouri the statute vests in the family of the deceased husband an estate in his realty which does not cease to exist until the widow dies and the youngest child becomes of age; and it was held that a purchaser from the mother of a minor child, who has a homestead right in the property bought, is not entitled to partition against the child; that the child is entitled to a homestead in the property, and not merely an aliquot part thereof. Rhorer v. Brockhage, 13 Mo. App. 397. So in Trotter v. Trotter, 31 Ark. 145, it was held that there can be no partition of the homestead. The question whether there may be a partition of a probate homestead has not heretofore been presented to this court. Principles, however, have been announced which I think are conclusive of the question. In Estate of Moore, 57 Cal. 442, 443, it was said: "A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. * * * The homestead, when set apart, is to be set apart for the benefit of the widow and children. Every minor child has an interest, and has a right to be named in the decree. The property set apart is to be a home for them all; she, the widow, taking her place as the head of the family. It certainly could not be said that her deed, conveying her interest as successor, would interfere with and defeat the purpose of the law in giving the family an abiding place." And quoting from Bates v. Bates, 97 Mass. 395, the court further said: "The estate of homestead is one of a peculiar nature. It is a provision by the humanity of the law for

a residence for the owner and his family." It is true that section 1468, Code Civ. Proc., provides that the homestead so set apart shall belong to the surviving husband or wife, if there be no minor child or children; but, if there be a minor child, one-half of the homestead shall belong to the surviving husband or widow, and the remaining one-half to the minor child, or in equal shares to the minor children, if there be more than one. But this provision only declares the ultimate ownership, and does not at all affect the use of the property as a family homestead. The homestead is of the same character, value, and extent, whether there be one minor child or several; and the necessity for the continuance of the homestead until the youngest child has attained majority is as imperative as the creation of the homestead when there was but one. In this case one of the children is still a minor. If the homestead is partitioned, it is destroyed as a homestead, and the interest of this minor is restricted to one-eighth of what had been the homestead. Which of the parties, in case of partition, shall have the dwelling house which has sheltered the family? And, if allotted to another, can the minor still claim shelter therein? Has he not received his portion, and shall he now say that he has any right in the portion allotted to another? A partition is therefore a destruction of the homestead, an undoing of the imperative requirement of the statute that a homestead shall be set apart for the use of the family (In re Ballentine, 45 Cal. 696), and would be in violation of a wise and beneficent public policy; and surely, if the will of a testator, expressing his desire or intention that his property shall be held in common, and not divided, is sufficient to prevent a partition, the obvious purposes and intent of the statute ought to be held sufficient. It may be said, however, that the minor has joined in the petition for a partition of the homestead, and is represented therein by a guardian ad litem, and that, therefore, no objection to a partition should be urged in his behalf. But the court will, sua sponte, interpose for the protection of a minor, and especially where, as here, a question of public policy is involved. We do not say that no case could arise where the court would not order a partition of a homestead. Circumstances might exist where it would be the duty of the court, for the benefit of the minor, to decree a partition, or order the interest of the minor to be sold. But this qualification need not be discussed. It is sufficient to say that no reason appears upon the face of the complaint why the homestead should be partitioned during the minority of one of the plaintiffs, and therefore it does not state facts which would authorize the partition of a homestead, which, if it can be partitioned at all during the minority of any of the beneficiaries, could only be done under special circumstances alleged in the complaint, and proved at the hearing. Even in case of application by or on behalf of infants for the partition of lands held under an ordinary tenancy in common, and not affected by homestead or other special right, it is said the courts are specially charged with their protection; and, if the conclusion is reached that the partition will not prove beneficial, it ought to be denied. Freem. Coten. § 457; Hartmann v. Hartmann, 59 Ill. 104; Freeman v. Freeman, 9 Heisk. 306.

3. The answer of Julia Hoppe in the foreclosure case set out all the facts in relation to the homestead hereinbefore stated, and alleged that the mortgage was void, and a cloud upon the homestead, and prayed that it be canceled. The question is made whether the mortgage created a lien upon her interest in the land, whatever that interest may be. Unquestionably, she is the owner of an undivided half. It is contended, however, that a homestead cannot be mortgaged without the concurrence of all who are interested in the title; and cases are cited of homesteads declared upon community property in the lifetime of both spouses, in which it is held that neither can convey any interest in the homestead by a separate deed. These cases are not in point. The effect of such declaration of homestead is to create a joint tenancy with survivorship. It ceases to be community property, and therefore the husband cannot convey it by his deed. Nor does it become the wife's separate property, and she cannot convey it. And, as the statute provides the mode in which it can be conveyed, neither, separately, can convey any interest therein. But upon the death of one of the joint tenants the estate vests in the survivor, and may then be conveyed or mortgaged. A probate homestead does not create a joint tenancy, though it creates a joint use.

It is further argued that, if the widow may mortgage her interest in the homestead, the mortgagee may foreclose; that the purchaser would become tenant in common with the minors, the homestead be destroyed, and the object of the legislature defeated. So far as homestead purposes are concerned, the principal object of the statute is accomplished when the youngest child arrives at majority. The homestead may then be partitioned, and each hold his interest in severalty. We have already held, in considering another branch of this appeal, that a partition cannot be had until all the children have arrived at majority; and, if this cannot be done by action, it cannot be accomplished in an indirect manner. No stranger can be admitted to the benefits and privileges of the homestead by succession to an undivided interest. But all this does not make the mortgage void, though it may postpone the possession of the purchaser. As the widow is the head of the family, and as the homestead must continue until the minors have all reached majority, she has the same interest in retaining the possession, and controlling the rents and profits, that the interveners have, and therefore, though her mortgage is not void, her answer is not obnoxious to a general demurrer.

The order sustaining the demurrer to the complaint in partition, and the judgment dismissing that action, should be affirmed. The judgment foreclosing the mortgage should be reversed, with directions to overrule the demurrers of respondent to the complaint of the interveners and to the answer of the defendant, with leave to respondent to answer the complaint in intervention.

We concur: SEARLS, C.; BELCHER, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment dismissing the action for partition is affirmed, and the judgment foreclosing the mortgage is reversed, with directions to the court below to overrule the demurrers to the complaint in intervention, and to the answer of Julia Hoppe, respectively, with leave to the plaintiff to answer the complaint of the interveners.

DE HAVEN, J. I concur in the judgment.

102 Cal. 47

TREZEVANT v. W. R. STRONG CO. (No. 18,212.)

(Supreme Court of California. March 28, 1894.)

VENUE—SUIT AGAINST CORPORATION.

Code Civ. Proc. § 395, giving a defendant a right to have the action tried in the county where he resides, gives a corporation no absolute right to a change of venue to the county where its principal office is situated, when sued in one of the counties named in Const. art. 12, § 16, providing that corporations may be sued in the county where the contract was made, or the liability arose, or the breach occurred, or where its principal place of business is situated.

Department 2. Appeal from superior court, Fresno county.

Action by N. M. Trezevant against the W. R. Strong Company for goods sold and delivered. From an order denying its motion for a change of venue, defendant appeals. Affirmed.

Stanton L. Carter and Johnson, Johnson & Johnson, for appellant. J. P. Meux, for respondent.

DE HAVEN, J. This is an appeal by the defendant from an order denying its motion for a change of venue from the county of Fresno to the county of Sacramento. The defendant is a corporation, and its principal place of business is in the county of Sacramento. The action is one to recover the value of merchandise alleged to have been sold and delivered to the defendant by the plaintiff, and it was admitted upon the hearing of the motion in the superior court that the liability of defendant accrued in the county of Fresno, where the action was commenced. The motion of the defendant for a change of the place of trial to the county of Sacramento is based solely upon the ground that its residence is in that county, within the meaning of section 395 of the Code of Civil Procedure, and that, under that section, it is entitled to have the action tried in the county of its residence. It must be conceded that, the defendant being a corporation, its place of residence is in the county of Sacramento, where it has its principal place of business. Jenkins v. Stage Co., 22 Cal. 537; Cohn v. Railroad Co., 71 Cal. 488, 12 Pac. 498; Buck v. City of Eureka, 97 Cal. 135, 31 Pac. 845. It will thus be seen that the question presented for decision is whether a corporation which is sued in a county other than that in which it has its principal place of business, but where its liability arose, has the absolute right, under section 395 of the Code of Civil Procedure, to have the action tried in the county of its residence.

Section 16, art. 12, of the constitution of this state, declares: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is argued upon the part of the defendant here that the right of a plaintiff to sue a corporation in any other county than that of its residence is, by the last clause of the section of the constitution just quoted, made "subject to the power of the court to change the place of trial, as in other cases," and as, under section 395 of the Code of Civil Procedure, a natural person who is a defendant has the right to have a personal action against him tried in the county where he resides, the same right is secured by the constitution to a defendant corporation, when sued upon a personal demand. The constitution, however, can receive no such construction. That instrument, in the section above quoted, gives to a plaintiff the right to sue a corporation in either of the counties therein referred to; and the option thus given includes something more than simply the bare right to choose the county where the complaint shall be filed in the first instance. The words "may be sued," found in the section of the constitution just cited, are broad enough to confer upon a plaintiff, not only the right to commence an action in either of the counties named for the recovery of a real or supposed right, but also the right to prosecute such action in the county where it is commenced, unless the place of trial is changed for some other reason than that of the residence of defendant. It was held in Lewis v. Railroad Co., 66 Cal. 209, 5 Pac. 79, that an action against a corporation to recover damages for injuries sustained was properly tried in the county where the injury was inflicted, and that the defendant corporation had no right to have the place of trial changed to the county of its principal place of business; and the principle upon which the case was necessarily decided is really decisive of the question involved here. In defining the scope of the decision in that case, it was said by this court in Fresno Nat. Bank v. Superior Court, 83 Cal. 498, 24 Pac. 157: "By this decision, it is settled that, where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue as matter of absolute right, but only as in other cases, and for other reasons than that the county in which the action is commenced is not the proper county." It seems entirely clear to us that the motion of defendant for a change of venue was properly denied, and that the right claimed by it is inconsistent with the right given the plaintiff to sue in the county where defendant's liability arose, if he elected so to do, rather than in the county of defendant's residence. Order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

BURNESS v. W. R. STRONG CO. (No. 18,211.)

(Supreme Court of California. March 28, 1894.)

Department 2. Appeal from superior court, Fresno county.

Action by H. Burness against the W. R. Strong Company. From an order denying its motion for a change of venue, defendant appeals. Affirmed.

Stanton L. Carter and Johnson, Johnson & Johnson, for appellant. J. P. Meux, for respondent.

PER CURIAM. This case presents the same question involved in Trezevant v. W. R. Strong Co. (No. 18,212, just decided) 36 Pac. 395; and, upon the authority of that case, the order here appealed from must be affirmed. Order affirmed.

(102 Cal. 184)

PEOPLE ex rel. HART, Attorney General, v. CARUTHERS SCHOOL DIST. et al. (No. 18,188.)

(Supreme Court of California. March 30, 1894.)

School District—Elections—Notice—Sufficiency.

1. Under Pol. Code, § 1880, providing that trustees of a school district may submit to the electors thereof the questions whether bonds shall be issued for purchasing a school lot and for building school houses, the question of buying a lot and building a school house may be submitted jointly with the question of the issuance of bonds.

2. Under Pol. Code, §§ 1831, 1832, requiring the trustees to give notice of such elections by posting notices in three public places, and by publishing notice in the county newspaper,—the notice to specify time and place,—an election is void where the posted notice first stated that the election would be held in the school house in Caruthers, and, further along, that it would be held at the hall in Caruthers, and where the published notice stated that it would be held at the hall in Caruthers, and also stated that it would be held at the school house in Caruthers.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the people, at the relation of W. H. H. Hart, attorney general, on the affidavit of Mary E. Caruthers, against the Caruthers school-district trustees, to determine the regularity of an election held in Caruthers school district. From a judgment declaring the election valid, relator appeals. Reversed.

Atty. Gen. Hart and J. P. Meux, for appellant. L. L. Cory, for respondents.

GAROUTTE, J. The validity of an election held in Caruthers school district is here assailed, and a determination of the regularity of the proceedings under which such election was held is determinative of the case. Subdivision 5 of section 1617 of the Political Code provides that the trustees of a school district shall have power, "when directed by a vote of the district, to build school houses, or to purchase or sell school lots." The question voted upon by the electors of this school district was: "Shall bonds to the amount of $10,000 be issued and sold for the purpose of purchasing a school lot, and building a school house thereon?" Under the statute, two ways are provided by which funds may be secured to purchase lots and erect school houses. It may be done either by direct tax, or by the issuance and sale of bonds; but, in both cases, it can only be done after a vote of the district to that effect. And sections 1833 and 1880 of the Political Code expressly allow the board of trustees to submit either of these propositions to a vote of the district whenever such board deems it advisable; thus clearly indicating that the question of the buying of a lot and building of a school house may be submitted—and, we think, properly should be submitted—jointly with the question of the issuance of the bonds, or the voting of the tax. This construction involves no contradiction, or even inconsistency, with the terms of the general provision found in section 1617; but, on the contrary, these sections fall directly under, and in line with, that general provision. It follows that the proposition presented to the voters of this school district was, in form, entirely justified by the law.

It is intimated by respondents that, while this election may have been sufficiently invalid to nullify all of the bonds issued thereunder, still it was sufficiently valid as a favorable expression of the voters of the district looking towards the purchase of the lot and the erection of the building. This view is unsound. The election must be conducted in substantial compliance with the statute, whatever may be its purpose; and, if there be no substantial compliance with the statute, it is insufficient to form the basis for any future proceedings of any kind or character. The statute provides certain requirements to be observed in the holding of such an election as is here involved, and also provides that in other respects it must be held, as nearly as practicable, in conformity with the general election law. And, as to the course adopted in the conduct of the present election, we shall now direct our attention. The board of trustees are required to give notice of the election by posting notices thereof in three public places, and also by publication in a newspaper printed in the county, if there be one.[1] Among other things, this notice is required to state the time and place of holding such election, and the hours during the day (not less than six) in which the polls will be open.[2] The record discloses various irregularities in the conduct of the election, the most important of which—and one which we think fatal to its validity—being defects in the notice of election. There is no requirement of the election law more important in its observance than that the notice should clearly state the particular place where the election is to be held; and, in that regard, we think the present notice so contradictory and misleading that it fails to satisfy the statute. The notice ordered to be given by the board of trustees informed the electors of the district that the election would be held "at the hall in the town of Caruthers, in said Caruthers school district." The notice posted stated first that the election would be held "at the public school house in the town of Caruthers, in said Caruthers school district;" and, further along, it stated that the election would be held "at the hall in Caruthers, in Caruthers school district." The notice which was published in the newspaper informed the electors that the election would be held "at the hall in Caruthers, in the town of Caruthers, in said Caruthers school district," and also it stated that the election would be held "at the school house in Caruthers school district." There appears to have been a studied attempt upon the part of some one having these matters in charge to locate this election at a different place at every opportunity presented. The notices posted and published are inconsistent and contradictory in themselves, and also inconsistent and contradictory with each other. We cannot say that the town hall and the public school house in the town of Caruthers are the same place, or that the school house in Caruthers school district and the public school house in the town of Caruthers refer to the same building. They may be the same, and, again, they may be situated miles apart. We might conjecture that these various places were one and the same, but we are not allowed to enter the domain of conjecture. We can only judge of these notices by the facts they state; and, read by their face, they are misleading and contradictory, and do not substantially comply with the statute that requires the place where the election is to be held to be clearly and unmistakably set forth.

There are a few other irregularities, which, although not so serious, might well be remedied, if another election be held. The order for the publication of the notice runs to the Fresno Daily Republican. The notice was published in the Fresno Morning Republican. This is a variance, but it is unnecessary to decide whether or not it be a substantial one. The polls were open from the hour of 12 m. to 7 p. m. Under the general election law the polls close at 5 p. m.; and while, in an election of the present character, it is only necessary that the polls be open six hours, the better practice, certainly, would be to confine those six hours within the time prescribed for keeping the polls open at a general election.

Upon the principal ground discussed, we think the election void. The judgment is reversed, and the cause remanded, with directions to the lower court to quash the proceedings.

We concur: PATERSON, J.; HARRISON, J.

CURTIS v. UNDERWOOD et al. (No. 18,230.)

(Supreme Court of California. March 21, 1894.)

Department 1. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Addie E. Curtis against Abbie M. Underwood, a minor, and E. B. Moore, her guardian, to quiet title. From a judgment for defendants, and from an order denying her motion for a new trial, plaintiff appeals. Affirmed.

Louttit, Woods & Levinsky, for appellant. Reddick & Solinsky, for respondents.

PER CURIAM. The appeal in this cause involves like questions with those in No. 18,229, between the same parties, this day decided (36 Pac. 110), and the judgment and order appealed from herein are affirmed for the reasons given in said cause.

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4 Cal. Unrep. 600

GROGAN v. NOLAN. (No. 19,348.)

(Supreme Court of California. April 10, 1894.)

COSTS ON FORECLOSURE—ATTORNEY'S FEE.

Where an attorney's fee on foreclosure is taxable "in the bill of costs," an appeal from a judgment allowing costs, taxed at $22.90, and plaintiff's attorney's fee, of $100, is frivolous.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Terrance Grogan against S. A. Nolan to foreclose a mortgage. Judgment for plaintiff. Defendant appeals. Affirmed.

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[1] Pol. Code, § 1831. [2] Pol. Code, § 1832.

Purington & Curtis, for appellant. Curtis & Oster, for respondent.

PER CURIAM. Action for the foreclosure of a mortgage. Judgment was rendered in favor of the plaintiff, and the defendant has appealed from the judgment, without any exceptions. It was provided in the mortgage that "in the event of foreclosure of this mortgage, a reasonable attorney's fee shall be taxed by the court, and included in the bill of costs." Findings of fact were waived, and the court, in its judgment, fixed the sum of $100 as the amount of attorney's fees to be allowed the plaintiff, and directed that the property be sold, and that the proceeds be applied to the payment "of the expense of sale and costs of this action, the plaintiff's attorney's fee, of $100, and the amount found due on said promissory note," and taxed the costs of the plaintiff at the sum of $22.90. The only point presented in support of the appeal is that the stipulation in the mortgage did not give the court any authority to allow an attorney's fee, except as a part of the bill of costs, and that its action in making a special allowance in the decree was error. There is no merit in this proposition, and, as the appeal is evidently frivolous, the judgment is affirmed, and the sum of $100 is allowed to the respondent, for damages, as a part of his costs on appeal.

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101 Cal. 671

BACIGALUPI v. CADAMARTORI et al.

(No. 18,222.)

(Supreme Court of California. March 23, 1894.)

EQUITY—RESCISSION OF CONTRACT—FRAUD.

An allegation of fraud in procurement of a mortgage, in that it was given merely to obtain a reconveyance of property held in trust by the mortgagee, which he wrongfully refused to reconvey, is not supported by proof that the mortgagors met the mortgagee at the office of their attorney, with whose aid and advice they compromised their dispute with the mortgagee, and gave the mortgage in settlement.

Department 2. Appeal from superior court, Tuolumne county; Joseph H. Budd, Judge.

Action by Louis Bacigalupi against Francisco Cadamartori, for himself, and as executor of the will of C. Lombardo, deceased, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

F. W. Street, for appellants. J. B. Curtin, for respondent.

FITZGERALD, J. Action to foreclose a mortgage. The defendants, in their answer, admit the execution of the note and mortgage, but deny that there was any consideration therefor, and aver fraud in the procurement thereof. The facts constituting the fraud complained of are substantially alleged as follows: That, prior to the execution of the note and mortgage, plaintiff held the legal title to certain mining property theretofore conveyed to him in trust by the defendants; that, upon repeated demands being made upon him by the defendants for a reconveyance of said property, plaintiff, in violation of his trust, refused to do so unless the defendants acceded to certain demands made upon them by him, among which was the execution of the note and mortgage in question; that, in making these demands, plaintiff, with intent to deceive, and defraud the defendants of their said property, falsely and fraudulently represented to them that the title thereto was vested absolutely in him, and that he could not be legally compelled to reconvey it; that defendants, relying upon these representations, which they believed to be true, and being in fear of losing their property unless they yielded to his demands, although they were not indebted to him at the time in any sum whatever, executed the note and mortgage upon which this action is brought. Conceding, for the purpose of this case, that the mining property referred to was conveyed by defendants to plaintiff in trust, as alleged, and that it was so accepted and held by him, although the court, in its decision, found to the contrary, still, the evidence shows that, subsequent to the alleged refusal to reconvey, and the making of the fraudulent representations complained of,—as to which, however, it might be well to state there was no evidence, and the court so found,—the plaintiff and defendants met at the office of the attorney of the latter, and then and there, acting upon the advice and with the assistance of their said attorney entered into an agreement with the plaintiff, by the terms of which the matters in dispute between them were compromised and settled, and the note and mortgage herein given in pursuance thereof. In view of this settlement, which the court, in its decision, finds was a compromise agreement, and was made "without any menace, duress, or fraud, or fraudulent intent, false statement, or misrepresentation," the terms of which "were fully understood and agreed to by all of the parties," which finding is fully sustained by the evidence, it follows that the errors complained of are either untenable or immaterial. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

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4 Cal. Unrep. 541

CHRISTENSEN v. McBRIDE. (No. 18,182.)

(Supreme Court of California. March 24, 1894.)

APPEAL—QUESTIONS OF FACT—NEWLY-DISCOVERED EVIDENCE.

1. Findings of fact cannot be reviewed on conflicting evidence.

2. Newly-discovered evidence, which is merely cumulative, is no ground for a new trial.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by one Christensen against one McBride. Judgment for plaintiff. Defendant appeals. Affirmed.

James H. Budd and John E. Budd, for appellant. F. T. Baldwin, R. D. Baldwin, and Nicol & Orr, for respondent.

PER CURIAM. The principal point upon which appellant relies is that the evidence does not support the findings. We have carefully examined the testimony of the witnesses, and find a sharp conflict on all material questions. Under the well-settled rule, therefore, the findings cannot be disturbed. Whatever transactions the parties may have had prior thereto, the court evidently believed, and so found upon sufficient evidence, that on the 1st day of April, 1891, after a consideration of the items of their accounts, they agreed that the defendant was owing the plaintiff $2,260, and that the plaintiff was indebted to the defendant in the sum of $200. It is claimed that as the court found plaintiff was to pay the defendant for his board at the rate of $4 per week, and as he had boarded with the defendant 78 weeks, the defendant ought to have been allowed a credit of $312 instead of $200. This claim is based upon the assumption that the plaintiff boarded with the defendant continuously from October 1, 1889, to April 1, 1891; but the plaintiff testified that he had "been boarding in his family a portion of the time." The court doubtless believed that some allowance had been made on account of plaintiff's absence, and that the parties had agreed, as testified by the plaintiff, to allow the defendant $200. The findings with respect to the defendant's counterclaim for use and occupation, and other affirmative matters, are as broad as the averments of the complaint, and are therefore sufficient. The affidavits filed on motion for a new trial set forth matters of evidence which are merely cumulative, and were properly disregarded by the court. Judgment and order affirmed.

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102 Cal. 159

MERCED COUNTY v. HELM et al. (No. 18,269.)

(Supreme Court of California. March 29, 1894.)

INTOXICATING LIQUORS — ILLEGAL SALES — CONSTRUCTION OF STATUTES.

St. 1891, p. 306, authorizes counties to license, for the purpose of revenue, all kinds of business not prohibited by law. Merced County Ordinance, § 12, requires persons who "sell" intoxicants therein to pay a license tax. Other sections declare the tax a debt payable from persons who engage in any "business" on which the tax is imposed, without having first paid the tax and procured the license. *Held* that, as St. 1891, p. 306, does not authorize counties to exact a license tax for the mere act of selling intoxicants, and as the ordinance does not purport to require a license tax for the "business" of selling intoxicants, but merely for the "sale" thereof, one is not liable for a license tax because he sold liquor.

In bank. Appeal from superior court, Merced county, Joseph H. Budd, Judge.

Action by the county of Merced against Helm & Nolan. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

F. G. Ostrander, Dist. Atty., and Frank H. Farrar, for appellant. T. C. Law and E. D. McCabe, for respondents.

HARRISON, J. In January, 1893, the county of Merced passed an ordinance fixing the rate of county license taxes upon certain occupations within the county, and providing for the collection of the same by suit, in case the persons liable to pay the tax should engage in any business subject thereto, without having first procured a license therefor. The present action was brought against the respondents to recover the sum of $3,000, claimed to be a debt due from them to the county by virtue of their having sold intoxicating liquors within the county without having first paid the license tax required by said ordinance for the quarter commencing March 1, 1893. The right of the county to prohibit the sale of intoxicating liquors in the exercise of the police power conferred upon it by article 11, § 11, of the constitution, which has been so fully discussed by counsel, is not involved in the determination of this case, as the ordinance in question does not purport to have been enacted under this power. By its very terms the ordinance is a revenue measure, and this suit is simply a civil action to recover a liability alleged to have been incurred by the defendants by virtue of the provisions of the ordinance, and the collection of a tax does not come within the exercise of police power as a prohibitory measure. That power is exercised in the enforcement of a penalty prescribed for a noncompliance with the law, or for the doing of some prohibited act. San Luis Obispo Co. v. Hendricks, 71 Cal. 245, 11 Pac. 682. As the county has chosen, by this ordinance, to require a license tax for engaging in certain kinds of business, and that this tax shall be collected by suit, and has fixed no penalty for engaging in the business, the ordinance is not to be regarded as the exercise of its police power, but rather as its desire to regulate the business and derive a revenue therefrom.

The power to pass the ordinance in question is given in subdivision 27 of section 25 of the county government act (St. 1891, p. 306), in the following terms: "To license for the purposes of regulation and revenue all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Under this power to license for revenue and regulation, prohibition cannot be effected (Cooley, Tax'n, 598); and, as the business to be licensed is one which is "transacted and carried on" within the county, the very terms of the power preclude its exercise to such an extent as to prevent the carrying on of the business. An attempt, by virtue of its exercise, to place such restrictions upon the sale of wine as would prevent its manufacture, would be in apparent contradiction to the policy of the state, as manifested in that portion of its legislation which has been directed to the encouragement of the manufacture of wines (see St. 1880, p. 52; St. 1885, p. 9; St. 1887, p. 46); and, if the county of Merced can place such restrictions, every other county can do the same, and the legislative power of the state would be thwarted by the action of the several counties. This power to impose a license tax upon a "business" cannot be extended to any subject not enumerated in the statute by which the power is conferred. The right to demand a license tax as the condition of engaging in any business within the county must be expressly conferred upon the county, and the right to impose a tax upon a "business" will not authorize imposing a tax upon the individual acts connected with such business, nor can a license tax required for one business be demanded for any act or business not specified in the ordinance providing for such taxes. Any attempt on the part of the state, or of the county as one of the political subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. Whether his property is to be taken by seizure or by suit, the rule is the same. In the one case the officer must show his warrant for the seizure, and in the other the plaintiff must establish every fact essential to the maintenance of his right of recovery. In either case the proceeding is in invitum, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. Suth. St. Const. § 363; Monterey Co. v. Abbott, 77 Cal. 542, 18 Pac. 113, and 20 Pac. 73; City of Camden v. Allen, 26 N. J. Law, 398; Sewall v. Jones, 9 Pick. 412. A tax can never be extended by construction to things not named or described in the statute as the subject of taxation. It was said by Lord Cairns in Partington v. Attorney General, L. R. 4 H. L. 122: "The principle of all fiscal legislation is that, if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an 'equitable construction,' certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The portion of the ordinance in question which fixes the amount of the license tax and the subjects upon which it is imposed is contained in the twelfth section, and in the other sections provision is made that this license tax shall be deemed a "debt" payable in advance, and due to the county from any person who "commences, carries on, engages or conducts" in the county any "business, trade, occupation, or employment" upon which the tax is imposed, without having first paid said license tax and procured said license; and the district attorney is directed to institute an action in the proper court for the collection of this tax. This section, in which is enumerated the different subjects of the license tax, declares that "all persons * * * who sell either spirituous, malt or fermented liquors, wines or ciders in said Merced county * * * shall pay quarterly in advance a license tax of $3,000 for each quarter of a year." It thus appears that, while this section purports to impose a tax for the sale of the enumerated articles, the right to collect the tax by a suit is limited to the instances in which the persons commence, carry on, engage in, or conduct some "business" for which a license tax is required; and it is a well-settled principle that without some special authority, either by the statute or by the ordinance itself, a civil action cannot be maintained to recover a license tax. City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143; Monterey Co. v. Abbott, 77 Cal. 541, 18 Pac. 113, and 20 Pac. 73. The tax fixed by this section is a charge imposed upon the sale, and not for carrying on or engaging in the business of selling. It applies to each sale before it is made, and for a single sale makes the person liable for the full amount of the tax. It is not imposed upon the "business" of selling, or limited to those who engage in such "business." The other portions of the ordinance providing a procedure for the collection of this tax cannot be invoked to change the terms of the tax, as the tax itself is only that which is fixed in the twelfth section. The distinction between a single act and the business in which the act is done is very marked, and is well recognized in adjudged cases. Weil v. State, 52 Ala. 19; Merritt v. State, 19 Tex. App. 435; Williams v. State, 26 Tex. App. 131, 9 S. W. 357; Jensen v. State, 60 Wis. 577, 19 N. W. 374. A single act does not constitute a business; and when a sale is but an incident in, or the final act of, another business, it cannot be said to be the business which is carried on and transacted. Manufacturers of wine, beer, brandy, cloth, and iron, who sell the product of their manufacture, do not carry on the business of selling such product. This distinction was evidently in the mind of the district attorney when he commenced the present action, as the complaint herein alleges that the defendants "commenced, carried on, engaged in, and continued in the business of saloon keeping," and during the times they were carrying on said business "did sell, and are now selling, in Merced county in said business, spirituous, malt, and fermented liquors, wines, and ciders." The ordinance, however, does not impose any license tax upon the business of "saloon keeping," and there is no necessary connection between saloon keeping and the selling of spirituous liquors, since a saloon may be kept for many other purposes than the sale of intoxicating drinks. See Kitson v. Ann Arbor, 26 Mich. 325; Mt. Pleasant v. Vansice, 43 Mich. 361, 5 N. W. 378; State v. Barr, 39 Conn. 41; State v. Mansker, 36 Tex. 364. One whose business is the keeping of an eating saloon where wine or beer is furnished with meals cannot be said to be engaged in the "business" of selling this wine or beer, and an ordinance requiring a license tax upon the business of keeping an eating saloon would not justify an additional license tax for selling beer in connection with the meals procured at such saloon. The ordinance in question is not limited to sales as a beverage, or in a dramshop, or by the keepers of tippling saloons, but applies to every person who sells the article within the limits of Merced county. Neither is there any limit prescribed as to the quantity which may be sold, or the purpose for which, or the person to whom, a sale may be made. Its terms are sufficiently comprehensive to embrace any and all sales within the county, whether the articles are sold to be carried out of the county or for purposes other than human consumption; whether the sale is that of the innkeeper to his guest, or the wine grower at the close of the season, or the brewer at his brewery. A sale by a wine grower of the product of his vineyard, or by a distiller of the spirits produced at his distillery, does not constitute a business of selling wine or spirits any more than the sale by the miller of the flour ground at his mill, or by the manufacturer of the cloth woven at his factory, constitutes the business of selling flour or cloth; and the power to impose a license upon a business does not authorize a tax, either by way of license or excise, upon the sale which the wine grower or the distiller may make.

Under the power conferred by the above section of the county government act it would be competent for the county to impose a license tax upon the business of manufacturing cloth or of raising sheep, but it would not be competent for it, under this authority, to require the payment of a license tax from every person who should sell a piece of cloth which he had manufactured, or the wool from the sheep which he had raised. The business of distilling spirits, or brewing beer, or manufacturing wool into cloth, or grain into flour, or grapes or currants into wine, or apples into cider, is a lawful occupation; and while the business, as such, under the authority thus given to the county, may be made subject to a license tax, the county cannot, under this authority, impose a tax upon the individual sales of the product of such business, or upon all of the sales made within each quarter of a year, or within any other limited period of time, for the reason that such a tax is not upon the business, but upon the different acts in the transaction of the business. With the same propriety might a tax be imposed upon the pruning of the vines, the picking of the grapes, the gathering of the apples, the pressing into the vats, the barreling of the juice, or its sale before fermentation into wine or cider. From these views it follows that, as the county had no authority to demand a license tax except from those persons who were engaged in carrying on some business, and as the ordinance in question does not impose a tax upon the business of saloon keeping, and as the complaint does not charge the defendants with having conducted any business upon which the ordinance imposes a license tax, there was no authority to commence or maintain this action. Inasmuch as there was no authority for bringing the action, the court was justified in dissolving the attachment issued thereon. The judgments and orders appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

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102 Cal. 177

Ex parte MASON. (No. 21,049.)

(Supreme Court of California. March 29, 1894.)

INTOXICATING LIQUORS — ILLEGAL SALES — CONSTRUCTION OF STATUTES.

Under St. 1891, p. 306, authorizing counties to license all kinds of business, Merced county, by ordinance, § 12, required persons who "sell" intoxicants therein to pay a license tax. *Held* that, as the ordinance does not purport to impose a license tax on the business of selling intoxicants, a person who carries on the "business" of selling intoxicants is not compelled to take out a license. Beatty, C. J., dissenting.

In bank.

Application by Mason for habeas for his discharge from the custody of the sheriff of Merced county. Petitioner discharged.

James F. Peck, F. H. Gould, J. C. Law, and E. D. McCabe, amici curae, for petitioner. Frank H. Farrar, for respondent.

PER CURIAM. The petitioner is held in the custody of the sheriff of Merced county by virtue of having been arrested upon a warrant issued by a justice of the peace on the complaint of one Turner that the petitioner was guilty of the crime of "carrying on a business for the carrying on of which a license is required by a law of this state, without taking out or procuring the license prescribed by such law; that is to say, said crime was committed as follows, and not otherwise: The said E. C. Mason did, on the 9th day of September, 1883, at and in the county of Merced, state of California, willfully and unlawfully engage in the business of selling whisky, a spirituous liquor, and did then and there sell whisky in said business for purposes other than medicinal, and for the purposes of being drunk by the purchaser as a beverage, and at said time there was in full force and effect an ordinance of the county of Merced" (then setting forth a copy of the entire ordinance).

In Merced Co. v. Helm (this day decided) 36 Pac. 399, the sufficiency of the same ordinance was involved, and we there held that the ordinance is a revenue measure which purports to have been adopted under the authority conferred upon the county in subdivision 27 of section 25 of the county government act (St. 1891, p. 306); that, under the power thus conferred, the right of the county to require the procurement of a license, and the payment of a license tax, is limited to "every kind of business not prohibited by law, and transacted and carried on within the county;" that it does not confer upon the county the right to exact a license tax for the mere act of "selling" any commodity; and that, as the ordinance does not purport to impose a license tax for the "business" of selling spirituous liquors, there can be no liability to the county for the amount of the license tax by reason of having engaged in such business. The ordinance in question does not attempt to prohibit the sale of spirituous liquors, or to impose any penalty for such sale, if made in violation of the terms of the ordinance, or without having first procured a license, so that the right of the county to make such prohibition, or to inflict a punishment for making a sale in violation of a prohibition, is not involved in this proceeding. The charge against the defendant is that of "carrying on a business for the carrying on of which a license is required by the law of this state, without taking out or procuring the license prescribed by such law." Unless, therefore, there is some law of the state which requires such license, there is no authority for the arrest and detention of the petitioner. The ordinance in question does not purport to impose a license tax upon the business of selling whisky; and, as the county was not authorized to require a license tax for the mere act of selling whisky, its provisions to that effect do not authorize his arrest for the failure to take out such license. The averment in the complaint that he sold the whisky for the purpose of being drunk by the purchaser as a beverage is immaterial, as the ordinance makes no distinction between the purposes for which a sale may be made, if they are other than medicinal. The petitioner is discharged.

I dissent: BEATTY, C. J.

102 Cal. 1

ROSS v. WELLMAN. (No. 18,221.)

(Supreme Court of California. March 21, 1894.)

PLEADING—CROSS COMPLAINT—QUIETING TITLE—EVIDENCE—DEFAULT—EXECUTION.

1. The permission to defendant to file a cross complaint after the issues are made up is not reversible error where the result would have been the same without it.

2. On trial of an action to quiet title, where the land in controversy was sold under judgment against plaintiff's husband in favor of defendant, and purchased by defendant at the sale, after transfer by her husband to a third person, who deeded it to her, it is proper to show that, before making the transfer, plaintiff's husband had asked a person if he could deed the land to his wife, saying he would be ruined if compelled to pay defendant's claim, and such person told him that, being in debt, he would have to make the transfer as he subsequently did.

3. A default judgment is not void where it was not entered until the time for answering expired, although the defendant lived out of the township in which the suit was brought, and the default was entered four days after the service.

4. The fact that an execution issued to the constable of a township was served by the sheriff does not render the service void where it might have been issued to either the sheriff or constable.

5. Statements made by a husband after he had conveyed the property to his wife, tending to impeach her title, are inadmissible.

6. Evidence of other indebtedness of plaintiff's husband is admissible, tending to show fraudulent motive for transfer.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Jessie Ross against W. B. Wellman to quiet title. From a judgment for defendant, and order denying motion for new trial, plaintiff appeals. Reversed.

Lamberson & Middlecoff, for appellant. W. B. Wallace, J. T. Witt, and Geo. A. Rankin, for respondent.

TEMPLE, C. This action was brought to quiet plaintiff's title to a tract of land. Defendant answered, denying the allegations of the complaint, except that he admitted that he claimed title to the land. The answer then proceeds to aver that plaintiff is, and had for a long time been, the wife of one A. Ross; that on the 27th of June, 1890, A. Ross was the owner of the land in controversy, and was indebted to the defendant; that at the time said A. Ross had no other property subject to execution; that on the day last named said A. Ross made a conveyance of the property to one John Campbell, for the purpose of having said Campbell immediately convey the same to plaintiff, which said Campbell did; that the conveyances were without consideration, and were made and received for the sole purpose of covering up and concealing the property of A. Ross, so that the same could not be taken to satisfy the just claims and demands of the creditors of said A. Ross; that subsequently the defendant obtained a judgment against said A. Ross, and caused an execution to be issued, which was levied upon the land, which was afterwards sold under the execution as the property of A. Ross, and purchased by the defendant, subject to redemption. Subsequent to the filing of the answer, by leave of the court, and against the objection of plaintiff, defendant filed a cross complaint, in which the same affirmative defense set up in the answer is somewhat more elaborately stated, and a prayer added that plaintiff's title be declared fraudulent, and that defendant's claim of lien be held valid, etc. At the trial defendant had judgment, and plaintiff appeals from the judgment, and from an order denying a new trial.

1. The first point urged by the appellant is that the court erred in permitting the defendant to file a cross complaint. The ground of the objection seems to be that leave was not asked until after the issues had been made up. I see no force at all in the objection, but it seems to me the so-called "cross complaint" is not really such. It brings in no new parties, tenders no issue not already made by the complaint and answer, and the relief demanded in it is only what the legal effect of a judgment in favor of the defendant would have been upon the issues tendered by the answer. As, however, no relief was granted to defendant beyond that which would have been attained without the cross complaint, and as there was no default for not answering it, even if it was error to permit it to be filed, it is not such error as will justify a reversal.

2. It is contended that the court erred in refusing to admit the deed from A. Ross to John Campbell. The deed was subsequently offered, and received in evidence.

3. Plaintiff's husband, A. Ross, was a witness for her, and in cross-examination was asked if he had not had a conversation with one W. L. Rose, wherein he asked Rose if he could not make a deed to his wife, saying that he was a surety upon the note to defendant, and that if he had to pay the debt it would ruin him; and if Rose did not tell him that he could not make a valid deed of gift when he was in debt, and if witness did not thereupon reply that he would make a deed to old Campbell, and have him make the deed to witness' wife. The question was objected to as incompetent and immaterial, as not cross-examination, and not binding upon plaintiff. The objection was overruled, and it is now urged that the ruling was erroneous. The intent of A. Ross in making the conveyance was a matter in controversy, and the evidence was admissible for the purpose of showing such intent. It was shown that the time of the alleged conversation was before the conveyance. The issue was divisible. Did Ross make the conveyance with intent to defraud his creditors? If so, did the grantee pay a valuable consideration for the conveyance? For, if the conveyance were voluntary, the question as to its fraudulent character depends upon the intent of the donor alone; the intent of the donee is immaterial. Bump, Fraud. Conv. 279. If there was a valuable consideration for the conveyance, then the knowledge and intent of the grantee becomes also material. But, even in that case, the intent of the debtor and grantor is a material issue in the case, and proof is admissible to show it, although such proof alone will not make a case against the grantee where a valuable consideration is shown. Here defendant takes both positions, as he had a right to do,—that there was a fraudulent conspiracy to hinder, delay, and defraud the creditors of A. Ross, and that both conveyances were without consideration. On either proposition it was competent to show the intent of Ross by proof of his statements made before the conveyance. It is said in Jones v. Simpson, 116 U. S. 610, 6 Sup. Ct. 538, that it is incumbent upon the creditor attacking a sale on the ground that it was made to defraud creditors, first, to show fraudulent intent in the vendor; that the burden is then on the purchaser to show valuable consideration, which shown, the burden again shifts, and the creditor must show knowledge of the fraudulent intent of the vendor on the part of the vendee.

4. It is next claimed that there was error in admitting in evidence the judgment of Wellman v. Redd Bros. et al., being the judgment under which defendant claimed. The objection was that the judgment was by default, and the record showed that the defendant A. Ross lived out of the township in which suit was brought; that the summons required him to answer within 10 days, and his default for not appearing was entered four days after the service. Judgment, however, was not entered until after the expiration of the full period. Such a judgment is not void. At the most, it was only irregular. Freem. Judgm. § 126, and note.

5. It is next objected that the court erred in admitting in evidence the execution under which the sale was made, and the return thereon. The point is that the execution was directed to a constable of Tule River township, and the return shows that it was received and executed by the sheriff of Tulare county. The execution might have been directed to the sheriff or any constable in the county. Each officer was vested with full power to serve the writ, and it was an

indifferent matter to whom it was issued. It was at most a mere irregularity, and does not render the service void.

6. There was no error in permitting testimony of other indebtedness on the part of A. Ross. Such evidence was admissible to show motive on the part of Ross. It was error, however, to allow the testimony of the witness James in regard to statements made by A. Ross after he had parted with title to the property. These statements tended to prove that the conveyance was made to hinder, delay, and defraud creditors. The title of his grantee could not be impeached by his statements made at that time. Briswalter v. Palomares, 66 Cal. 259, 5 Pac. 226. For this error the judgment and order must be reversed. It is not, therefore, necessary, and perhaps would not be proper, to discuss the further point as to the sufficiency of the evidence to establish a fraudulent conspiracy. I advise that the judgment and order be reversed, and a new trial had.

We concur: SEARLES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

(102 Cal. 12)

PEOPLE ex rel. WOOD v. SANDS. (No. 15,369.)

(Supreme Court of California. March 26, 1894.)

JUSTICES OF THE PEACE — APPOINTMENT—REPEAL OF STATUTE.

1. Code Civ. Proc. § 111, providing that, if any vacancy occurs in the office of a justice of the peace, the board of supervisors shall appoint an eligible person for the remainder of the term, applies to all justices, whether in cities or townships; Oakland city charter, which provides that the mayor may appoint suitable persons to fill vacancies in any office, except as in the charter provided, applying only to vacancies in offices created by the charter itself.

2. Act 1891, p. 304, § 25, authorizing the board of supervisors to fill by appointment all vacancies occurring in any office filled by its appointment, and elective county and township offices, does not repeal Code Civ. Proc. § 111, providing that if any vacancy occurs in the office of a justice the board shall appoint an eligible person to hold the office for the remainder of the term.

In bank. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Quo warranto by the people, at the relation of Fred V. Wood, against John A. Sands, to try title to the office of justice of the peace of the city of Oakland. There was judgment for relator, and defendant appeals. Affirmed.

Davis & Hill, for appellant. W. H. H. Hart, Atty. Gen., Jas. C. Martin, and A. A. Moore, for respondent.

GAROUTTE, J. The question here involved is the respective rights of the relator and the defendant to hold the office of justice of the peace in the city of Oakland; and these rights depend upon the determination by this court as to where the appointing power to fill a vacancy in that office is lodged, under the constitution and laws of the state. The relator claims the office by virtue of an appointment by the board of supervisors of the county of Alameda, and the defendant claims the office by virtue of an appointment by the mayor of the city. There is but one other source from which, by any possible construction of the constitution and statutes, an appointment can come; and that is the governor, under article 5, § 8, of the constitution, and section 999 of the Political Code. Neither party to this controversy has received the appointment of the governor, nor does either party contend that the governor has the power to fill a vacancy in such office. As indicating that a justice of the peace of the city of Oakland is a county or township officer, it is suggested that his office is one provided for by the general law; that it is filled at a general state election, and at a time when the city holds no election; that the call for the election is published, the officers of the election appointed, the precincts established, the votes canvassed, the result declared, and the amount of the bond fixed, by the board of supervisors; the certificate of election is issued by the county clerk, the bond approved by the judge of the superior court, filed with the county clerk, and recorded with the county recorder. The criminal jurisdiction of this office extends over the entire county, and the process, likewise, is only limited by the boundaries of the county; and the civil jurisdiction extends to the limits of the township in which the court is held, regardless of city lines. As indicating that such office is a city office, and that such justice of the peace is a city officer of the city of Oakland, it is urged that the city is required by law to provide a suitable place for holding his court; that he must report to the city treasurer, monthly, and turn over to said treasurer, all fees collected; that his salary is paid by the city; that he is elected by the electors of the city alone; that such office has a strictly municipal jurisdiction; and that such justice is, ex officio, police judge. For the foregoing reasons, it appears that a "city justice of the peace," as he is named by various provisions of the statute, might well be termed a county or township officer, for the law looks upon him, and deals with him, in the respects we have suggested, as it looks upon and deals with other persons whom we know to be county and township officers. Again, in other respects, such officer bears the indicia of an officer of the municipality. The office thus partakes of the character of both a county and township office, and also a city office, and it certainly would be somewhat of a misnomer to call it either. In order to support appellant's position, he must bring himself within the designation of an officer of the city, for the appointing power of the mayor extends to no other, while the success of respondent's position does not depend upon the technical name of the office, as to whether or not he is either a county or township officer, for the law under which he asserts his claims designates such officers as justices of the peace. This question presenting these difficulties, we pass by the controversy as to the exact classification of the office, and, without naming it, will find the appointing power. For the location of that power is a matter purely with the legislature, regardless of the technical character of the office. Section 203 of the charter of the city of Oakland declares: "If any officer of the city * * * shall resign, * * * his office shall be vacant, and the vacancy filled as herein provided. The mayor shall have power to appoint suitable persons to fill vacancies in any office except as in this charter provided. The appointee shall hold for the unexpired term, and until the election and qualification of his successor." And it is upon this provision that appellant rests his claim. Section 111 of the Code of Civil Procedure declares: "If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term." And respondent bases his contention upon that declaration of the Code.

When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction. Courts are not allowed to interpret where interpretation is not demanded, and section 111 speaks for itself. It is broad in its terms, and, upon its face, applies to all justices of the peace, whether these justices be found in cities or townships. As against such a plain provision of the statute, we will not locate the appointing power elsewhere, unless legal reasons, entirely convincing, are presented for our consideration. When the statute says that justices of the peace shall be appointed by the various boards of supervisors, we assume that all justices of the peace are included within the designation; and we are not justified in giving the provision any other construction, unless the intent of the legislature is unmistakably manifested in that direction by other provisions of the statute, and section 203 of the charter of the city of Oakland does not contain that plain manifestation of a different intent for which we are seeking. We there find no limitation upon the general language of section 111 of the Code of Civil Procedure, but, upon the contrary, it is very apparent, when we consider the charter in its entirety, in connection with section 203 thereof, that the vacancies contemplated by that section are vacancies arising in offices created by the charter itself. This would be the natural construction of the section, read without the light furnished by other provisions; and, read and construed with the aid of that light, whatever uncertainty might have otherwise existed at once disappears. Section 45 of the charter presents a fair illustration of this view. It provides that every officer shall, within a certain time, file his official bond in such sum as the council may direct, which bond is made payable to the city, and is approved by the mayor and city attorney, and is filed and recorded in the city archives; and it is further provided that upon a failure of the officer to file an additional bond, when demanded by the city council, such council must declare the office vacant. These requirements and conditions do not apply to the justices of the peace of the city of Oakland, and appellant concedes that fact, yet there is no question but that the officers referred to in section 45 of the charter are the same officers that come within the purview of section 203 of that instrument. The office of justice of the peace is a creation of the constitution. Such an officer is elected at a general state election, and qualifies under general state law. The charter did not create the office of justice of the peace, and under the authority of Ex parte Ah You, 82 Cal. 339, 22 Pac. 929, and People v. Toal, 85 Cal. 333, 24 Pac. 603, could not have done so if its framers and the legislature had so attempted. For this reason, unless the contrary appears, we must assume the filling of a vacancy of the character here presented was not in the mind of the framers of the charter; and it would be an unnatural construction to give the provision such effect. Section 103 of the Code of Civil Procedure provides for the organization of justices' courts, and the election of justices of the peace for both townships and cities. The immediate subsequent sections relate to their duties and powers. Section 110 provides that the term of office shall be two years from the 1st day of January next succeeding their election. Section 111, as we have seen, refers to the mode of filing vacancies in the office. Section 112, and following, declare the civil and criminal jurisdiction of justices' courts. It is not questioned but that these sections, excepting the single section 111, refer to justices of the peace and justices' courts of both cities and townships; and, that fact being conceded, the conclusion is irresistible that section 111 occupies common ground with all the others, and also includes all justices of the peace.

It is further insisted that section 111 of the Code of Civil Procedure is impliedly repealed by the provisions of the county government act of 1891. We do not perceive how appellant could be materially benefited if such be the case, for, if those conditions are present, then the appointment rests with the governor, and appellant's title to the office comes from an entirely different source. We are not favorably inclined towards repeals by implication. It is only when two provisions of the statute are absolutely repugnant to each other that a repeal of the earlier will be declared, and section 111 of the Code of Civil Procedure is not repealed by the county government act. In defining the duties of the board of supervisors, subdivision 21, § 25, of the act of 1891,[1] reads: "To fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors and elective county or township offices." Conceding, without deciding, that justices of the peace of the city of Oakland are neither county nor township officers, still there is no repugnancy between this provision and section 111 of the Code. There is no such inconsistency in these acts that prevents force and effect from being given to both. All the appointing power of the board of supervisors is not necessarily located in subdivision 21 of section 25. Section 35 of the same act expressly recognizes that fact, and, under the head of "General Permanent Powers of the Board of Supervisors," declares that the board has power "to do and perform all other acts and things required by law, not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative department of the county government." And section 111 may well be held a law requiring the board to do and perform certain acts and things not enumerated in the county government act.

There are constitutional objections urged to the soundness of appellant's contentions, which we do not find it necessary to discuss. For the foregoing reasons, it is ordered that the judgment be affirmed.

We concur: McFARLAND, J.; PATERSON, J.; HARRISON, J.

102 Cal. 132

EVANS v. PAIGE. (No. 18,130.)

(Supreme Court of California. March 29, 1894.)

Review on Appeal—Judgment on Pleadings.

The denial of defendant's motion for judgment on the pleadings, made during the trial, is not reviewable on appeal from an order denying his motion for a new trial.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Evans against one Paige. There was a judgment for plaintiff, and defendant appeals from an order denying a motion for new trial. Affirmed.

Pringle, Hayne & Boyd (E. W. McKinstry, of counsel), for appellant. Maxwell & McEnerney, for respondent.

PER CURIAM. This is an appeal by the defendant from an order denying his motion for a new trial. In the brief of counsel for appellant it is said that "the main question involved is the validity of an attachment and sale under execution of an equity of redemption, or other equitable interest, in even-numbered sections of land adjoining each other only at the corners, upon only one of which sections was posted the notice required by the statute to be posted upon the land in the absence of any occupant." It is also argued that the complaint is defective, because it contains no averment of facts excusing the plaintiff for his failure to make application to have the execution sale set aside on motion, within the period of six months from the date of the sale. The questions thus discussed arise upon the face of the complaint, and it is argued that they may be properly considered on this appeal, because the defendant made a motion for judgment upon the pleadings during the progress of the trial, which motion was denied by the court, and excepted to by the defendant. It is claimed that this ruling of the court was an error of law committed during the trial, and properly reviewable upon the motion for a new trial, one of the grounds of the motion being alleged errors of law occurring during the trial; but we do not think so. A motion by a defendant for a judgment upon the pleadings is in fact nothing more than a demurrer to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, and presents precisely the same question (De Toro v. Robinson, 91 Cal. 373, 27 Pac. 671); and we are of the opinion that such ruling can only be reviewed upon an appeal from the judgment. The general rule is thus stated by the court in Jacks v. Buell, 47 Cal. 162: "Upon a motion for a new trial, questions respecting the sufficiency of the complaint cannot be presented, for they are not comprehended in the statutory grounds of the motion; and where an appeal is taken, as here, from the order refusing a new trial, and not from the judgment, those questions cannot be considered by this court." To the same effect is Brison v. Brison, 90 Cal. 323, 27 Pac. 186. Nor do we think that the case at bar is taken out of this rule because the motion for the judgment was made during the progress of the trial, and the ruling of the court thereon, preserved in the bill of exceptions, and relied upon by the defendant when the motion for a new trial was submitted in the superior court. After all, the question presented only relates to the sufficiency of the complaint, and this objection can be reviewed by us only on an appeal from the judgment. We do not think the court erred in admitting evidence of the value of the land which is the subject of the action, nor can we say that the findings excepted to are not sustained by the evidence. Order affirmed.

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[1] Act 1891, p. 304.

102 Cal. 143

STEPHENSON v. SOUTHERN PAC. CO.

(No. 19,186.)

(Supreme Court of California. March 29, 1894.)

RAILROADS—CROSSINGS—STREET-CAR PASSENGERS.

1. The complaint in an action against a railroad company alleged that the driver of a horse car, in which plaintiff was a passenger, on approaching a crossing of defendant's track, observed an engine standing on the track within 25 feet of the crossing, whereupon he stopped the car; that, after ascertaining that the engine was not in motion, he started to cross the track; that when he was very near it the engineer of defendant's engine negligently commenced to back it towards the car, whereupon the passengers, including plaintiff, observing that a collision was imminent, jumped from the car; and that in so doing plaintiff, though using due care, was injured. *Held*, that the complaint stated a cause of action. 34 Pac. 618, affirmed.

2. An instruction that if defendant was guilty of negligence, as charged in the complaint, and plaintiff was injured thereby, the verdict must be for plaintiff, is not erroneous in ignoring the question of contributory negligence, when accompanied by several instructions making the right of recovery dependent on plaintiff's exercise of reasonable care. 34 Pac. 618, affirmed.

In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Sallie D. Stephenson against the Southern Pacific Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

John D. Bricknell, for appellant. Wells, Monroe & Lee, for respondent.

PER CURIAM. Upon a reconsideration of this case, we are satisfied with the opinion therein filed by department 2 of this court on October 10, 1893 (34 Pac. 618), and for the reasons there stated the judgment and order appealed from will be affirmed. Judgment and order affirmed.

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102 Cal. 70

In re WILLIAMS' ESTATE. (No. 18,247.)

(Supreme Court of California. March 29, 1894.)

ADOPTION—APPLICATION—CHILD OF DIVORCED PARENT.

1. Under Civ. Code, § 226, providing that an order of adoption must be made by a judge of the county where the adopting parent resides, where an order fails to recite that fact, extrinsic evidence is admissible to show it.

2. Under Civ. Code, §§ 221, 223, giving any adult person the right to adopt a child, except that neither a husband nor a wife may do so without the other's consent, a husband and wife may join in an application for an order of adoption, and such order may declare that the child be regarded as the child of both.

3. Civ. Code, § 227, providing that the judge shall examine all parties to the proceeding separately, is directory merely, and a failure to do so will not render the proceeding void.

4. Civ. Code, § 224, rendering the consent of a parent who has been divorced for adultery unnecessary to an adoption of his child, is not inapplicable because the divorce was granted before the enactment of such provision, and for an act of adultery committed in another state.

Department 2. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

In the matter of the estate of Lewellyn Williams, deceased. Appeals from orders making partial distribution. Affirmed.

Johnson, Johnson & Johnson, for appellants. A. C. Freeman, McKune & George, and L. T. Hatfield, for respondents.

DE HAVEN, J. Appeals from two orders of the superior court of Sacramento county, making partial distribution of the estate of Lewellyn Williams, deceased, to Lucy W. Auzerais and Sophia G. Cutter. The orders are based upon separate petitions, but both appeals can be properly disposed of by a consideration of the questions arising upon the appeal from the order made in favor of the respondent, Auzerais. Lewellyn Williams died testate, and Lucy W. Auzerais is named in his will as a residuary legatee. This will was admitted to probate in the superior court of Sacramento county prior to the commencement of this proceeding, and, in her petition asking for a partial distribution of the estate to her, the respondent, Auzerais, alleges, in addition to the foregoing facts, that she is the adopted child of said deceased, and that he never had any other child, and was unmarried at the time of his death. The appellants, claiming to be, respectively, the nephew and niece of the deceased, appeared in opposition to the application for partial distribution, and filed an answer to the petition therein, in which they denied that the respondent, Auzerais, was ever adopted by the deceased as his child, and also denied that the deceased died testate; and in this connection they further alleged the pendency of a proceeding instituted by them to revoke the probate of the alleged will of the deceased. The issues thus made by the petition and answer thereto were tried by the court, and findings of fact filed, to the effect that the petitioner was duly adopted by the deceased as his child on August 17, 1875, and that she was and is his only child; and the court further found the allegation of the answer in reference to the pendency of the proceeding to revoke the probate of the alleged will of the deceased to be true. The appellants insist that the finding in reference to the adoption of the respondent, Auzerais, is not justified by the evidence, and also that the court erred in admitting evidence to prove that fact; and the questions thus presented are the only ones we deem it necessary to consider in this opinion.

The respondent, Auzerais, was the daughter of Eliza J. and George W. Strickland. Her parents were divorced in the state of New York on the ground of the adultery of the father, and by that decree the care and custody of the respondent was awarded to the mother. At the time of the alleged adoption she was of the age of ten years and about eight months, and was then living in Sacramento county with the deceased, who was her uncle, and also her guardian. The mother was dead, and her father was a resident of the state of New York. The adoption papers consist of a petition by the deceased, Lewellyn Williams, and his wife, Lucy C. Williams, which recites that the petitioners are residents of the county of Sacramento, and also contains an averment of the death of the mother of respondent, and of the fact that she had been divorced from the father on the ground of his adultery; second, a joint agreement by the deceased and his wife to adopt the respondent; third, the order of adoption made by the judge, and dated August 17, 1875. This order, after reciting the fact of the presentation of the petition of the deceased and his wife and their agreement to adopt, and that it was proven that the mother of respondent was dead, and had been divorced, as stated in the petition, concludes as follows: "And the said Lewellyn and Lucy C., his wife, and said child, all being present and being fully satisfied that the interests of said child will be promoted by such adoption, it is hereby ordered, adjudged, and decreed that said Lucy W., child aforesaid, shall from now henceforth be regarded and treated in all respects as the child of said Lewellyn Williams and Lucy C. Williams, his wife." The order makes no mention of the fact of the residence of the adopting parents, and fails to state that any of the parties were examined separately or otherwise by the judge making the order; but it was proven by oral evidence, upon the trial of the present proceeding, that the adopting parents were residents of the county in which the order of adoption was made, and that all the parties were examined by the judge at the time, but not separately. This evidence was properly admitted, and the contention of appellants that the order of adoption is void because it does not show upon its face that the deceased and his wife resided in the county of Sacramento at the time of the adoption, and that all the parties to that proceeding were examined by the judge in the manner directed by section 227 of the Civil Code, cannot be sustained. Undoubtedly, under section 226 of that Code, it is a material fact, and necessary to the validity of an order consenting to the act of adoption, that the adopting parent and the judge making the order shall both be residents of the same county (Ex parte Clark, 87 Cal. 638, 25 Pac. 967); but the statute does not require that this fact shall appear upon the face of what may be termed the "adoption papers." The only memorial of the proceeding which is required by the chapter of our Civil Code relating to adoption is the written consent of the parties whose consent is made necessary by the law, and the order of the proper judge, "declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting." Civ. Code, §§ 226, 227. This being so, it is evident that extrinsic evidence should be received for the purpose of proving any other matter, the existence of which is necessary to the validity of the proceeding. It has been held—and we think correctly—that facts necessary to show that a court or board of special or limited power has acted within its jurisdiction may be proven by other competent evidence, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings. Jolley v. Foltz, 34 Cal. 321; Reclamation Dist. v. Goldman, 65 Cal. 638, 4 Pac. 676; Van Deusen v. Sweet, 51 N. Y. 378; Williams v. Cammack, 27 Miss. 209; 2 Freem. Judgm. (4th Ed.) § 518. It is true the act of adoption in this state is not a judicial proceeding, and the order, therefore, is in no sense to be considered as the judgment of a court. Estate of Stevens, 83 Cal. 322, 23 Pac. 379; In re Johnson's Estate, 98 Cal. 531, 33 Pac. 460. Still, the rule above stated, affirming the right of a party to show by extrinsic evidence the existence of the jurisdictional facts in support of the judgment or other determination of a court or board of limited jurisdiction, is applicable in principle to the case as presented here, and fully justifies the action of the superior court in admitting the evidence referred to. The case of Ex parte Clark, 87 Cal. 638, 25 Pac. 967, does not sustain the contention of appellants upon this point. The statement in the opinion in that case, to the effect that it is necessary for the record to show that the adopting parent appeared before the proper judge, has reference to the record in the action in which the order of adoption may be offered in evidence, and not to the papers relating to the proceeding for adoption. The question of the admissibility of oral evidence, for the purpose of establishing material facts not shown by such papers, and not required to be recited therein, did not arise in that case, and was not passed upon by the court at that time. But, if the rule were otherwise, and it should be conceded that the court erred in admitting evidence as to the residence of the deceased, the error was harmless, as the petition for adoption states that the deceased and his wife were residents of the county of Sacramento, and having, upon the strength of that representation, obtained the order of the county judge of that county, consenting to the adoption of respondent, the deceased would in his lifetime have been estopped to deny its truth in any controversy as to his parental duty to support and care for the child thus adopted by him, and the appellants, who claim under him, are equally estopped to deny the fact in this proceeding.

The appellants further claim that the order of adoption is void—First, because it was made upon the joint petition of the deceased and his wife, and purports to order and direct that the respondent should thereafter be treated and regarded as the child of both of them; second, because the parties to the contract of adoption were not separately examined; and lastly, because the father of the respondent did not consent to the adoption, and was a nonresident of the state, and without notice of the proceeding. There is no force in the first of the foregoing objections. Section 221 of the Civil Code gives to any adult person the right to adopt the minor child of another in the cases, and under the rules, prescribed by the chapter of which that section forms a part; and the following section (223) provides that neither husband nor wife, unless lawfully separated, shall adopt a child without the consent of the other, if capable of giving such consent. Under these sections the wife has precisely the same right to adopt a child as the husband; and we know of no reason why both may not unite in an application for the adoption of a child as the child of both, or why, in such a case, the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses. On the contrary, such procedure would seem to be in entire harmony with the object of the law, and an appropriate way by which husband and wife may mutually consent to the adoption of a stranger in blood into the family, and to assume towards such child the duties of the parental relation. The question of the right of husband and wife to jointly adopt a child arose in the state of Indiana under a statute similar to our own, and the supreme court of that state, in Krug v. Davis, 87 Ind. 590, in answer to the objection that the statute did not contemplate or authorize such joint adoption, said: "On the contrary, the better and more reasonable construction appears to us to be that a wife may unite with her husband in such a proceeding, as, from the very nature of things, the interests of the entire family are necessarily involved in the object sought to be accomplished by it. There is not only no inconsistency, but a manifest propriety, in the wife thus uniting with her husband, as by doing so the adopted child is made to assume, in a general sense, the same position in the family which it would occupy if it were the natural child of both, born in lawful wedlock." These views are so manifestly correct, and applicable to the construction of our own law, as to render any further discussion of this point unnecessary.

Nor can the right of the respondent here to succeed to the estate of her parent by adoption be defeated by the fact that the judge signing the order of adoption failed to separately examine the parties to it. It was expressly held by us in Re Johnson's Estate, 98 Cal. 531, 33 Pac. 460, that the examination of a child under the age of 12 years—the age of consent—was entirely discretionary with the judge; and we think the general reasoning of the opinion in that case in regard to the nature of the act of adoption in this state, and its statement of the rule by which to determine whether the provisions of a statute prescribing the mode of proceeding upon the part of a public officer in the discharge of a given duty is mandatory or simply directory, lead to the conclusion that the examination of the other parties to the contract by the judge making the order is not absolutely necessary in order to effect the adoption of a minor; and, if this is so, it would necessarily result that section 227 of the Civil Code must be regarded as directory in so far as it requires that the parties shall be separately examined. In the case just referred to, in speaking of the nature of the act of adoption under our statute, we said: "The essential foundation of the proceeding is the consent of the persons named in the statute; and when this has been given in the presence of the proper judge, and manifested in writing and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises." And it was further said by us at that time that the object of the statute in directing the judge to make a separate examination of the parties was for the protection of a wife, or child over the age of 12 years, whose consent is made essential to the creation of the contract, by guarding them in some degree from the possible coercive influence of the husband or parent, and also to enable the judge to ascertain whether the consent of such persons was entirely free. Undoubtedly, the judge ought, in the orderly and proper discharge of his duty, to conform to this direction of the law; but his omission to do so would not render the contract absolutely void, and subject to attack by one not a party to it. The deceased voluntarily entered into the contract of adoption under consideration here, and received, in his lifetime, the benefits resulting from the relation thus created,—the society, affection, and devotion of an adopted daughter; and no principle of law or equity will permit the appellants, claiming under him, to avail themselves of this technical departure from the direction of the statute, to defeat the rights of respondent growing out of the contract, the validity of which was never disputed by the deceased, and which has been fully performed by all the parties to it.

The remaining question to be considered is whether the validity of the order of adoption is affected by the fact that it was made without the consent of the father of respondent, and without notice to him. As already stated, the father of respondent had been divorced from the mother on the ground of his adultery, and, such being the case, his consent to the order of adoption was rendered unnecessary by the express provisions of section 224 of the Civil Code, then and now in force. The fact that the decree of divorce was made before the enactment of our Civil Code, and for an act of adultery committed in another state, did not make that section inapplicable to the proceeding taken by the deceased for the adoption of respondent; and to so hold is not to give any retroactive or extraterritorial effect to the provisions of that section. The section simply declares under what circumstances the consent of the natural parent shall not be required in a proceeding for the adoption of a child, and it was intended to furnish the rule in regard to that matter in all subsequent applications for adoption under the statute. It is argued, however, by counsel for appellants, that it is not in the power of the state to deprive a parent of the natural right to his child for such a cause, without at least affording him an opportunity to appear and answer the charge in the proceeding which is taken for the purpose of severing his parental relations. Whatever force there might be in this position in a case where the natural father of an adopted child was asserting his right to the custody of such child, or in an action brought by him to recover the value of its services from the adopted parent, is seems to us that the question thus argued by counsel does not arise here. The father of the respondent is dead; but, if he were alive, no rights of his would be impaired by giving force and effect to the contract of adoption, and permitting respondent to succeed to the estate of the deceased as the adopted child of the latter. The question here is simply whether the proceeding for the respondent's adoption entitles her to succeed to the estate of her adopted father, and we have no doubt that it does. The adoption was in accordance with the law of this state, and certainly, so far as relates to the right of inheritance under the laws of this state, it gave to the respondent the status of a child of the deceased. "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is ordinarily made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired." Ross v. Ross, 129 Mass. 246.

The conclusion we have reached in regard to the validity of respondent's adoption by deceased also disposes of all questions arising upon the appeal from the order making partial distribution of his estate to Sophia G. Cutter. The distribution was made to her as a legatee under the will of the deceased. The will has been probated, and the respondent, Auzerais, does not question its validity; and the court, having found that she was the adopted and only child of deceased, and therefore the only person having a right to object to distribution under its terms, properly held that the pendency of the proceeding instituted by appellants for the purpose of revoking the probate of such will would not defeat the rights of the legatees named therein. The respondent, Auzerais, being the only heir of the deceased, the appellants have no rights to be affected, no matter what disposition may be made of the estate of deceased. Orders affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

SMITH v. PACIFIC BANK (three cases. Nos. 15,658, 15,659, 15,660).

(Supreme Court of California. March 30, 1894.)

Department 1. Appeal from superior court, city and county of San Francisco.

Actions by the Pacific Bank against one Smith. From the judgments, defendant appeals. Dismissed.

W. J. Baggett and Dunne & McPike, for appellant. Blake, Williams & Harrison, for respondent.

PER CURIAM. Notices of appeal in the above-numbered actions (all bearing the same title) were filed January 13, 1894, and undertakings on appeal were filed January 16, 1894, but transcripts have not been filed in this court. On motion of the respondent, therefore, the appeals are dismissed.

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102 Cal. 218

STEWART v. HELVETIA SWISS FIRE INS. CO. (No. 18,134.)

(Supreme Court of California. March 30, 1894.)

INSURANCE—RENEWAL—PROMISE OF AGENT.

Where a local agent, having no actual or ostensible authority to renew a policy, fails to perform his promise to inform the company of assured's offer to renew, the company is not liable for a loss after expiration of the old policy.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by one Stewart against the Helvetia Swiss Fire Insurance Company on a policy. Judgment for plaintiff. Defendant appeals. Reversed.

T. C. Van Ness (Bradley & Farnsworth, of counsel), for appellant. Daggett & Adams, for respondent.

PER CURIAM. Byrnes, the local agent of defendant at Visalia, had no actual or ostensible authority to enter into a binding contract upon the part of defendant for the renewal of the policy held by plaintiff; and the proposal of plaintiff, made to such agent, for a renewal of said policy, was, until communicated to and accepted by defendant, nothing more than a mere offer upon the part of plaintiff to renew such policy. The fact that the agent promised to communicate the offer to defendant, and did not do so until after the loss, while it might make the agent liable to plaintiff for the damage sustained by him growing out of such neglect, did not have the effect to create a binding contract for renewal between the plaintiff and defendant. Judgment reversed.

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102 Cal. 220

COLGROVE et al. v. SMITH et al. (No. 14,922.)

(Supreme Court of California. March 30, 1894.)

NEGLIGENCE—LIABILITY FOR NEGLIGENCE OF CONTRACTOR.

A company which obtains leave to dig up streets and lay its pipes along them is liable for personal injuries caused by the defective filling of a trench, even though the work was being done by and under the exclusive control of another, who had contracted to do the work for the company.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Margaret H. Colgrove and another against Fred J. Smith and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Joy & Sumner, C. E. Sumner, and Edwin E. Meserve, for appellants. A. W. Hutton, P. C. Tonner, and J. W. Swanrick, for respondents.

PER CURIAM. Action for personal injuries. Appeal by defendants from the judgment, and an order denying a new trial. Appellants, as copartners doing business under the name of the Citizens' Water Company of Pomona, obtained from the city of Pomona, by ordinance, a grant or franchise to dig trenches and lay pipes in the streets of the city for the purpose of selling to and supplying its inhabitants with water. Afterwards, on June 1, 1889, appellants contracted with M. O'Neill and Frank Osler to dig and fill the trenches for the pipe at a specified price per 100 feet, a part to be 2 feet wide, and part 20 inches wide, and all 30 inches deep. The contract contained the following clause: "Said ditches to be filled as required by city ordinance. All road crossings to be properly tamped and kept in repair for sixty days after completion of the work. Parties digging ditch to be responsible for all damages resulting by reason of injury to, or breaking of, any pipes owned by other persons." The ordinance required the grantee (appellants) or its assigns, immediately after laying the pipes, to restore the streets to their former condition, and have the same in as good repair as before; the work to be done under the direction, and to the satisfaction, of the superintendent of streets. Plaintiff Margaret A. Colgrove (wife of her coplaintiff), on June 15, 1889, was driving along Garey avenue, where defendants' pipe had been laid, and the trench improperly filled with loose dirt, in which her buggy wheels sank, whereby she was thrown out and injured. There were no guards along the line of the trench, nor any notice of its unsafe condition. Several exceptions were taken to evidence, and to the refusal of the court to give to the jury certain instructions requested by defendants; but all these exceptions present a single question, arising upon the issue raised by defendants' answer, to the effect that O'Neill and Osler were independent contractors, in the exclusive control of the work of filling up the ditch, and for whose negligence defendants claim they are not liable.

It is commonly stated—and, in a large class of cases, correctly—that the principle of respondeat superior does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employé, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see Boswell v. Laird, 8 Cal. 469. But there are exceptions to the general doctrine, and this case, we think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not, by such contract, have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street and lay their pipes relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created; and, if not done in the manner required by the ordinance, the departure creates a nuisance. The judgment and order are affirmed.

4 Cal. Unrep. 542

FRESNO MILLING CO. v. FRESNO CANAL & IRRIGATION CO. (No. 18,133.)

(Supreme Court of California. March 30, 1894.)

Contract for Water Power — Construction—Damages for Breach — Res Judicata—Final Judgment.

1. A contract for the use of water as a motive power for a mill gives the mill no right to use such water for any other purpose.

2. Under a contract for the use of water as a motive power the mill owner is not damaged by a failure to deliver the amount of water called for, when an amount equal to the full capacity of plaintiff's mill wheel is delivered. Beatty, C. J., dissenting.

3. A judgment cannot be pleaded in bar during the time for appeal therefrom, and while a motion for a new trial is pending.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Fresno Milling Company against the Fresno Canal & Irrigation Company. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

T. P. Ryan, for appellant. Church & Cory and Harry I. Thornton, for respondent.

GAROUTTE, J. This appeal is taken from the judgment and order denying a motion for a new trial. Upon the rendition of the judgment the trial court filed the following opinion regarding the questions involved in the litigation. It is lucid and convincing, and we are satisfied with the views there expressed:

"The pleadings in this case are quite voluminous, but the relief sought and prayed for may be divided into three heads: First. That a certain contract of writing, entered into by M. J. Church, the Fresno Canal and Irrigation Company, and the Fresno Milling Company, dated April 22, 1886, be canceled, and that the defendant, the canal company, be enjoined from using the same or asserting any rights thereunder. Second. That the defendant, the canal company, be required to furnish a deed in fee simple to the plaintiff to 83⅓ cubic feet of water passing a given point per second. Third. That the defendant be required to pay said plaintiff damages for said canal company's failure and neglect to furnish certain water agreed to be furnished to plaintiff, or the value of the rents and profits of certain water alleged to have been used by defendant, which plaintiff alleges rightfully belong to the plaintiff, the milling company. There are other questions, but they are corollaries of the foregoing propositions, and stand or fall with them.

"On the 10th day of September, 1885, a certain contract of writing was entered into between M. J. Church, the Fresno Canal and Irrigation Company, and one Joseph G. Deming. Under this contract said Church agreed to sell said Deming lots 28, 29, 30, 31, and 32, block A, of the town of Fresno, on which were then situated what were commonly known as the 'Champion Mills,' together with said mills and other improvements thereon, and the water power to the amount of 83⅓ cubic feet of water per second for running said mill, with all the privileges and appurtenances thereunto belonging or appertaining, for which said Deming agreed to pay the sum of $20,500,—$10,000 in cash, and $10,500 thereof as soon as the canal used to convey water to said mill for motive power should be so enlarged and improved as to deliver to said mill for such motive power the amount of 83⅓ cubic feet of water per second. The party of the second part, the Fresno Canal and Irrigation Company, agreed to begin at once upon said canal to increase its capacity, as aforesaid, and to enlarge and improve the said canal so that it should deliver at the said mill, for its motive power, not less than 83⅓ cubic feet of water per second; said work to be completed within ninety days. Said Church and the canal company further agreed that when said second installment of the purchase price of said property, to wit, $10,500, should be paid, that they would make, execute, and deliver to said Deming, as the grantee, a good and sufficient deed of grant of said property, which should convey to him a perfect title in fee simple, absolute, free and clear of all incumbrances, of said lots, with said mill and improvements thereon situated, together with all the privileges and appurtenances thereunto belonging, with a water right of 83⅓ cubic feet of water per second for said mill during the existence of said corporation. The canal company further agreed that upon the payment of said sum it would furnish to said Deming, during the period of its existence, for the running of said mill, an amount of water equal to 83⅓ cubic feet per second, providing that it should have the privilege of shutting off the water in said ditch during such times as should be necessary for the repairing of the same, etc., and should not be held responsible for lack of water caused by drought, insufficient water in King's river, hostile diversion, temporary damage by flood, etc., but that it should at all times use due diligence in restoring and maintaining the flow of water in said canal. It was also agreed that said Deming should have the right to turn in enough additional water to make up said amount into the mill canal, at any waste way or bulkhead between the mill and the northwest corner of section 36, township 13 south, range 20 east, in case of any deficiency in said agreed supply, or that he might turn off any excess, if necessary. The canal company further agreed that it would enlarge the capacity of the ditch below the mill, so as to take away the water as fast as it should be necessary to prevent its impeding the running of the mill. This clause is also in said contract: 'It is also understood and agreed by and between the respective parties hereto that the above grant to the party of the third part [being said Deming] of the water right of 83⅓ cubic feet of water per second as a motive power for said mill is intended to vest in said third party [Deming], his heirs and assigns, forever, anything in the above instrument to the contrary notwithstanding.'

"Afterwards, on the 22d day of April, 1886, a contract in writing was entered into between the defendant, the Fresno Canal and Irrigation Company, and the said Joseph G. Deming, in which it was provided that, in consideration of the sum of five dollars and other good and valuable considerations, said canal company agreed to furnish and thereby grant to said Deming all the water that might be required, not exceeding at any time 83⅓ cubic feet per second, to be supplied by and through the canal, known as the 'Mill Ditch,' on Fresno street, in the town of Fresno, county of Fresno, to the use of the said party of the second part, as a motive power to propel the machinery of a flouring mill situated on said lots 28, 29, 30, 31, and 32 in block A of said town, together with the privilege of entering upon said canal and building and maintaining such proper and necessary works and machinery as might be proper in order to utilize said water and water power for the purposes of a flouring mill, provided such use should not interfere with the flow of water in said canal. It is also agreed that the canal should be under the control of the canal company, and that it should have the right to use and enlarge the same, provided such use and enlargement should not interfere with the flow of water to the mill. It is also provided that said Deming should return all said water so used to the mill ditch, and not permit the same to run to waste, and not to use or permit the same other than as a motive power for said mill. It was also understood and agreed that the water to be used and granted was intended to form a part of the appurtenances of said mill and land, and that the right thereto should be transferable, etc. It is further covenanted and agreed, among other things, that the canal company might sell 1,000 water rights of 1 cubic foot of water each, and if at any time the aggregate quantity of water in the canal of said company should fall short of 1,000 cubic feet of water flowing per second, then said 83⅓ cubic feet should represent 83⅓-1000ths of said aggregate quantity, and said Deming should be entitled to receive water in that proportion. It is also covenanted that the agreements and covenants in said contract should run with and bind said land and mill. There are a number of other stipulations in said contract, which, however, are contained in the contract first referred to herein, and are not now necessary to be noticed. Afterwards said Deming conveyed all his right, title, and interest in said property, and his rights under said contracts, to the Fresno Milling Company, the plaintiff herein.

"Plaintiff in this action claims that the assigned contract—the one dated the 22d day of April, 1886—was procured by fraud on the part of the Fresno Canal Company, and is, as to the plaintiff herein, null and void; that under the first contract made, said Deming, or his successors, the plaintiff, was entitled to a deed in fee simple to said 83⅓ cubic feet of water, to be used by said plaintiff in any manner that it should see fit. The contention of the defendant, on the other hand, is that the assigned contract was not obtained by fraud, but was entered into to take the place of the first contract, and for the purpose of more fully and precisely carrying out the views and intentions of the parties thereto; that it was never intended that the plaintiff should have any right to said water, excepting as a motive power to its mill. Without reviewing at length the evidence on this point, I think it clearly appears, not only from the terms of the contracts themselves, but from the other evidence in the case, that the second contract was not procured by fraud; that the parties to it understood fully its terms and effect, and that it fully expresses what the intentions of the parties were from the inception of the transactions complained of down to the time of their completion, and that it was intended by both parties thereto that it should take the place of the first contract; that they both entered into it with a full understanding of its terms and effects of the covenants therein contained. To mention a few of the many reasons for this conclusion, I would say that the amount of water, according to the evidence,—83⅓ cubic feet per second,—was worth for irrigation purposes, at the rates at which water was being sold at that time, over $65,000, whereas the full purchase price agreed to be paid by the plaintiff for the use of said water, together with said four lots with the improvements thereon, was only $20,500. It will also be understood that throughout the first instrument—because, as to the terms of the second instrument, there can be no question —the expression constantly occurs that said water was to be furnished to said Deming for motive power to said mill, for the purpose of running said mill, etc. Further, that for several years after this contract was entered into, and water was being furnished to said mill, the milling company laid no claim to said water after it had passed its mill, and the defendant during all these years constantly and uninterruptedly appropriated said water to its own use, without any objection on the part of said milling company. Besides, the evidence clearly shows that the second contract was entered into deliberately by Deming, without a scintilla of proof tending to show that he was misled or overreached in any manner whatever. If this conclusion is correct, the fact, as contended by counsel for plaintiff, that the first contract operated as a grant from defendant to plaintiff, cannot alter the result, as it was simply a grant of water as a 'motive power for said mill.'

"The remaining question which I shall notice in this decision is whether or not the defendant, the canal company, has furnished to said milling company, at their mill, the quantity of water agreed to be furnished by them, to wit, 83⅓ cubic feet per second. The evidence upon this point, necessarily, from the nature of the case, consists mostly of expert testimony. That offered upon the part of the plaintiff,—Mr. Grunsky,—who seemed to be quite a competent witness upon such matters, tended to prove that the plaintiff failed to deliver the full amount of water agreed by it to be delivered, and that it only delivered some 70.79 feet. The evidence upon the part of the defendant consisted of the testimony of Mr. Manuel and Mr. Eastwood, two scientific men, apparently as competent and disinterested to testify upon this question as Mr. Grunsky, and their evidence tended to prove that the defendant not only delivered as much as 83⅓ cubic feet of water per second, but that the supply furnished by it far exceeded this amount, to wit, about 110 cubic feet per second. It also appeared in evidence, without contradiction, that the water wheel of the plaintiff only had a capacity of some 71.91 feet, and defendant contends that, even if it had failed to deliver the full amount agreed to by it, the plaintiff has not been damaged, for the reason that, if the water had been delivered, it could not have utilized the same. It would be an idle matter for me to review the evidence of these scientific witnesses upon this question by entering upon an extended criticism of their modes of procedure and the mathematical processes upon which their opinions are based. Suffice it to say that the witnesses on both sides, though adopting and using recognized and approved scientific tests, arrived at surprisingly different conclusions; and I am of the opinion, giving it full weight, and after a very thorough consideration of all the evidence offered by them, that the plaintiff has failed to prove by a preponderance of the evidence that the defendant has not delivered the amount of water agreed upon. Upon the contrary, the preponderance of the evidence is with the defendant that something over 110 feet of water has, during the times specified in said complaint, been delivered at the mill of the plaintiff. As I stated before, the evidence is uncontradicted that the plaintiff's water wheel only had a capacity of some 71.90 cubic feet per second, and, this being true, I am unable to see in what manner the plaintiff has been injured by a failure, even if it were true, of the defendant to deliver 83⅓ cubic feet of water per second, when it had no means of utilizing more than 71.90 feet. Upon this point Mr. Grunsky says: 'It would not have been of any advantage to have had a larger quantity of water in the canal or in the mill ditch than there was at the time of my observations, for the reason that the excess could not have been carried away by the tail race.' The canal company agreed to enlarge the canal below the mill so as to properly carry off the water delivered, and this it did. But there was no agreement that it would increase the fall at the mill, which was some 13 feet to 16 feet, which would have entailed an expenditure of over $20,000, in order that the power and capacity of the mill might be increased. There is no evidence that such a thing was ever contemplated by the parties. This being true, of course the court is of the opinion that the plaintiff has not been damaged, and it is idle to consider what its profits would have been had its capacity and motive power been larger."

In addition to an answer upon the merits, defendant pleaded in bar a judgment rendered in an action entitled "City of Fresno v. The Fresno Milling Company and the Fresno Canal & Irrigation Company." When the judgment roll in that case was offered in evidence, objection was made that it was not a final judgment, the time for appeal not having expired, and the motion for a new trial being then pending. We think the action of the court in overruling the objection error. A judgment, in order to be successfully pleaded in bar, must be a final judgment; not alone final as to the court which rendered it, but final as to the subject-matter. We had occasion to discuss this question in Re Blythe's Estate (decision filed Aug. 31, 1893) 34 Pac. 108, and are well satisfied with the rule of law there declared. The soundness of the doctrine finds no better illustration than is presented by the trial of the present case. The judgment which was here successfully pleaded in bar was subsequently reversed by this court. It is thus apparent how unsubstantial a thing it was, and how entirely insufficient to serve as a perpetual bar to further litigation. But the error of the court was harmless, for, as we have already seen, the defendant's cause is a just one upon the merits. The remaining objections to the admissibility of the evidence are not well founded. While the evidence in some respects may conflict, the findings all appear to find support therein. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFARLAND, J.; PATERSON, J.; HARRISON, J.

BEATTY, C. J. I concur in the conclusions of the court, except upon one point. I think it appears from the evidence, without substantial conflict, that the defendant has failed on several occasions, and for considerable periods of time, and without any sufficient excuse, to furnish the amount of water it contracted to furnish; also that it has failed to keep the canal below the plaintiff's mill clear and of sufficient capacity to carry the water away from the wheel, as it contracted to do,—from all of which the plaintiff has suffered damage for which it is entitled to compensation. For these reasons I think the appellant should have been granted a new trial.

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4 Cal. Unrep. 625

BYGUM v. SOUTHERN PAC. CO. (No. 15,222.)

(Supreme Court of California. April 29, 1894.)

INJURY AT RAILROAD CROSSING.

In an action against a railroad company to recover for the death of a boy between five and six years of age, where the evidence tended to show that he was killed at a public crossing in a town of between 2,000 and 3,000 people, by being run over by defendant's passenger train, which was running from 15 to 40 miles an hour, the questions of the company's negligence, and the contributory negligence of the boy and his parents, are for the jury.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Carl C. Bygum against the Southern Pacific Company for damages for causing the death of his minor son. From an order granting plaintiff a new trial, after nonsuit, defendant appeals. Affirmed.

Jas. C. Martin and A. A. Moore, for appellant. Jennings & Hubbs, for respondent.

PER CURIAM. This is an appeal by the defendant from an order granting the plaintiff a new trial after a judgment of nonsuit had been entered against him. The action was brought to recover damages for the death of plaintiff's son, alleged to have been caused by the negligence of the defendant, its servants, and employés, in operating its railroad. The boy was between five and six years of age, and, when attempting to cross defendant's railroad track, was struck by a moving engine, and instantly killed. The complaint alleged that the accident which resulted in the death of the boy occurred about 1 o'clock in the afternoon, at the crossing of the railroad and University avenue, in the village of West Berkeley, Alameda county. The answer denied that the accident occurred at the crossing named in the complaint, or at any public crossing of the railroad; denied that it occurred by reason of any negligence or fault on the part of the defendant or its servants and employes; and alleged that it occurred solely by and through the negligence of the boy and his father, the plaintiff. The nonsuit was granted upon the theory that the accident did not occur at a street crossing, and that the case came within the rule declared in Toomey v. Railroad Co., 86 Cal. 374, 24 Pac. 1074; but after hearing the motion for new trial the court was of the opinion that the evidence as to where the accident occurred, and as to whether it was caused by the negligence of the defendant, or by the negligence of the boy and his parents, should have been submitted to the jury, and therefore granted the motion.

There was evidence tending to show that West Berkeley was a village situated partly on both sides of the railroad, and having a population numbering from two to three thousand; that University avenue crossed the railroad and was the principal street of the village, and was much used by people passing over it with teams and on foot; that the boy, when struck by the engine, was on that street, and was attempting to cross from the east to the west side of the railroad track; and that the engine which struck him was hauling a belated west-bound passenger train, and was running at the rate of from 15 to 40 miles an hour. The issues in the case were: Was the accident caused by the negligence of the employés of the defendant? and did the negligence of the boy and his parents proximately contribute to it? Upon these issues, we think there was evidence sufficient to entitle the plaintiff to have them submitted to the jury, and that the court properly so held, in granting the motion for new trial. Negligence is generally an inference from facts and circumstances, which it is the province of the jury to find; and, in an action for damages for injury caused by negligence, a nonsuit upon the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside. And the negligence of parents in allowing their child to be alone in the street does not relieve the defendant from liability, if the injury occurred through the gross negligence of its employé. Schierhold v. Railroad Co., 40 Cal. 447. On a trial before a jury in an action for negligence, a nonsuit should not be ordered by the court unless there is no evidence at all, or a mere scintilla of evidence, wholly insufficient for the consideration of the jury. Wilson v. Railroad Co., 62 Cal. 164. And when a nonsuit is improperly ordered, and a motion for new trial is made, it should be granted. Alvarado v. De Celis, 54 Cal. 588. It follows that the order appealed from must be affirmed, and it is so ordered.

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4 Cal. Unrep. 603

CRAMER v. KESTER, Road Overseer. (No. 15,191.)

(Supreme Court of California. April 19, 1894.)

INJUNCTION—RESTRAINING DESTRUCTION OF FENCE —TITLE OF PLAINTIFF.

In an action to enjoin a road overseer from removing a fence, where defendant does not deny plaintiff's allegation of possession, but relies on an easement in the public as justifying him, plaintiff need not prove title, possession being sufficient upon which to maintain his action.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Jos. Cramer against F. U. Kester, road overseer, to enjoin him from removing a fence. From a judgment for plaintiff, and an order denying his motion for new trial, defendant appeals. Affirmed.

B. V. Sargent, Dist. Atty., and S. F. Geil, for appellant. W. A. Kearney, for respondent.

SEARLS, C. This is an action by Joseph Cramer against F. U. Kester, road overseer of Cholame road district, in the county of Monterey, to restrain the latter from destroying and removing a fence surrounding premises of the plaintiff. Plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals.

Plaintiff, in his complaint, avers that he is the owner of, in the possession of, and entitled to the possession of, the W. ½ of the N. W. ¼, section 8, township 24 S., range 13 E., M. D. M., situate in the county of Monterey, state of California; that said land is inclosed by a substantial fence, and is valuable for raising crops of vegetables, cereals, and hay; that on November 2, 1891, the board of supervisors of Monterey county, claiming that there was a highway over said tract of land, passed an order directing the road overseer to open, and to keep open, for public travel, such public highway so claimed; that defendant is road overseer, has threatened, and will, unless restrained, tear down the fence, and open, and keep open, said alleged highway. The complaint then negatives the fact that a highway has ever been laid out or erected as a road or highway by order of the board of supervisors of said county, or that it has ever become such by use or dedication, or otherwise. The answer admits the ownership of plaintiff to all the land described in his complaint, except a strip which is defined by courses and distances, being a strip of about 40 feet wide across said land, as to which defendant, on information and belief, denies plaintiff is the owner, or entitled to the possession of, and, upon like information and belief, avers it to be a public highway, to which the county of Monterey, a municipal corporation, is entitled to the possession and control of as such. The answer further avers, upon information and belief, that plaintiff will not lose any vested right, and that the said public highway was established upon the land, and that plaintiff and his predecessors acquired the same subject to the said easement, and not otherwise. There are other allegations in the complaint and answer, but they are not important to any question made on appeal. At the trial, defendant called the plaintiff as a witness on behalf of the defense, and put to him the following questions: (1) "Does this piece of land described in your complaint belong to you, or your wife?" (2) "Did you ever execute and deliver a deed or other document purporting to convey the land described in your complaint to your wife, after you purchased it from Davis?" Counsel for plaintiff objected to the evidence as incompetent, and not the best evidence. The objections were sustained, exceptions noted, and the rulings are assigned as error. There seem two answers to the contention of appellant:

1. If the proffered evidence was admissible for any purpose, it was to show that title had passed from plaintiff to his wife. This could only be proven by a proper conveyance in writing. "There can be no evidence of the contents of a writing, other than the writing itself," except in certain enumerated cases, of which this is not one. There are a few instances in which the fact that an instrument was executed or existed may be proven by parol, for some incidental purpose, as to fix the date of a transaction, and in which the contents of the instrument itself are not proffered as evidence. These are exceptions, however, to what may be regarded as one of the most clearly settled propositions of the law of evidence. Rice, Ev. p. 145.

2. The ownership, possession, and right to possession of plaintiff to the land described in his complaint are practically admitted by the pleadings. The answer expressly admits his ownership to the land, except as to that covered by the alleged highway, as to which it denies, upon information and belief, that he is the owner, or entitled to the possession, but, on the contrary, avers it is a public highway, and that, as such, the county is entitled to the control and possession of it. As before stated, the answer further avers that the locus in quo is a highway, and that the plaintiff and his predecessors in interest acquired the same subject to the easement. An easement or right of way over land does not constitute a title thereto; and we think it apparent that as the appellant did not deny the possession of plaintiff, which, in itself, is sufficient to maintain an action against a mere trespasser, and did justify the threatened entry only by pleading an easement in the public, of which the defendant was the representative, that the denials of the answer did not call for proof of title in the plaintiff. If defendant had no right to open the premises for highway purposes, possession in plaintiff was a sufficient title upon which to maintain the action. If defendant possessed such right, title in the plaintiff could not defeat it. Counsel have devoted much space in their briefs to a discussion of the testimony, and to quotations therefrom. It requires but a casual review of such testimony to show that it involved a substantial conflict upon all the material points, and, as the findings are full and explicit in favor of the plaintiff, the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 26

WENGANT v. BARTLETT. (No. 15,271.)

(Supreme Court of California. April 18, 1894.)

IMPLIED TRUST—WHAT CONSTITUTES.

Where a purchaser of property has the title made to another as a matter of convenience, —such other conveying it to him on the same day,—such other is not the purchaser's trustee, as to the land, though the latter conveyance is delivered back to him by the purchaser, and destroyed, with the purchaser's consent, since, on the delivery of the deed to the purchaser, the legal title passed, and the subsequent destruction thereof could not affect the title.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Hannah Wengant against Alfred Bartlett to quiet title to land. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Fisher Ames, for appellant. T. M. Osmont, for respondent.

GAROUTTE, J. This is an action to quiet title. Defendant admits that he claims an adverse interest in the land, and bases such interest upon a claim for compensation out of said land as plaintiff's trustee thereof. Judgment went for plaintiff, and this appeal is from the order denying a motion for a new trial.

The facts of the case, briefly stated, are as follows: Plaintiff purchased the tract of land, and had the conveyance made to defendant, as a mere matter of convenience. Upon the same day the defendant conveyed the land to plaintiff, and some time thereafter this deed was delivered back to defendant, it never having been recorded. The deed was then destroyed by defendant, probably with the consent of plaintiff. The record title thus appeared in the defendant at the commencement of this action. The defendant claims that under this state of facts he was constituted the trustee of plaintiff, and, as such trustee rendered services to her, in the care and attention of this realty, and that his compensation therefor constitutes a lien thereon. The findings of fact are full and complete against defendant's claims, at all points. Among other things, the court found that the defendant rendered no services of appreciable value to plaintiff, and if any services whatever were rendered, they were intended by defendant to be gratuitous. The evidence is sufficient to support these findings, and they are determinative of the case. Again, the facts we have cited do not constitute the defendant plaintiff's trustee. Upon the delivery by defendant of his deed to plaintiff, the legal title passed from him, and never came back. The subsequent destruction of the deed, even if destroyed with the consent of plaintiff, did not affect the status of the title in the slightest degree. The mere record title stood in the name of defendant, and that was all. That fact comprised his entire connection with the property, and was not sufficient to create a trust. The order denying the motion for a new trial is affirmed.

We concur: HARRISON, J.; PATERSON, J.

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102 Cal. 224

HUFFMAN v. HALL. (No. 18,029.)

(Supreme Court of California. March 27, 1894.)

REPEAL OF STATUTE—EFFECT OF AMENDING ACT —HIGHWAYS—TITLE BY USER.

1. Since the re-enactment of a statute for the purpose of amending it, as required by Const. art. 4, § 24, has the effect of repealing the original statute, Act March 30, 1874, amending Pol. Code, § 2619, by striking out the provision that "all roads used as such for a period of five years" shall be highways, repealed such provision as to the whole state, though the amending act in terms applied only to certain counties therein named. Beatty, C. J., dissenting. Gloster v. Wade, 21 Pac. 6, 78 Cal. 407, overruled.

2. The fact that land is inclosed is strong evidence to show that any use of it by the public was only permissive.

In bank. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by C. H. Huffman against A. C. Hall to recover damages for the removal of a fence, and to enjoin defendant from further interfering therewith. From a judgment for plaintiff, defendant appeals. Affirmed.

Breckinridge & Peck and B. F. Fowler, for appellant. W. A. Nygh, F. H. Gould, T. C. Law, and Baldwin & Campbell, for respondent.

HARRISON, J. The plaintiff is the owner of a tract of land in Merced county, lying to the east of the Snelling road, and bounding upon Bear creek at the south. The defendant was the road overseer of road district No. 1 of Merced county, and on the 17th of January, 1889, destroyed and removed about 60 feet of a fence which extended from Bear creek northerly between the Snelling road and the plaintiff's land, under the claim that it was an obstruction to a public road along the northerly bank of Bear creek. The plaintiff brought this action for damages for the alleged trespass, and to enjoin the defendant from further interfering with the fence. Judgment was rendered in his favor, and the defendant has appealed.

The title of the plaintiff to the land was not questioned at the trial, and the finding of the court that the land had been, for a period of more than 10 years prior to January, 1889, inclosed along the Snelling road with a good and substantial fence, is not excepted to. The defendant, however, sought to show that the public had traveled over this strip of land, and used the same as a public highway, for a continuous period of more than five years since the 10th of January, 1873, and claimed that by reason of such user it had become a public highway. In this connection he stated that he did not expect to prove that the owner had shown any intention to dedicate the land as a public highway, except by showing such use, and it was admitted that no compensation had been paid to the plaintiff. Upon the objection of the plaintiff this evidence was excluded, and this ruling is now assigned as error. The Political Code went into effect January 1, 1873, and section 2619 thereof provided that "roads laid out and recorded as highways by order of the board of supervisors, and all roads used as such for a period of five years are highways." In 1874 this section was amended by striking out the words, "and all roads used as such for a period of five years," and the section, as thus amended, was in force upon that subject until the entire chapter upon this subject was repealed, in 1883, and a new chapter substituted in its place, by which it is declared in section 2618: "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails and bridges laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." As there is no claim that the road in question has been laid out as such by the public, it cannot be held to be a public highway by virtue of this section, unless it is shown to have been "dedicated or abandoned to the public" by the owner of the land. The finding that the premises had been inclosed for a period of more than 10 years prior to the alleged trespass is inconsistent with an abandonment of them to the public, and shows that the road had not been laid out or erected over them; and it was stated by the defendant at the trial that he did not expect to prove any intention on the part of the owner to dedicate the land as a public highway, except by proving its use by the public. Unless, therefore, the road in question had become a public highway prior to 1883, the offer of proof on the part of the defendant was insufficient to establish its existence as a highway, and was properly excluded. Dedication must be made by the owner of the land, and exists only when he has manifested some intention to make the dedication. "It is never to be presumed without evidence of an unequivocal intention on the part of the owner." Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746. The fact that the land had been inclosed by a fence would show that any use of it by the public was only permissive, and "has always been considered as strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use." Quinn v. Anderson, supra. Private property cannot be taken for public use without compensation, either by direct proceedings for that purpose or by a mere user on the part of the public, unless the use has been so adverse as to prevent the owner from asserting title thereto, and for this purpose it must be shown that the user was adverse. "Where the dedication as a highway is sought to be established by user, it must appear that such user was with the knowledge of the owner, and with his consent, or without objection on his part." Hope v. Barnett, 78 Cal. 14, 20 Pac. 245.

The provision in section 2619 of the Code, as it was originally enacted, declaring that all roads used as such for a period of five years are highways, having been superseded by the amendment of that section in 1874, cannot be invoked as an authority for the creation of a highway by mere user. By the amendment of the section its provisions, as originally enacted, were obliterated from the statutes of the state, and the amended section was thereafter the only statutory provision upon that subject. The amendment was made by an act passed March 30, 1874 (Amend. Codes 1873-74, p. 116), in which several other sections in relation to highways were amended, of which section 38 provides that "this act shall apply only to the following named counties" (designating them). This limitation of the section to certain enumerated counties did not, however, have the effect of retaining the original section in force upon the statute book. By its amendment it was repealed, and the effect of section 38 was to limit the statutory provisions of the amended sections to the enumerated counties, and leave the remaining counties of the state unaffected by the provisions of the Civil Code upon the subjects embraced in those sections. The constitution (article 4, § 24) declares that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." It was held in Billings v. Harvey, 6 Cal. 381, that under this provision of the constitution, "if a statute or section of a statute is re-enacted, it is totally inconsistent with the idea that the old statute or section still remains in force, or has vitality for any purpose whatever. The re-enactment creates anew the rule of action, and, even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands, to all intents, as if absolutely and expressly repealed." This rule of construction was afterwards reaffirmed by the court in Billings v. Hall, 7 Cal. 3; Morton v. Folger, 15 Cal. 284; Clarke v. Huber, 25 Cal. 594; Bensley v. Ellis, 39 Cal. 313; People v. Tisdale, 57 Cal. 104. When section 2619 was, in 1874, "amended to read as follows," the section, as it had previously stood upon the statute book, ceased to have any statutory force, and was no longer a portion of the laws of the state. The provision of section 38 of the act by which the amendment was made limited the effect of the amended section to certain enumerated counties, but did not have the effect of continuing the original section in force in the other counties. The section, as amended, is to be construed as if the designated counties had been specified in the section itself, and as if it had been amended to read: "In the counties of [designating them], roads laid out and recorded as highways by order of the board of supervisors are highways." If the section had been amended in this form, there would be no room for construction, or, if the amendatory act had provided that the sections as originally enacted should remain in force in the remaining counties of the state, the legislative will would have been manifest and upheld, since the constitution in force at that time did not prohibit local legislation. In the absence of such saving clause, however, the effect of the amendment was to make the section local in its application, and to leave the other counties of the state without any provisions in the Code upon the subject. We are not unmindful of the fact that in Gloster v. Wade, 78 Cal. 407, 21 Pac. 6, it was held that the effect of section 38 in the amendatory act of 1874 was to leave the provisions of section 2619, as originally enacted, in force in all the counties, except those enumerated in said section 38, and to cause the provisions of the amended section to be applicable only to the designated counties, thus, in effect, leaving section 2619, as originally enacted, in force after it had been superseded by its amendment. This construction is, however, at variance with the provisions of the constitution as expounded in the foregoing cases, and we must regard the constitution as of higher authority than the decision in that case, and therefore decline to follow it as an authority.

The suggestion that this construction of the effect of the act of 1874 would destroy the existence of a road law in most of the counties of the state, from 1874 to 1883, and invalidate all action that had been taken in those counties, loses its force upon a consideration of the Civil Code in connection with the law on this subject as it existed prior to 1873. It is well known that, prior to the adoption of the Codes, it was customary for the legislature to enact special road laws for individual counties in the state, adapting the provisions of those laws to the needs of the respective counties. This mode of legislation began as early as 1858, the legislature having in that year enacted road laws for seven different counties in the state, and the general road law which was adopted in 1861 excepted a large number of counties from its operation. In 1872, at the same session of the legislature in which the Codes were adopted, special road laws were enacted for 15 different counties in the state, and acts amending the existing road laws for 13 other counties. When the compilers of the Codes made their report to the legislature, they recognized the existence of these various laws, and proposed two alternative chapters upon the subject of highways,—one substantially in the form as it was enacted, and another declaring that none of the provisions of the Codes should affect any of the provisions of these laws, but that they should be continued in force notwithstanding the provisions of the Political Code. The legislature, however, instead of adopting either of these chapters by itself, combined the two, and added to the chapter on highways section 2757 of the Political Code, as follows: "Nothing in this chapter affects the provisions of any statute in relation to roads and highways now in force, and made applicable to one or more counties by name, but whenever any such statute is repealed, then the provisions of this chapter are applicable to the county named in the statute repealed." When the amendments of 1874 were adopted, this section, with several others of the chapter, were retained, so that the provisions contained in these laws continued in force until 1883, when the entire chapter was revised, and all special laws relating to roads were repealed. At the session in 1874, when these amendments were adopted, the special laws applicable to the greater portion of the counties enumerated in section 38 of the amendatory act were repealed, and at subsequent sessions statutes were enacted providing special road laws for some of the same counties,—Contra Costa, Sacramento, Fresno, Butte, and others. In 1876 a special road law was enacted for Lassen county (St. 1876, p. 539), in which "all the provisions of the Political Code in relation to highways" were made applicable to that county. Similar provisions have been made in road laws enacted for other counties since 1874,—San Bernardino (St. 1876, p. 57), Butte (St. 1856, p. 37), Fresno (St. 1878, p. 859), and others. From these acts it is apparent that it could not have been the understanding of the legislature that those provisions of the Political Code as they were originally adopted, and as found in the sections enumerated in the amendatory act of 1874, were both in force; and, unless it be held that by the amending of the sections the original ones were repealed, there would be in some of these acts contradictory and irreconcilable provisions. Under these provisions of the Code it ought to be assumed that, if any roads were established or improved in any of these counties during this period, the work was done under the provisions of these special acts, rather than under a law which was inapplicable to those counties. The judgment is affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; GAROUTTE, J.; McFARLAND, J.

BEATTY, C. J. (dissenting). There are several grounds elaborately presented in respondent's brief, upon one or more of which the judgment of the superior court might, perhaps, be affirmed; but, these matters havbeen passed over in the opinion of the court, it would be profitless to discuss them in a dissenting opinion, and therefore I shall make no attempt to do so. It would not be proper, however, to say that I dissent from the judgment without meeting and disposing of the questions so presented, and I do not say so. I merely wish to express my dissent from the conclusion and reasoning of the court upon the single point decided in its opinion.

As one of those who participated in the decision of Gloster v. Wade, 78 Cal. 407, 21 Pac. 6 (here overruled), I am perfectly willing to concede that the provisions of the constitution are of higher authority than that decision, or any decision, but I am unable to perceive the application of the doctrine. The provision of the constitution alluded to prescribes the method of amending statutes, and the entire sum and substance of the decisions cited upon its construction is that, when a section of the statute is amended as the constitution directs, the old section ceases to exist at the same time that the new and amended section comes into operation. But none of those cases involved the effect of a saving clause, and, while they are undoubtedly correct as far as they go, the doctrine which they establish is in no wise inconsistent with the proposition conceded in this opinion,—that the legislature, in amending a statute or part of a statute, may by a saving clause continue the old section or statute in force as to classes of persons or parts of the state. This proposition was very recently affirmed here in a case which received more careful, and I may say more anxious, consideration than any case that has been before the court during the time that I have participated in its deliberations. In the Case of McNulty, 93 Cal. 427, 26 Pac. 597, and 29 Pac. 61, it was held that various sections of the Penal Code relating to the mode of executing a sentence of death were kept in force as to all capital offenses committed prior to their amendment, by virtue of a general saving clause contained in section 329 of the Political Code; and there can be no distinction in principle between a saving clause which keeps a road law in force after amendment as to certain counties of the state and one which keeps a penal statute in force after amendment as to a certain class of offenders. The legislature, then, having the undoubted power to preserve the old road law as to a part of the state by a saving clause, the only question in Gloster v. Wade was one of statutory construction; whether, in other words, the legislature had, by section 38 of the act of 1874, manifested its intention so to preserve the old law in all except the enumerated counties. If it had, by language which, however equivocal, fairly expressed such an intention, there could be no question that it must prevail. After due deliberation, the court in banc, without any dissent, adopted the opinion unanimously concurred in by the commissioners,—that section 38 was intended to operate as a saving clause,—and afterwards a petition for a rehearing was denied, again without dissent expressed by any member of the court. This decision was, in my opinion, correct. But, even if it was erroneous in putting a wrong construction upon the statute, I cannot see how it violated the constitution. It certainly did not concede to the legislature any power which it does not possess, but merely affirmed an intention to exercise a power, the existence of which no one denies; and, unless a contrary meaning is so clearly expressed in the statute as to admit of no difference of opinion, it seems to me that a decision made under such circumstances, concurred in apparently by the whole court and all the commissioners, and deliberately reaffirmed on petition for rehearing, ought to be deemed sufficient authority to call for the same decision here.

But Gloster v. Wade is not wholly unsupported. If any law writer is entitled to be deemed authority upon the statute law of California, Mr. Hittell may fairly claim that honor. His compilations of the statutes and codes were for many years, and until superseded in part by later compilations, commonly cited in all the courts of the state, and certainly enjoyed the reputation of being accurate and trustworthy, which they could not have been if prepared by a compiler ignorant of the effect and construction of saving and repealing clauses. Upon these points I should say that he might properly be regarded as an expert. Now, by reference to a note under section 2619 of Hittell's Political Code of 1876, it will be seen that he placed precisely the same construction upon section 38 of the act of 1874 that was subsequently given to it by this court in Gloster v. Wade. And not only did Mr. Hittell give it that construction. It was so construed and acted upon throughout the state, from the date of its passage, for a period of nine years, and until the road law was revised and re-enacted by the statute of 1883. For it is to be observed that not only section 2619 of the Political Code was amended by the act of 1874. More than 30 other sections of the road law, embracing every important provision in it, were either amended or directly repealed by the same act; and upon the doctrine of the present case it follows that there was no road law in most of the counties of the state from 1874 to 1883. There was, during that period, not only no statute defining a road; there was no law for establishing, erecting, improving, or maintaining a road or bridge. No road district could be created, no road overseer appointed, no tax collected. Yet it is notorious that all these things were continually done throughout the state, under the assumed authority of the statute, during the entire period when, as we are now told, there was no statute. This is certainly remarkable.

But aside from the mere authority of our former decision, the opinion of Mr. Hittell, and the practical construction of all public officers charged with the care of public roads and bridges for a period of nine years, I rest confidently on the language of section 38 to justify a construction which carried out what no one can doubt was the actual intention of the legislature. "This act shall apply only to the following counties: Calaveras," etc. By the words "this act" the legislature could have intended no other act than that of which the section was a part, viz. the amendatory act of 1874, and not the Political Code, of which section 38 never became a part. This act, then, amending the Political Code, was to apply only to the enumerated counties. But how could this be so if it repealed the Political Code in all other counties? The amendatory act (the only act to which the words "to act" in section 38 can possibly apply) is entitled "An act to amend the Political Code in relation to highways," and all its operative clauses are in strict conformity to its title, as the following examples will show: "Section 1. Section twenty-six hundred and nineteen of said Code is hereby amended so as to read as follows." "Sec. 4. Sections twenty-six hundred and forty-five and twenty-six hundred and forty-six are hereby repealed." These, I repeat, were the operative clauses of "this act;" and if "this act" applied only to certain enumerated counties, and by necessary consequence had no operation in the nonenumerated counties, then, as to such counties, the designated sections of the Political Code were neither amended nor repealed. This, it appears to me, is the plain and obvious and common-sense construction of section 38 of the act of 1874, and was, beyond a doubt, what the legislature actually intended.

(102 Cal. 177)

WEBSTER v. HANNA, Justice of the Peace.

(No. 15,579.)

(Supreme Court of California. March 29, 1894.)

MANDAMUS TO JUSTICE—COSTS ON APPEAL.

Under St. 1877–78, p. 134, requiring that all fees of a justice of the peace must be paid before he can be compelled to forward any papers on appeal, mandamus will not lie to compel a justice to forward papers on appeal in a civil action until his fees incurred by both parties have been paid. Beatty, C. J., dissenting.

In bank.

Application for writ of mandamus compelling W. H. Hanna, justice of the peace, to forward papers on appeal. Denied.

Ford & Burnell, for petitioner. H. W. Hanna, in pro. per.

GAROUTTE, J. This is an original application for a writ of mandate to compel a justice of the peace to send to the superior court the papers on appeal in a civil action which had theretofore been tried before said justice, and judgment rendered. The appellant paid the fees of the justice upon the appeal, and also his own costs incurred at the trial of the action, but refused to pay to the justice the costs of the respondent incurred at the trial, and for that reason the justice declined to forward the papers to the clerk of the superior court. If the justice is entitled to receive from the appellant the costs incurred by the respondent at the trial before it becomes his duty to forward the papers to the appellate court, then this application must be denied. An act of the legislature (St. 1877–78, p. 134) declares what fees justices of the peace are entitled to charge, and following such declaration in the same act this language occurs: "All fees of justices of the peace, including those on trial and those on appeal, must be paid before the justice shall be compelled to forward any papers on appeal." This language is very broad, and covers the entire subject. It certainly refers to all fees to which the justice is entitled under the law, whether those fees be incurred by appellant or respondent. See Bray v. Redman, 6 Cal. 287. As to the policy of the law requiring the appellant to pay to the justice all fees incurred by respondent before he is entitled to have the papers transferred to the superior court, we are not called upon to discuss it. This provision of the statute is not in conflict with any section of the Code of Civil Procedure, and is entirely in line with that portion of section 977 bearing upon the fees of justices of the peace. It not being in conflict with any subsequent provision of the Code or statutes, there can be no repeal by implication. While, to some extent, it may be inconsistent with other provisions of the Code, yet inconsistency in statutes does not make this court a forum for the exercise of legislative functions in amending or repealing plain provisions of the law. The application is denied, and the proceedings dismissed.

We concur: PATERSON, J.; McFARLAND, J.; FITZGERALD, J.

BEATTY, C. J. I dissent. The allegations of the petition confessed by the demurrer are, in effect, that in an action commenced in respondent's court by Charles and Emily Foster, judgment was given in their favor and against the petitioner for the return of certain chattels, and for damages, and for $52.60, costs of suit; that petitioner, being dissatisfied with the judgment, took and regularly perfected an appeal to the superior court, and in due time paid to the respondent all of his fees as justice of the peace, and all other costs incurred by the petitioner on the trial of said cause and for making out and transmitting the appeal papers; that the respondent nevertheless refused for more than five days thereafter petitioner's demand that he should transmit said papers. Section 977 of the Code of Civil Procedure reads as follows: "Upon receiving the notice of appeal, and on payment of the fees of the justice or judge, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the superior court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the superior court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the superior court either party may have the benefit of all legal objections made in the justice's court." If, within the meaning of this section, the fees of the respondent had been paid at the time transmission of said papers was demanded, there can be no doubt that it was his duty, specially enjoined by law, to transmit them to the county clerk within five days thereafter, and no question is made that mandamus will lie to compel him. But the contention, and the whole contention, of respondent is that his fees had not been paid according to the requirements of the section quoted, because, although the petitioner had paid all his own costs and all fees of the justice chargeable to him, he had not paid the costs incurred by, and the fees chargeable to, the Fosters,—the plaintiffs in the action,—and he justifies his refusal upon the ground that the law has annexed to the right of appeal from the judgment of a justice of the peace the condition that the party appealing shall not only pay his own costs, but the costs of his adversary also. This is by no means an obvious construction of section 977, standing alone, and it is in direct conflict with other provisions of the Code in pari materia; at least it is a construction which renders such provisions meaningless and absurd. For instance, by section 896 the costs of the prevailing party must be taxed and included in the judgment, and by section 978 the party appealing, in order to get a stay of proceedings, must file an undertaking with sureties in twice the amount of the judgment, including costs, conditioned for the payment of such, etc. By section 974, 30 days are allowed within which to take an appeal, and by sections 891, 892, the judgment is required to be entered at once upon the rendition of a verdict in case of a jury trial; and when the trial is by the court it must be entered at the close of the trial. These provisions all imply that the prevailing party has paid his costs, and got a judgment for them before the appeal is taken, and, necessarily, before the party appealing is called upon to pay the fees and costs, payment of which is made a condition precedent to the right to demand a transmission of the papers. Taking these several provisions of the statute together, their obvious construction imposes upon the party appealing the payment of no costs but his own. And this construction is also in favor of justice, as the opposite construction is productive of the rankest injustice; for, why should the losing party be compelled to pay the costs of the prevailing party as a condition of exercising his right of appeal, and, especially, when the prevailing party has a judgment for such costs, secured by an ample undertaking, and the losing party has no security for their repayment in case he is finally successful in the litigation? As a question of justice between the parties, the matter is too plain for discussion.

But we are cited to two cases decided in this court, one in 1855 and the other in 1856, which, it is contended, give to a corresponding section of the old practice act (section 627) the construction claimed by respondent for section 977 of the Code of Civil Procedure. In the first of these cases (McDermott v. Douglass, 5 Cal. 89) it clearly appears from the report that the appealing party had failed to pay or tender any fees for filing the appeal bond, or any fees whatever, and, of course, the mandamus was properly refused on that ground. The whole opinion of the court is embraced in two lines, and consists of a misquotation of the statute; that is to say, it quotes the language of section 627 as amended in 1853. St. 1853, p. 280. But this had been changed by the amendment of 1854. St. 1854, p. 70. The case before the court was, however, correctly decided under the statute as amended, and as it has been incorporated into section 977 of the Code, for, as above stated, the appealing party had failed to pay his own costs, including the fee for filing the undertaking on appeal. In the second case (Bray v. Redman, 6 Cal. 287), the point under consideration was not involved, but the court incidentally refers to and approves the decision in McDermott v. Douglass, the correctness of which is not questioned. No case, however, is cited in which this court has held or intimated that the legislature of California has ever deliberately sanctioned such practices as the statute, construed as respondent construes it, would warrant. If the law really meant that a justice of the peace, who has chosen to give credit for his fees to one of the parties to an action before him, may, by deciding the cause in his favor, compel the other party to pay a debt not his own as a condition of exercising his right of appeal, it is easy to see what scandalous abuses might result; for under such a law the justices of the peace would have a pecuniary interest, to be affected favorably or unfavorably by their own decisions, and, whether they were or were not in fact biased, they could never escape the suspicion of bias when their decisions happened to coincide with their interest. This would be an evil of sufficient magnitude if this were all. But if a justice of the peace, whose fees are his only compensation, could increase his official emoluments by encouraging the prosecution of baseless and vexatious suits against responsible defendants by giving credit to impecunious plaintiffs, the bias which would always be suspected in such cases would sometimes exist, and the defendant would be compelled, as the price of an appeal to an impartial tribunal, to pay, not only his own costs, but the costs and charges incurred by the plaintiff in vexatiously pursuing him, and that without any security for their repayment upon a final decision in his favor. This view might be further pressed, and even more strongly illustrated, but enough has been said to show how reluctant any court should be to sustain a construction of the statutes so widely at variance with justice and propriety; and, even if the previous decisions of the court had been in favor of such construction, we should feel no hesitation in overruling them if the terms of the statute would justify us in so doing. But, as we have shown, the cases cited only involved the question whether the appealing party was required to pay his own costs, and, consequently, it could not have been decided that he was required to pay costs of his adversary.

Coming, then, to the statutes themselves, and construing them, as we may, without reference to decisions which do not touch the point in controversy here, we think it has been made sufficiently clear that the provisions of the Code of Civil Procedure not only do not require the construction claimed by respondent, but are plainly inconsistent with it. There is, however, another statute, approved March 1, 1878, relating to the fees of justices, which contains the provision: "All fees of justices of the peace, including those on trial and those on appeal, must be paid before the justice shall be compelled to forward any papers on appeal." In order to determine the proper effect of this provision of the fee bill, it may be necessary to take into consideration the date of its enactment, as compared to the existing provisions of the Code of Civil Procedure relating to the same matter; for, if they are inconsistent, the later statute will prevail, operating a repeal by implication of the earlier. We are not prepared to say when the clause above quoted first found its way into the fee bill, but it dates at least as far back as the act of April 4, 1870, which was amended in other particulars by the act of March 1, 1878. Afterwards—in 1873—the Code of Civil Procedure was adopted. Then, in 1878, as we have seen, this provision of the act of 1870 was re-enacted in amending the section in which it occurs in some other particulars. Then, on March 26, 1880 (St. p. 16), sections 977 et seq., Code Civ. Proc., were re-enacted; so that, on the theory that the two statutes are so inconsistent that the later will repeal the earlier by implication, the provisions of the Code must prevail. On the other hand, if the two statutes are to be construed as statutes in pari materia ought to be construed, so as to harmonize all their provisions as far as can be done, the same result will follow. For the two laws can be harmonized, and they can be harmonized only by limiting the application of the clause quoted from the fee bill to fees and costs incurred by the appealing party; fees, in other words, which he owes, to the exclusion of fees and costs which in legal contemplation have been paid by the other party, and included in his judgment. If it be said that this construction disregards the letter of the law, it may be truly answered that any other construction disregards its substance, and, what is worse, disregards the plainest dictates of justice and propriety. For these reasons, I think a peremptory writ of mandate should issue as prayed.

DE HAVEN, J., concurs.

(102 Cal. 169)

GRAND LODGE OF I. O. G. T. OF STATE OF CALIFORNIA v. MARKHAM et al. (No. 15,493.)

(Supreme Court of California. March 29, 1894.)

ORPHAN ASYLUM—SUPPORT BY STATE.

Under St. 1880 (Bancroft's Ed.) p. 48, which provides that institutions conducted for the support of minor orphans, half orphans, and abandoned children shall receive from the state $100 per year for each minor orphan, and $75 for each half orphan and abandoned child, supported by it, for whose specific support therein it does not receive $10 or more per month, the state cannot deduct from the allowance due an institution money otherwise received by it for the specific support of a minor orphan, half orphan, or abandoned child, amounting to less than $10 per month.

In bank.

Petition by the Grand Lodge of the I. O. G. T. of the state of California for a writ of mandamus compelling the state board of examiners to allow it the sum of $866.17 for the support of minor orphans in its orphan asylum. Petition granted.

R. Thompson and J. M. Walling, for petitioner. Oregon Saunders, Dep. Atty. Gen., for respondent.

PER CURIAM. This is an original proceeding in which the petitioner asks this court to issue its writ of mandate, directed to the state board of examiners of the state of California, requiring said board to allow the petitioner the sum of $866.17, which sum petitioner claims is justly due it from the state of California for the support of minor orphans maintained in its orphan asylum in the county of Solano for the maintenance and education of orphans, half orphans, and abandoned children, who are minors. The facts are undisputed, and the decision to be made by us depends entirely upon the construction of sections 1 and 7 of an act of the legislature of this state approved March 25, 1880, entitled "An act to appropriate money for the support of orphans, half orphans and abandoned children." St. 1880 (Bancroft's Ed.) p. 48. "Section 1. There is hereby appropriated out of any money in the state treasury not otherwise appropriated, to each and every institution in this state conducted for the support and maintenance of minor orphans, half orphans or abandoned children * * * aid as follows: For each whole orphan supported and maintained in any such institution the sum of one hundred dollars per annum; for each half orphan supported and maintained in any such institution the sum of seventy-five dollars per annum; for each abandoned child supported and maintained in any such institution, the sum of seventy-five dollars per annum; provided, such abandoned child shall have been an inmate thereof for one year prior to receiving any support as provided in this act." "Sec. 7. In order that the provisions of this act shall not be abused, it is hereby declared: (1) * * * (2) * * * (3) That no child for whose specific support there is paid to any such institution the sum of ten dollars or more per month shall be deemed a minor orphan, half orphan, or abandoned child within the intent and meaning of this act." The only question involved in this proceeding is whether, in the case of a minor orphan supported by the petitioner in its orphan asylum, and for whose support during the period covered by its setlement with the state there has been paid by others a sum less than $10 per month, the state board of examiners is authorized to deduct the sum so paid to the petitioner from the $100 per annum appropriated by the state for the support of minor orphans by the terms of the first section of the act above quoted, and allow to the petitioner only the balance after making such deduction. The statute is so plain that there is no room for construction, and the question presented must be answered in the negative. When less than $10 per month is received by the petitioner from other sources for the specific support of a minor orphan during the period covered by its semiannual settlement, the petitioner is entitled to receive from the state the semiannual installment of the full sum named in section 1 of the act under consideration. Ordered that a peremptory writ of mandate issue in accordance with the prayer of the petitioner.

(102 Cal. 113)

LIVERMORE v. WAITE, Secretary of State.

(No. 18,270.)

(Supreme Court of California. March 29, 1894.)

STATE CAPITAL—CHANGE—CONSTITUTIONAL AMENDMENT.

Const. art. 20, § 1, declares Sacramento the capital until changed by law approved by a majority of the electors at a general election, under such regulations as the legislature by a two-thirds vote of each house may provide, submitting the question of change to the people. A proposition for an amendment of this section declared San Jose the capital until changed in the manner before prescribed, provided that the state should receive a donation of a 10-acre site and $1,000,000 "before such removal shall be had;" the governor, secretary of state, and attorney general to approve the site, and, after the approval and payment of the money, the legislature to provide for building, and for the removal of the seat of government. *Held*, that these provisos vitiated the proposition, since the vote of the people would not have the effect to change the seat, but merely to do away with the present one, leaving the matter still undetermined. Paterson and McFarland, JJ., say, further, that the seat of government cannot be changed by an amendment of Const. art. 20, § 1, but only by proceedings under that article.

In bank. Appeal from superior court, Sacramento county; W. H. Grant, Judge.

Suit by one Livermore, as a taxpayer and citizen of the state, against E. G. Waite, secretary of state, for an injunction. Judgment for plaintiff. Defendant appeals. Affirmed.

Atty. Gen. Hart, W. H. Layson, Dep. Atty. Gen., D. M. Delmas, and Morehouse & Tuttle, for appellant. L. T. Hatfield and Grove L. Johnson, for respondent.

HARRISON, J. At the last session of the legislature a proposition for an amendment to section 1 of article 20 of the constitution was adopted by the vote of two-thirds of the members of each house, in the following terms: "Senate Constitutional Amendment No. 23. Submitting to the people of the state of California an amendment to the constitution, amending section one of article twenty of the constitution of the state of California, relative to changing the seat of government from the city of Sacramento to the city of San Jose. The legislature of the state of California, at its thirtieth session, commencing on the second day of January, A. D. one thousand eight hundred and ninety-three, two-thirds of all the members elected to each house of said legislature voting in favor thereof, hereby proposes that section one of article twenty (miscellaneous subjects) of the constitution of the state of California be amended so as to read as follows: Section 1. The city of San Jose is hereby declared to be the seat of government of this state, and shall so remain until changed by law; but no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state voting therefor at a general state election, under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide, submitting the question of change to the people; provided, that the state shall receive a donation of a site of not less than ten acres and one million dollars before such removal shall be had. The governor, the secretary of state, and the attorney-general are hereby authorized to approve said site, and upon the approval thereof, and the payment of one million dollars into the state treasury, the legislature shall provide for the erection of the necessary building and the removal of the seat of government." The present action was brought by the respondent as a taxpayer and citizen of the state, to restrain the defendant, as secretary of state, from certifying the said amendment to the clerks of the respective counties of the state, and from doing any other act with intent to have the said amendment submitted to the electors of the state, and from incurring any expenses in connection with said amendment, or with any attempt to secure a vote thereon by the people, upon the grounds, as contended by him, that, by reason of the failure to comply with certain constitutional requirements, the amendment was never legally adopted, and, also, that, by the terms of the proposition itself, it is inefficient as an amendment to the constitution, and would be inoperative if approved by the people; and that, as a taxpayer and citizen, he is entitled to this relief against the improper expenditure of public moneys. Judgment was rendered by the court below in favor of the plaintiff, and the defendant has appealed.

The court made findings of fact in reference to the adoption of the amendment substantially as follows: On the 11th of March, 1893, while the legislature was in evening session, and after the hour of 10 o'clock in the afternoon of that day, the proposed amendment was introduced and read in the senate; and, after the roll had been called upon a motion for its adoption, the secretary of the senate announced that 28 senators, including Senators Hart and Voorhies, had voted for the amendment, and 7 had voted against it. Immediately upon the announcement of the vote, what purported to be a true copy of the proposed amendment was transmitted to the assembly, with the announcement that it had been duly adopted by the senate; and at the hour of 10 o'clock and 15 minutes p. m. the senate adjourned. On the same evening, between the hour of 10 o'clock and 15 minutes and 11 o'clock p. m., the rules of the assembly were suspended, and the amendment was voted upon in that house, and received the votes of 57 members in its favor, and 7 against it. Immediately thereon one of the assemblymen who had voted in favor of its adoption gave notice of his intention to move for a reconsideration of the vote, and at 11 o'clock p. m. the assembly adjourned. On the 13th of March (the intervening day being Sunday) another assemblyman who had voted for its adoption moved the reconsideration of such vote, and immediately thereafter, upon his motion, the motion to reconsider was laid upon the table, and during the afternoon session of that day the copy of the amendment, as sent to the assembly, was returned to the senate, with the announcement that it had been duly adopted by the assembly, and the legislature adjourned sine die, without any action by the assembly upon the motion for a reconsideration of the vote by which the amendment had been adopted. When the senate convened on the 13th of March, the journal was corrected so as to show that Senator Voorhies had voted "No" upon the adoption of the amendment, instead of "Aye," as it had been recorded. Thereupon Senator Hart, who had been opposed to the measure, stated that he had voted "No," but had changed to "Aye," because he had ascertained before the announcement of the vote that 27 votes had been cast in favor of the amendment, and that he had changed his vote for the purpose of giving notice of a motion to reconsider, and that, when the vote was announced, he attempted to make such motion, but an adjournment was had before he could present the motion. He therefore asked to have his vote recorded against the amendment. The matter was referred to the committee on judiciary, which reported that he had earnestly endeavored to defeat the measure when before the senate, and recommended that his personal statement be entered upon the journal. The motion of Senator Hart to have the journal corrected was denied, and the journal was approved, showing 27 votes, including that of Senator Hart, in favor of the proposed amendment, and 8 votes against it. The copy voted on in the assembly differed from that voted on in the senate by the omission of the words "of this state," in section 1, immediately after the words "seat of government," and in having the word "laws" instead of "law" in the first sentence. Upon these facts, the respondent, in his argument, has presented various reasons for the affirmance of the judgment, but the conclusion that we have reached concerning the character and effect of the proposed amendment renders it unnecessary to consider the other propositions presented by him.

Article 18 of the constitution provides two methods by which changes may be effected in that instrument,—one by a convention of delegates chosen by the people for the express purpose of revising the entire instrument, and the other through the adoption by the people of propositions for specific amendments that have been previously submitted to it by two-thirds of the members of each branch of the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legis lature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued. Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States. If, upon its submission to the people, it is adopted, it becomes the measure of authority for all the departments of government,—the organic law of the state,—to which every citizen must yield an acquiescent obedience. The power of the legislature to initiate any change in the existing organic law is, however, of greatly less extent, and, being a delegated power, is to be strictly construed, under the limitations by which it has been conferred. In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the governor, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment, nor can it submit to their votes a proposition which, if adopted, would, by the very terms in which it is framed, be inoperative. The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose; and the provision in article 18 that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision. The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. Experience may disclose defects in some of its details, or in the practical application of some of the principles or limitations which it contains. The changed condition of affairs in different parts of the state, or the changes of society or time, may demand an enlargement of some of these limitations, or an extended application of its principles. So, too, some popular wave of sociological reform, like the abolition of the death penalty for crime, or a prohibition against the manufacture or sale of intoxicating liquors, may induce a legislature to submit for enactment, in the permanent form of a constitutional prohibition, a rule which it has the power itself to enact as a law, but which might be of only temporary effect.

Section 1 of article 20 of the constitution is as follows: "The city of Sacramento is hereby declared to be the seat of government of this state, and shall so remain until changed by law; but no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state, voting therefor at a general state election, under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide, submitting the question of change to the people." The designation of the seat of government of a state may not properly fall within the definition of a constitution, but as it is a matter which is of public interest, and concerns the entire state, it is frequently made a part of that instrument, with the qualification that it shall so remain until changed by law. This declaration that the city of Sacramento is the seat of government of this state is a part of the constitution, and may be amended in the same manner as any other portion of that instrument. The provision that it shall so remain the seat of government until changed by law, whether such law is to be passed like any other law, or with the limitations prescribed in this section, is immaterial. The section of the constitution in which this provision is contained is not thereby withdrawn from the possibility of amendment. By this section the constitution provides that the seat of government may be changed in the manner therein prescribed, but the mode of effecting such change is not limited to the one thus provided. The legislature might have provided for changing the seat of government to San Jose by passing a law under the provisions of this section, but, instead of attempting this course, it has seen fit to seek to accomplish the same result through an amendment to the constitution. Either of these courses was open to its choice, and, if the amendment proposed by it were such as is within its power to submit for the approval of the people, the course adopted by it is without objection, for it must be left to the discretion of the legislature to determine which of two methods open to its selection it will adopt. The proposed amendment is, however, ineffective in accomplishing the object expressed in the title of the proposition. Article 18 of section 1 of the constitution provides that, if a proposed amendment is ratified and approved by the people, it "shall become a part of this constitution." By the terms of the proposed amendment, however, its operative effect is limited upon the donation to the state of not less than 10 acres in land and $1,000,000 in money, and the approval by the governor, the secretary of state, and the attorney general of the site so donated. The section of the constitution which is to be superseded by the proposed amendment fixes the seat of government at Sacramento, and, so long as that section remains a part of the constitution, the seat of government will remain at Sacramento until changed by law. But, if the proposed amendment should be adopted by the people, it would obliterate this section from the constitution without leaving any constitutional declaration by which the seat of government would be located in any part of the state. Although the first section of the amendment is in terms the declaration of an existing fact, the concluding portion shows that the amendment, as a whole, has reference to a future state of facts which may never come into existence. The proviso in the amendment is a limitation upon the declaration that the seat of government is at San Jose, and postpones the effect of that declaration until the conditions in the proviso have been complied with. Under established rules of construction applicable to constitutions, as well as to statutes, the effect of a proviso to an act is to render the proviso a limitation upon the body of the act, and to deprive the substantive part of the act of all effect inconsistent with the terms of the proviso. The effect of the amendment, if approved by the people, would be that the seat of government will at some future time be at San Jose, provided a donation of $1,000,000 in money and 10 acres of land shall be made. Until the donation of money and land shall have been made, and the site donated approved by the designated officers, the removal of the seat of government cannot take place; and the declaration in the first sentence that "the city of San Jose is hereby declared to be the seat of government of this state" would be ineffectual, for the reason that the amendment would fail to become an operative part of the constitution. The "removal" for which the legislature is directed to provide in the last clause of the proposed amendment is the removal from Sacramento to San Jose, and not a subsequent removal from San Jose, as is suggested in one of the briefs filed herein. By the existing constitution the seat of government is fixed at Sacramento, and is to remain there until changed; and by the terms of the proposed amendment there can be no removal except in accordance with the terms of the proviso upon which it is conditioned, and which limits the removal from Sacramento to San Jose to those terms. This removal is conditioned upon the approval of the site that must be donated before the declarative portion of the section can have any operation, and is the removal which is referred to in the proviso which declares that the donation shall be made "before such removal shall be had." If any additional argument is needed, it is found in the current history of the adoption of the amendment, and also in the entitling of the proposition for the amendment, which declares it to be "relative to changing the seat of government from the city of Sacramento to the city of San Jose." The provision in the proposed amendment for a law providing for its subsequent change from San Jose would not, upon its approval by the people, become an operative provision of the constitution, for the reason that that city will not, upon the mere approval of the amendment by the people, become the seat of government, so that the proposition of the legislature, instead of amending the constitution, either by changing any of its terms, or adding thereto some other limitation, would take away the provision which now exists, and place in its stead a provision which is incompatible with the requirement that it shall become a part of the instrument. The legislature was not authorized by the framers of the constitution, nor do the terms of that instrument permit it, to propose any amendment that will not, upon its adoption by the people, become an effective part of the constitution; nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition. The amendment proposed is neither a declaration by the people of a principle or of a fact, nor is it a limitation or a rule prescribed for the guidance of either of the departments to which the sovereignty of the people has been intrusted. If adopted, it would have merely the effect to present the option to any one so disposed of making a donation of land and money for the purpose of having the seat of government at San Jose. Such a proposition is legislative in character, rather than constitutional, and, being conditional in its terms, would be ineffective in accomplishing a change of the seat of government from that already fixed by the constitution. Even if it should be conceded that its approval by the people would incorporate its terms into the constitution, it would take from that instrument the existing declaration fixing the place for the seat of government, and leave the state without any constitutional seat of government until the conditions upon which the declaration rests have been performed. As there is no limitation of the time within which these conditions are to be performed, and no obligation for their performance, it follows that the seat of government would have no established location. But the donation of the money and land does not bring the provision into operation, for, until after the site that may be offered has received the approval of the designated officers, there can be no act of the legislature tending to the removal. Instead, therefore, of there being any declaration by the people of a place for the seat of government, a commission is substituted whose judgment is to be taken instead of the judgment of the people, and to which is assigned a discretion which should be exercised by the people themselves. We do not mean to say that a legislative provision in a constitution that has been ratified by the people would be nugatory. If placed there, it must be observed by courts and citizens; but, for the purpose of determining the extent of the power conferred upon the legislature to propose amendments to the constitution, we must assume that it is only such amendments as may naturally and reasonably belong to the elements of a constitution. The amendment proposed substitutes for, or rather superadds to, the will of the people another will or judgment, without which its own will can have no effect, and which is therefore made the controlling judgment before the amendment can have any operative existence. As the proposed amendment is therefore only a proposition for the people to submit to some other individuals or body to determine whether there shall be a change of the seat of government, we hold that it is not such an amendment as the legislature has been authorized to submit to their votes. If the people shall at any time desire a removal of the seat of government from Sacramento, this result can be readily effected, either by a law passed in accordance with the existing provisions of the constitution, or by a proposal on the part of the legislature for such an amendment to the constitution as will afford them an opportunity to give immediate effect to their desire by a direct vote upon the question. The judgment and order of the court below are affirmed.

We concur: BEATTY, C. J.; FITZGERALD, J.; DE HAVEN, J.; GAROUTTE, J.

PATERSON, J. (concurring). At the argument it was contended by respondent that the judgment should be affirmed because the proposed amendment was never finally disposed of by the assembly, the whole matter having been laid on the table; that it was not passed in the senate by a two-thirds vote of all the members thereof, the record showing that Senator Hart's vote ought to have been recorded in the negative; that the house did not act upon the measure that was passed by the senate; that the proposed amendment is on its face void, because in contravention of public morals, being an offer on the part of the state to abandon its property at Sacramento, and change its seat of government to San Jose, for a bribe or consideration of $1,000,000 and 10 acres of land; and that, in any event, it is void for uncertainty, there being nothing to show who is to pay the money or donate the land, or how long the people will have to wait for a tender of the property,—how many propositions may be made and rejected before it can be known where the seat of government is to be permanently located; and that no one can know where the seat of government would be in the event of a failure of the governor, attorney general, and secretary of state, or a majority of them, to act upon any proposition for a site that might be offered. It must be admitted that there are serious questions involved in some of these contentions. We agree with the majority in holding that the proposed amendment is ineffective on account of the conditions contained therein, but there is another ground upon which we also desire to place our conclusion.

The language of section 1 of article 20 of the constitution is plain. No law changing the seat of government shall be valid or binding until said law has been ratified by a majority of the qualified electors of the state, voting therefor at a general election; and that law must first receive the sanction of two-thirds of the members of each house, and have been approved by the governor. No law has ever been passed by the legislature proposing to change the seat of government from Sacramento to San Jose, or providing under what regulations or provisions the question of a change of the seat of government should be voted upon. The proposed amendment was not put in the form of a bill. It was neither printed nor read on three several days, nor was the measure declared to constitute a case of urgency. It was not considered by the governor. Therefore it is not a law. It is true the legislature has by a general act provided how proposed amendments to the constitution may be submitted when no other mode is provided by law for their submission (St. 1883, p. 53; St. 1891, p. 165), and such provisions may be, and doubtless are, sufficient for the submission of proposed amendments generally; but the seat of government cannot be changed by any law, whether it be an ordinary act, or in the form of a proposed amendment to the constitution, unless it has been regularly introduced, taken the regular course, received the approval of two-thirds of the members of each house, and been approved by the governor. Appellant claims that section 1 of article 20 of the constitution can be amended by proceedings under section 1 of article 18 of the constitution, and for that purpose the acts of 1883 and 1891, supra, are sufficient legislation to submit the proposed constitutional amendment to the people; that sections 1 and 2 of article 18 are the only sections relating to amendments, and that they contain no limitation as to amendments; that section 1 of article 20 provides for the removal of the state capitol by a law under the constitution as it now exists, while section 1 of article 18 provides for amending any section of the constitution, including section 1 of article 20. It is claimed that the court below and counsel for respondent confounded the question of removal of the state capitol with the question of amending the constitution. A glance at the proposed amendment, however, is sufficient to show that its sole object is a removal of the seat of government from Sacramento to San Jose. With the word "Sacramento" substituted for the word "San Jose," the proposed section is identical with the provision of the constitution, down to the condition of removal. If the framers of the constitution intended to permit the seat of government to be removed by the proposal and submission of a constitutional amendment under section 1 of article 18, it is difficult to see why they inserted the provision in section 1 of article 20, requiring the proposal to change the seat of government to be submitted to the people at a general election, under such regulations as two-thirds of all the members of each house should provide, by an act regularly introduced, passed, and approved, as other acts of the legislature are introduced, passed, and approved by the governor. If section 1 of article 20 can be amended in the manner proposed, then the seat of government may be removed by a simple resolution, indorsed by two-thirds of the members elected to each house, and the regulations under which the question of removal is to be voted upon may be adopted by a bare majority of each house, and submitted to the people at a special election, held at any time. But such was clearly the thing which the framers of the constitution did not intend to allow to take place, when it provided that the question must be voted upon at a general election, and that no law changing the seat of government should be valid until it had received the sanction of two-thirds of the members of each house of the legislature proposing the amendment, and the regulations upon which the question should be submitted were provided by the same number of members, and had been approved by the executive. It is intended that a bare majority of the members of the legislature should not have the power to call for an election upon so important a question. The time for voting upon the question was fixed at a general election, for the purpose of giving the people ample opportunity to fully deliberate upon the question of public policy and public economy necessarily involved in the issue, and when the greatest number of electors would probably assemble at the polls. That it was the purpose of the framers of the constitution to make the subject of the removal of the seat of government an exception to the general rule, and to place a check upon hasty action thereon by requiring the greatest deliberation on the part of those who proposed the amendment, as well as those who should vote upon it, is manifest, not only in the language of the section itself, but in the history of the seat of government in this state, and the debates upon the subject in the constitutional convention. The constitution of 1849 provided that the Pueblo de San Jose should be "the permanent seat of government until removed by law; provided, however, that two-thirds of all the members elected to each house of the legislature shall concur in the passage of such law." Soon after the adoption of that constitution (November 13, 1849) a proposition was made to the legislature offering a large donation to the state if the seat of government should be located permanently at Vallejo, and an act was passed "to take the sense of the people of California upon the subject to the permanent location of the seat of government." St. 1849–50, p. 412. On February 4, 1851, an act was passed providing for "the permanent location of the seat of government" at Vallejo, provided M. G. Vallejo should submit a satisfactory bond for the performance of his proposition, and furnish a state-house for three years. St. 1851, p. 430. On February 4, 1853, a resolution was passed by the legislature calling upon Vallejo for payment of his proposed donation of $370,000, and to state his intentions and wishes respecting the location of the seat of government. St. 1852–53, p. 309. Vallejo, having asked to be released from his obligation on account of his inability to comply with the condition, an act was passed providing that the seat of government on and after February 5, 1853, should be at Benicia, provided Vallejo should release the state from all claims for damages (St. 1853, p. 24); and on May 18, 1853, such release having been given, it was provided by "An act for the permanent location of the seat of government" that the "city of Benicia, situated on the straits of Carquines, shall be and remain the permanent seat of government, in accordance with the constitution." St. 1853, p. 217. On February 25, 1854, the legislature passed an act repealing the former act, and providing that the permanent seat of government should be and remain at the city of Sacramento. Thus the matter rested until the subject again came up in the constitutional convention of 1879. Meantime, however, the state had spent $2,500,000 in state capitol buildings and grounds at Sacramento. In the convention Mr. Edgerton introduced a proposition providing that the seat of government should remain at Sacramento until changed by law, but that no law proposing a change should be effectual until submitted to the electors of the state at a general election, and approved by a majority of two-thirds of all the votes cast. But the section (section 1, art. 20), as proposed by the committee and finally passed, reads as above quoted. During the argument one member of the convention moved to strike out all of the section after the word "remain;" also to strike out the words "by a two-thirds vote of each house." To show the temper of the convention in regard to the matter, we quote briefly from some of the speeches made during the debate on these proposed amendments: "Mr. Wicks: It should not be left to the caprice of demagogues and politicians. We were cursed by such fickleness in the earlier history of our state. The state, too, has spent a great deal of money here in Sacramento, and has acquired a valuable property. Mr. Barbour: Suppose Sacramento washes away. Mr. Wicks: There is no danger of Sacramento washing away. This building never will be washed away. Mr. Ayers: I do not see any necessity for the amendment. I think that the section as it is now is conservative enough. It requires a two-thirds vote of the legislature to submit the question. I think that is strong enough to prevent anything like rash action with reference to the removal of the capitol. Mr. Brown: Now, I do not see there is any antagonistic feeling against Sacramento as to state capitol, but to attempt to bind the future entirely to this place I think would be wrong, and when the matter is provided for here that, by a certain action of the legislature, the matter shall be submitted to a vote of the people, it seems to me that that should be sufficient. Mr. Schell: I believe this section is right. I believe that, whenever we seek to tear up the foundations of the state capitol, it should be at the instance of two-thirds of the legislature. At least two-thirds of the legislature ought to vote in favor of submitting it to the people first, and then the people may by a majority vote remove it. It is not an ordinary question that ought to be submitted to merely a majority of the legislature. Mr. White: I desire to say that I am going to vote for the amendment of the gentleman from Santa Clara, and that I have no feeling of malice; and if there is any feeling, except by the gentleman himself, I do not know it. We desire merely to give the power to the people to move the capitol at any time they wish. We do not intend to tie down the legislature to a two-thirds vote if we can help it. Mr. Tinnin: The capitol has been located here at immense expense. It is true, I think, that it was a great mistake in placing it here, but it is here; and it has cost the people of the state a great deal of money, and it should not be removed unless some great calamity or misfortune befalls this city which necessitates that removal. Mr. Tully: There has been a good deal said here in reference to lobbying, and I don't know any section that has been adopted or anything that this convention could do to encourage lobbying more than to adopt this amendment. There would be a fight every time the legislature met for a majority to move this capitol, perhaps down to Los Angeles or some other prominent place." 3 Const. Conv. pp. 1388, 1389.

It is a rule of construction applicable to constitutions as well as to statutes that general words are qualified by particular clauses, and that effect must be given to all the provisions of the constitution, if possible, that no word or clause may become redundant; and, as said before, if it had been the intention to permit the removal by resort to the remedy provided in section 1 of article 18, there would have been no necessity for the other and more difficult remedy provided by section 1 of article 20. The only alteration attempted by the proposed amendment is of that portion of the section which fixes the seat of government. No principle of the organic law was in any manner affected, and it would be a clear violation, not only of the spirit, but the letter, of the provision that the seat of government shall not be removed except in a particular way, to hold that the purpose may be accomplished in another and easier way. That which cannot be done by direction cannot be done by indirection. Two rules of procedure have been prescribed by the constitution,—one for amendments of the organic law, and the other for a change of the seat of government. The contention of respondent, if sustained, would result in the nullification of one provision of the constitution by another. While one section of the constitution would provide for removal only in a particular way, another section of the same instrument, relating to general subjects, would authorize the removal in an entirely different manner, and the last clause of the section would accomplish no purpose whatever. It is conceded, of course, that the people may adopt any amendment of the constitution which is proposed in the manner prescribed by the instrument itself, but neither the legislature nor the people can disregard the provisions which limit and prescribe their power. It would be competent, of course, for the legislature to propose, and the people to approve, an amendment of section 1 of article 20 to provide a different method from that which now exists of changing the seat of government. That power might be delegated to the legislature alone by a majority vote, but, until some other method has been adopted by amendment to the constitution, the seat of government must remain at Sacramento until it has been changed by a law passed, approved, and ratified in the manner now prescribed by the constitution. If the members of the convention had been told at the conclusion of their debate that, notwithstanding all the care they had taken to secure the deliberate judgment of two-thirds of both houses, and the approval of the governor, or his reasons for disapproval, before the question of removal could be again submitted for decision, even at a general election, the time would come when the legislature would claim the right to precipitate the question at any time it saw fit, by resolution introduced and passed within an hour, and under resolutions prescribed by a general act, and passed by a bare majority, can any one doubt, in view of the importance they attached to the matter, that they would have declared in express and unmistakable words that the rule prescribed by section 1 of article 18 should not apply to the subject of removal of the seat of government? What could the members of the convention have expected to accomplish by the precautions provided for in section 1 of article 20? They certainly did not expect those desiring to procure an amendment effecting a change of the seat of government to follow the difficult procedure therein prescribed, when there was an easier way by following section 1 of article 18.

McFARLAND, J. I concur.

PEOPLE ex rel. RIDEOUT v. WAITE, Secretary of State. (No. 18,224.)

(Supreme Court of California. March 29, 1894.)

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Mandamus, on relation of one Rideout, to E. G. Waite, secretary of state. Writ denied. The people appeal. Reversed.

J. W. Armstrong and Atty. Gen. Hart, for appellant. D. M. Delmas, Morehouse & Tuttle, John H. McKune, and John W. Armstrong, for respondent.

PER CURIAM. Upon the authority of Livermore v. Waite (this day decided) 36 Pac. 424, the judgment herein is reversed.

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102 Cal. 151

MODOC LAND & LIVE-STOCK CO. et al. v. BOOTH et al. (No. 18,127.)

(Supreme Court of California. March 29, 1894.)

IRRIGATION — DIVERSION OF WATER BY NONRIPARIAN OWNER—INJUNCTION.

A riparian owner is not entitled to an injunction to restrain the diversion of water above him by a nonriparian owner, where the amount diverted would not be used by the former, nor cause any loss or injury to him or his land, present or prospective, and would greatly benefit the party diverting it. McFarland, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by Modoc Land & Live-Stock Company and others against Stephen Booth and others to enjoin the diversion of the waters of a stream by defendants. The action was dismissed as to several defendants, and others filed a disclaimer. From a judgment that plaintiffs take nothing as against defendant H. G. Payne, plaintiffs appeal. Affirmed.

D. W. Jenks, for appellants. J. D. Goodwin and J. H. Stewart, for respondents.

BELCHER, C. The plaintiffs brought this action to obtain a perpetual injunction, restraining the defendants—14 in number—from diverting any of the waters of the south fork of Pit river, or its tributaries. The case was submitted for decision in the court below upon an agreed statement of the facts, which are, in substance, as follows: The plaintiffs own, in severalty, tracts of land in Modoc county aggregating 14,382 acres. The tracts are contiguous, and extend along and on both sides of the south fork of Pit river a distance of about 12 miles, with a width of from 1 to 3 miles. About 10,000 acres of the land are of the class known as "swamp and overflowed land," and the title thereto was acquired under the state laws providing for the sale of such lands. The balance is high land, and the title to about one-half of it was acquired from the United States under the desert land act, and to the other half under the homestead and pre-emption laws. The south fork of Pit river heads in the mountains, about 20 miles east of the plaintiffs' lands, and is fed by several tributary creeks, which unite with it before it reaches their lands. The channel of the river across the plaintiffs' lands has an average width of 30 feet, a depth of 5 feet, and a grade of 3½ feet to the mile; but from where it leaves their lands, for a distance of about 4 miles, its grade is not more than 3 feet to the mile. Where the stream enters the plaintiffs' lands, it carries, in ordinary seasons, on the 1st of July, not less than 2,000 inches of water measured under a 4-inch pressure; and further down on their lands another tributary creek joins it which carries in ordinary seasons, on the 1st of July, 300 inches of water, measured as aforesaid. When the plaintiffs and their grantors located their swamp and overflowed lands, the waters of the river periodically overflowed its banks during the spring and early summer, up to the middle of June of each year, and covered said swamp-land tracts from one inch to two feet in depth; and portions of the same then were, and from time immemorial had been, a tule swamp, and wholly unfit for cultivation, or the growth of valuable grasses. To reclaim the said swamp lands, and make them productive grass lands, plaintiffs and their grantors had spent large sums of money in controlling the waters of the stream upon them, and in draining them; and in order to utilize the lands, and make them produce grasses, or any crop of value, and to harvest the same, it is necessary for the plaintiffs to control the flow of said waters so as to prevent them from overflowing said lands during the haying season, which usually occupies the months of July and August of each year, and to that end to maintain extensive diverting and draining works on and around said swamp lands, to keep the water from so naturally overflowing the same. The lands described in the complaint, which were acquired from the government as "desert lands," were reclaimed from their desert character by the plaintiffs, or their grantors, by diverting upon the same, from points above said lands, portions of the waters of said river; and the amounts at different times so diverted for such purposes aggregate 1,400 inches, measured under a 4-inch pressure. By the means used, plaintiffs have reclaimed most of their swamp lands, and those lands now require more irrigation than other lands in that vicinity. In the year 1889 at least one-fourth of the lands of the corporation plaintiff were too dry to produce a crop. Plaintiffs own about 7,000 head of cattle and other live stock, and they use their lands for raising hay to feed their animals during the winter season, and for pasturage during the late summer, fall, and winter months; and their animals are dependent upon the grass and herbage which grow upon said lands for food and maintenance, and upon the said stream for water to drink, while depasturing upon said lands. In June, 1886, the defendants H. G. Payne and Carlos Payne owned certain tracts of land which were not watered by any natural stream, and were not riparian to Pit river. In order to procure water for the irrigation of their land, and for their stock and domestic purposes thereon, they, in the month named, entered upon Mill creek, one of the tributaries of the said river, and about 15½ miles above the uppermost part of the plaintiffs' land, and posted a notice, in the form and manner required by law, claiming 200 inches of the waters of the creek, to be conveyed thence by ditch to their said lands for irrigation, and other uses thereon. The notice was duly recorded, and thereafter they constructed the ditch, and in 1887 diverted the waters of the creek through the same, to the extent claimed, and used them during June, July, August, and September; and the use of 200 inches of water on their lands was necessary. In making the diversion, it was understood and agreed between them that H. G. Payne should own and use three-fourths of the said water, and Carlos Payne one-fourth. In 1887 one of the plaintiffs, Flournoy, on behalf of his brother, who is not made a party to the action, posted a notice on Mill creek, a few rods below the head of the Payne ditch, claiming, in due form, 600 inches of the waters of the creek, to be conveyed away from the creek to lands belonging to his brother, and which were not riparian; and thereafter he, as the agent of his brother, constructed a ditch from the point on the creek where this notice was posted, and since then, as such agent, has diverted and used, at times, during 1888, 1889, and 1890, a large amount of the waters of said stream. At divers times within five years before the commencement of this action, the defendants, other than the Paynes, entered upon the natural channels of said river and its tributaries, and, at sundry points above plaintiffs' lands, placed dams therein, and dug and constructed ditches connected with said dams, and leading out from said natural channels, and away from the same, and, by means of said dams and ditches, have diverted from the streams large quantities of water, which, but for such diversions, would have flowed to, upon, and across plaintiffs' lands. After this action was commenced, the defendant Carlos Payne, by an instrument in writing, remised, released, and quitclaimed to the plaintiffs all his right, title, interest, and claim in and to the flow and use of, and right to divert, any portion of the waters of said river, particularly Mill creek, saving and excepting Fitzhugh creek; and thereupon plaintiffs dismissed the action as to him. The defendants McGahey and Fitzgerald, also by an instrument in writing, remised, released, and quitclaimed to the plaintiffs all their right to the use of any water that might be diverted from East creek at the point described in the complaint as their point of diversion, save and except 25 inches; and thereupon plaintiffs dismissed the action as to them. The defendant Booth, also by an instrument in writing, remised, released, and quitclaimed to the plaintiffs all his right to use water from the said river, save and except 20 inches measured under a 4-inch pressure; and thereupon plaintiffs dismissed the action as to him. Plaintiffs stipulated with the defendants Duke, Williams, Gaustad, and Harvey that judgment should be entered to the effect that they should not divert any water from the south fork of Pit river at any time when the stream is at its usual and ordinary flow within its banks, provided such water is demanded by plaintiffs for the necessary use of any of them. Plaintiffs also stipulated with defendant Todd that the decree should allow him the use at all times of 25 inches of water, measured under a 4-inch pressure, upon his land, and also the right to make a reasonable use upon his land of all overflow, flood, and surplus waters flowing in said river. The defendants Cantrall disclaimed any interest in the waters of the said river or its tributaries, save and except the surplus above the natural and ordinary flow of the stream, and certain storage water mentioned in their disclaimer. Upon these facts the court gave judgment that the plaintiffs take nothing as against the defendant H. G. Payne, and from that judgment they have appealed upon the judgment roll. The only point made for a reversal is that the court erred in not granting an injunction against the respondent, because appellants were riparian owners, and, as such, "entitled to have the stream flow in its natural channel, undiminished and unobstructed."

In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to, and cover, all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river, in Yolo county, could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county; and yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained. In Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704, it was held that a riparian proprietor, who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, cannot restrain the diversion, during times of extraordinary high water, of the surplus not used or appropriated by him; and this case was referred to approvingly in Heilbron v. Water Co., 80 Cal. 189, 22 Pac. 62. In Black's Pomeroy on Water Rights (section 75) it is said: "Unless the flow of a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction against another for wrongfully diverting water from the stream." And in Lux v. Haggin, 69 Cal. 284, 10 Pac. 674, it is said: "Under our Codes, the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied." Under the law, as thus declared, were the appellants entitled to an injunction against the respondents? We do not think they were. During the months of June, July, August, and September, when respondent used the small quantity of water appropriated by him, the full flow would have worked an injury, rather than a benefit, to appellants, and they sought to avoid the injury by maintaining extensive diverting and draining works on and around their swamp lands, so as to keep them from being overflowed, and by turning the water off upon their high lands, and permitting others to turn it off upon their lands. It is true that it is stated that in the year 1889 at least one-fourth of the lands of the corporation plaintiff were too dry to produce a crop, but what particular lands were referred to, and why they were too dry, does not appear. They may have been, so far as shown by the record, chiefly its high lands, and the necessary steps to irrigate them during that year may not have been taken. Looking at the whole record, we conclude, therefore, that there was no error in the action of the court, and that the judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

I dissent: McFARLAND, J.

102 Cal. 226

GROSSE-BECKER v. BECKER et al. (No. 15,347.)

(Supreme Court of California. April 18, 1894.)

REVIEW ON APPEAL — CONFLICTING EVIDENCE — ESTOPPEL—WHEN ARISES.

1. A verdict will not be disturbed where the evidence is conflicting.

2. In an action for services under a contract of employment against a partnership composed of one B. (with whom plaintiff lived under the assumed relation of wife) and others, it was shown that, at the inception of the partnership, B. represented that plaintiff was his wife. The other partners testified that he agreed to furnish her services gratuitously, but B. denied it. *Held*, that plaintiff was not estopped, as against B.'s partners, from showing that she was not B.'s wife; it not appearing that she had any knowledge of B.'s representations in that regard, or that B.'s partners relied on such representations, or that such representations operated to their damage.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Franziska Grosse-Becker against Arthur Becker and others. There was judgment for plaintiff, and defendants appeal. Affirmed.

Lindley & Eickhoff, for appellants. Edmond Tausky, for respondent.

GAROUTTE, J. This action was instituted by plaintiff against defendants, as partners, for services rendered by her as an actress. She recovered judgment, and this appeal is prosecuted from the judgment and order denying a motion for a new trial.

It is insisted by defendants that plaintiff's services were to be furnished without a definite salary, and that her compensation was to consist of a certain part of the profits of the venture, and, there being no profits, her services were necessarily gratuitous. Plaintiff relies upon an express contract of employment at the fixed sum of $150 per month. Plaintiff and defendant Becker testified positively that such was the contract, and the verdict of the jury necessarily indicates that this evidence was given credit by them. Defendant Becker went to Europe in behalf of, and at the request of, the partnership, for the purpose of securing theatrical talent in furtherance of the partnership venture. Without considering Becker's powers as a full partner in the firm, it appears that under his authorization he made a contract of employment with the plaintiff at a monthly salary; and the extent of his powers as the agent of the partnership in making such a contract was a matter of fact to be passed upon by the jury in arriving at the verdict. The evidence was contradictory in this regard, and, under proper instructions of the court as to the law bearing upon the question, the matter was submitted to the jury, and their judgment will not be disturbed. At the inception of the partnership between these parties, it is claimed by defendants Hirsch and Kahn that defendant Becker represented that the plaintiff was his wife, and that he would furnish her services gratuitously for the benefit of the partnership. Becker concedes the representations as to the plaintiff being his wife, but denies that her services were to be a gratuity. During the progress of the trial it was developed that plaintiff was not the wife of Becker, but had been living with him under such assumed relations for several years. In view of these peculiar conditions, the defendants asked certain instructions to be given to the jury, but the request was denied by the court. These instructions are based upon the theory that the plaintiff was estopped from showing that she was not the wife of defendant Becker. It does not appear that plaintiff ever had any knowledge of the representations made by Becker to his codefendants, at the time the contract was entered into, as to their status as husband and wife, and, consequently, it cannot be said that she is bound by such representations. Again, it does not appear that Hirsch and Kahn, to any extent or in any degree, relied upon such representations as a moving cause for the formation of the partnership. As far as is developed by the record, the mere fact of the existence or nonexistence of the marriage relation between these parties was wholly immaterial in the minds of Hirsch and Kahn. Neither does it appear that these false representations of Becker as to his marriage, conceding Hirsch and Kahn to have relied upon them, operated in any way to their injury and damage. Plaintiff was probably as good an actress unmarried as married, and the unsuccessful ending of the theatrical venture is not claimed to have resulted, to any extent, by reason of the false relations under which these two parties were living. Indeed, they were thought by these two defendants, and by the world at large, to be husband and wife, up to the very hour of the trial. The circumstances here suggested are necessarily fatal to the successful plea of an estoppel as against the plaintiff, and for these reasons we think the instructions were properly refused. But even conceding that the representations of Becker, taken in connection with the subsequent acts of plaintiff, were such as to forbid her denying that she was his wife, still it does not follow that she has no standing before the court. And, bearing generally upon the rights of the wife acting in her own behalf, see Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908, and Wren v. Wren (Cal.) 34 Pac. 775. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(4 Cal. Unrep. 606)

THOMPSON v. GORNER. (No. 15,262.)

(Supreme Court of California. April 19, 1894.)

Interest—Rate after Maturity—Acceptance.

When interest on a note is payable at a certain rate monthly in advance, "and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at" a higher rate, acceptance of interest from time to time, for two years after maturity, at the former rate, waives the latter, though this be in no wise a penalty.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Mary Thompson against Christ Gorner on a promissory note. Judgment for plaintiff, with costs for defendant. Plaintiff appeals. Affirmed.

Edgar B. Haymond, for appellant. John Yule and Edward H. Stearns, for respondent.

SEARLS, C. This is an appeal by plaintiff from a judgment in her favor for $1,283.85, without costs, and for costs in favor of defendant. The whole contention arises upon the rate of interest due upon a promissory note of which the following is a copy: "$1,400. Oakland, Cal., March 20, 1888. On or before two years after date, for value received, I promise to pay Clarence J. Wetmore, or order, the sum of one thousand four hundred dollars in gold coin of the United States of America of the present standard, with interest thereon, in like gold coin, from the date hereof until paid, at the rate of eight per cent. per annum, payable monthly in advance, and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month; and in case said monthly interest, or any part thereof, is not paid within one month after the same becomes due and payable, then the whole of said principal sum and interest due thereon shall forthwith become due and payable at the option of the holder hereof. This note is secured by a mortgage bearing even date herewith. Christ Gorner." Plaintiff succeeded to the note, and a mortgage given to secure the payment thereof, by assignment before maturity. The interest on the note was paid when due, and was paid to plaintiff at the rate of 8 per cent. per annum, and accepted by her in full, until the 20th day of February, 1892, when, upon the tender to her of one month's interest at said rate, she refused to receive the same in full, and claimed interest at 1 per cent. per month, and demanded an additional 4 per cent. per month on the principal from the maturity of the note, compounded, so as to make up, with that paid, 1 per cent. per month. On the 18th day of March, 1892, and before the commencement of this action, defendant tendered to plaintiff $1,283.85, which is conceded to be all that was due upon the note unless plaintiff was entitled to interest at 1 per cent. per month, and upon the commencement of the suit defendant paid said sum into court for plaintiff. The facts are agreed upon.

The court below found, as conclusions of law: (1) That the promissory note provides for the payment of interest at 8 per cent. per annum, and no more, and that the clause therein that, "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month," is in the nature of a penalty, and may be waived, and that, defendant having failed to pay the principal sum when it became due, he is liable in damages at the rate of 8 per cent. per annum upon the principal sum remaining unpaid, and no more; (2) that plaintiff, having accepted the interest at 8 per cent. after the note fell due, in full payment, thereby waived her right to any or greater sum,—and rendered judgment accordingly.

I cannot agree with the conclusion of the court below that the clause in the promissory note that, "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month," is to be treated as a penalty, but am inclined to regard it as a contract to pay 1 per cent. per month upon a contingency which is shown to have occurred. It related, or might relate, to the interest to become due and payable under the contract; that is to say, before the maturity of the note as well as afterwards. It may be said that all contracts for the payment of interest at a given rate are, in contemplation of law, confined to the life of the contract, and that after its violation a recovery is had not of interest as such, but damages for the violation of the contract, which are measured by the agreement of the parties as contained in their contract, or, in the absence of such agreement, by the law. Where there is no statute to prevent, parties may contract for such rate of interest as they choose, not only before the maturity of the contract, but after its breach, and until paid. By our Civil Code (section 1918), "parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment." Again: "Interest is the compensation allowed by law, or fixed by the parties for the use, or forbearance, or detention of money." Civ. Code, § 1915. Under this section, parties in this state can as well agree upon the compensation to be fixed for forbearance to enforce the payment of money due after a breach of contract as for its use before such breach, and, when agreed upon in writing, it is equally binding in the one case with the other. Hubbard v. Callahan, 42 Conn. 524; Wilkerson v. Daniels, 1 G. Greene, 179; Wernwag v. Mothershead, 3 Blackf. 401. In the case last cited, the makers of the note agreed, if not paid at maturity, "to pay five dollars interest per week until paid;" and the court held it drew interest at the agreed rate until paid. A vast number of cases might be cited, all to the effect that similar provisions in promissory notes are to be enforced as per contract, and not treated as penalties. It follows from this view that upon the maturity and nonpayment of the note the contingency occurred upon which she was entitled to interest thereon at 1 per cent. per month.

But upon the facts of the case, as they appear of record, it does not follow that she can recover such interest in this action. For two years next after the maturity of the note, plaintiff continued to receive the interest monthly in advance at the rate of 8 per cent. per annum, which was "accepted in full payment of interest due on said note from the date of such payment to the 20th day of each month next succeeding such payment." This was clearly a waiver of her right to the larger interest. "A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it,—that he excuses the performance,—or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other." 2 Herm. Estop. § 825. The same author, at section 1020 of volume 2, says: "No one who waives or dispenses with the performance of a contract can rely upon the failure to perform it, either as a defense or cause of action, for no one can complain of a default which he has caused or sanctioned." In Bradford v. Hoiles, 66 Ill. 517, a note was given for $1,000, payable 90 days after date, with the following clause: "And, if the sum is not paid when due, to pay thereon five per cent. per month as damages thereon from the time the same is due until paid." The maker paid interest on the note from July, 1869, to September 8, 1870, which, from the indorsements, was shown to be at 10 per cent. per annum, and to have been in full. The maker then died, and two years later, in an action on the note, the court held that the holder, when the first interest was due, might have demanded the stipulated damages at 5 per cent. per month, but that having then, and from time to time thereafter while the maker lived, received 10 per cent. per annum interest, this was inconsistent with a claim of 5 per cent. per month for damages, and was evidence of an agreement to accept 10 per cent. per annum instead of 5 per cent. per month, and was a waiver of the penalty. It is true that the court there regarded the 5 per cent. per month as a penalty. It is also true that courts more readily lean to a waiver, in cases of penalty, than in those of the ordinary provisions of contracts. Still in the present case I am of opinion the conceded facts are strong enough to raise the legal presumption, not only that plaintiff had waived the right to the higher interest, so far as she accepted the lower rate specified in the note, but that the waiver evinced by a uniform course of conduct for two years extended to and estopped her from the very right to demand the higher rate of 1 per cent. per month for the month commencing February 20, 1892. The interest was payable monthly in advance. When, on the 20th day of February, 1892, defendant tendered the interest ($8.70) which, by uniform usage, had come to be the conceded amount due, it operated as a payment as effectively as though received, subject to the duty devolving upon defendant of keeping the tender good. This he did by paying the amount into court for plaintiff. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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102 Cal. 19

PEOPLE v. PATTERSON. (No. 21,056.)

(Supreme Court of California. April 19, 1894.)

Incest—Prosecution of One Party—Evidence—Instructions.

1. Though the consent of both parties to the sexual intercourse is necessary to constitute incest, one of them may be indicted alone, and convicted of the offense.

2. Where incest is charged, prior acts of sexual intercourse between the same parties may be proved.

3. On a trial for incest, an instruction that "there is much greater danger that injustice may be done to the defendant in cases of this kind than there is in prosecutions of any other character," states no proposition of law, and is properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

H. L. Patterson was convicted of incest, and appeals. Affirmed.

Byron Ball and R. L. Simpson, for appellant. Atty. Gen. Hart and C. M. Head, Dist. Atty., for the People.

BELCHER, C. The defendant was convicted of the crime of incest, and has appealed from the judgment and an order denying his motion for a new trial. The information charged that on the 7th day of March, 1893, at the county of Yolo, in this state, the defendant, H. L. Patterson, did willfully, unlawfully, and feloniously, "upon the person of one Annie L. Patterson, the daughter of said H. L. Patterson, commit fornication, and have sexual intercourse with and carnally know the said Annie L. Patterson." The defendant demurred to the information upon the ground that it did not conform to the requirements of sections 950–952 of the Penal Code, and that the facts stated did not constitute a public offense. The demurrer was overruled, and thereafter a plea of not guilty was duly entered.

1. The first point made for a reversal is that the crime of incest is a joint offense, which can be committed only with the concurrent assent of two persons, and of which both persons must be guilty, or neither is; and that the information was insufficient, and should have been set aside, because it "charges the defendant with an offense not known to the law, in this: that it charges him alone with the commission of an offense which one person cannot commit." Section 285 of the Penal Code defines the crime of incest, and declares it punishable as follows: "Persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding ten years." And the same Code contains the following provisions as to indictments and informations: "Sec. 950. The indictment or information must contain: 1. * * * 2. A statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." "Sec. 960. No indictment or information is insufficient, nor can the trial, judgment or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." "Sec. 1404. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Now, conceding that the consent of both parties to the sexual in-

tercourse is necessary to constitute the crime of incest, still it does not follow that one of them alone may not be indicted or informed against, and tried and convicted for the offense. Nor does it follow that one cannot be guilty unless the other is. For instance, it might happen, when the intercourse was with the mutual consent of both parties, that one party had knowledge of the relationship and the other was entirely ignorant of it; and in such a case it is clear that the former would be guilty, and the latter not. In this state an indictment or information is sufficient if the language of the statute is substantially followed. Here, we think, the information sufficiently conforms to the general rule, and states the facts "in such a manner as to enable a person of common understanding to know what is intended."

2. The next point is that the court erreneously denied a challenge for actual bias which was interposed by the defendant to one of the persons called and examined as to his fitness to serve as a juror in the case. This point does not require special notice. It appears that the defendant peremptorily challenged the juror, and that, after exercising that right, he had eight challenges left. Besides, the court allowed two additional peremptory challenges, which had not been used when the jury was completed. Conceding, therefore, that the ruling complained of was erroneous, still it is apparent that the defendant was in no way prejudiced by it.

3. At the trial Annie L. Patterson was called and examined as a witness for the prosecution. It appeared from her testimony that she was 19 years old, was the daughter of the defendant, and was living with him in Yolo county until some time in March, 1893, when she left his house, and went to the house of a neighbor, where she resided up to the time of the trial. Her testimony on direct and cross-examination is quite lengthy, and it is unnecessary to rehearse the criminating facts stated by her in detail. It is enough to say of them that, if true, they very clearly show that the defendant was guilty of the crime charged. Among other things, however, she stated that her father had many times before, and during a period of several years, been doing the same "meanness" with her. The defendant objected to all the evidence as to acts other than that charged in the information, and his objection was overruled; and he also moved the court to strike out all such evidence, and his motion was denied. It is earnestly contended that these rulings were erroneous, and the rule is invoked that testimony is inadmissible which tends to prove a distinct and different offense from that for which the defendant is on trial. But while the general rule is as stated, there are well-recognized exceptions to it (People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, and 6 Pac. 700, 846), and it seems to be well settled that cases where incest or adultery is charged are among the exceptions. In such cases it has been held that prior acts of sexual intercourse between the parties may be proved. People v. Jenness, 5 Mich. 305; State v. Markins, 95 Ind. 464; Lefforge v. State, 129 Ind. 551, 29 N. E. 34; State v. Bridgman, 49 Vt. 202; State v. Pippin, 88 N. C. 646. It must be held, therefore, here, that there was no error in the rulings complained of under this head.

4. It is further contended that the testimony of the prosecutrix, when looked at as a whole, was so contradictory and improbable as to be wholly unworthy of belief, and insufficient to justify a verdict of guilty; and that, if believed, it showed that defendant was guilty of rape, and not of incest, of which offense he could not be convicted under the charge of incest; and also, that if the testimony tended to show that defendant was guilty of incest, the prosecutrix was an accomplice, and her testimony was not sufficiently corroborated to justify a conviction. That the testimony of the prosecutrix tended to show guilt on the part of the defendant is beyond dispute, but whether it was true or false was a question for the jury. The jurors saw the witness and heard her tell her story, and were in a better position than we are to determine whether she was worthy of belief or not. We do not think the evidence shows that the offense committed was rape, and, if the defendant had been charged with and convicted of that offense, the verdict would have been clearly wrong. It is not necessary, therefore, to express any opinion as to whether one charged with incest can be convicted, when the evidence shows that the offense committed was really rape. Upon this question we know of no decisions in this state, but in other states the decisions are conflicting. See State v. Ellis, 74 Mo. 385; State v. Jarvis, 20 Or. 437, 26 Pac. 302; and, contra, 10 Am. & Eng. Enc. Law, 341, and cases cited. The testimony of the prosecutrix was, in our opinion, sufficiently corroborated to meet all the requirements of the statute. The boy, Henry Bell, was a nephew of defendant, and living with him. He testified that during the year before he saw the defendant, in the nighttime, get into bed with the prosecutrix a good many times. And the witness Moore testified to remarks made by defendant at the time and shortly after his arrest which seem unaccountable if no illicit relations had existed between him and his daughter.

5. It is urged that the court erred in amending certain instructions asked by defendant, and in refusing to give certain others asked by him. We see no error in the action of the court complained of. Instruction No. 6, as asked, was substantially in the language of section 1111 of the Penal Code, and the part added as an amendment was simply a statement as to the amount and kind of corroboration required. The lan-

guage used in the amendment was approved in People v. Thompson, 50 Cal. 480. The part stricken from instruction No. 8 stated that "there is much greater danger that injustice may be done to the defendant in cases of this kind than there is in prosecutions of any other character." This is not a proposition of law. Instruction No. 10 was amended by simply writing the word "reasonable" before the word "doubt," making it read, "If you have any reasonable doubt," etc. Instruction No. 12 was ambiguous and misleading, and was properly refused. There is but one presumption until the verdict is rendered, and that is one of innocence. To say, therefore, that a presumption of guilt is met by a stronger presumption of innocence, and must give way to it, is confusing, and not sound law. There are some other minor points made, but they do not require especial notice. We find no prejudicial error in the record, and advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 19

PEOPLE v. TOMLINSON. (No. 21,039.)

(Supreme Court of California. March 27, 1894.)

LARCENY—WHAT CONSTITUTES—EVIDENCE—INSTRUCTIONS.

1. Where one induces another, by promise of employment, to deposit with him a sum of money as security for funds to be handled by the employe, intending at the time to convert the money to his own use, which he subsequently does, he is guilty of larceny.

2. The fact that, unsolicited, he gave such prospective employe his promissory note for the amount of the deposit, does not affect the character of the crime.

3. Defendant advertised for help, and the prosecuting witness responded to the advertisement, and deposited, with defendant, money, as security, which defendant converted to his own use. Soon after his employment, on January 12th, defendant laid him off, alleging lack of business. *Held*, that a letter written by defendant January 20th, to one who had responded to the same advertisement, stating that he wanted a clerk, and reciting the same conditions as those on which the prosecuting witness was employed, was admissible on defendant's trial for larceny.

4. An instruction that when, by fraud or artifice, the possession of property is obtained, with "the intention of stealing it," the crime is larceny, is not erroneous because the word "feloniously" was not used before the word "stealing."

5. It is within the discretion of the court to allow the jurors to remain in the court room during the argument of a motion for a nonsuit.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

J. H. Tomlinson was convicted of larceny, and appeals. Affirmed.

A. E. Mack and A. D. Lemon, for appellant. Atty. Gen. Hart and Wm. S. Barnes, Dist. Atty., for the People.

PATERSON, J. The defendant was convicted of the crime of grand larceny, and sentenced to serve a term of four years in the state prison at San Quentin. His counsel claim on this appeal that, if any offense is shown by the evidence, it is embezzlement, and not larceny. The information is in the language of the statute defining "larceny," charging that he did "feloniously steal, take, and carry away $150, of the lawful money of the United States."

The testimony of the prosecuting witnesses, Claxton and wife, shows that on December 21, 1892, they found an advertisement in a San Francisco newspaper, which read as follows: "Steady men wanted to collect, and wait on customers, in pleasant, cash business. Short hours and light work. No experience necessary. Must have $150 cash, and be satisfied with $70 per month. Apply No. 7 Grant Ave., Room 2." Following the direction of the advertisement, Claxton went to No. 7 Grant avenue, and there met a man who took him to the defendant's office, No. 777 Market street. The defendant stated to him that he wanted a man to look after the office, and wait on customers, and that he would have steady work. The advertisement was referred to in the conversation. The defendant told him he could have the position at $70 per month, but he would be required to give him $150 as security, as there was a great deal of money to be handled in the business. Thereupon Claxton gave the defendant the $150, who wrote and delivered to the former a receipt in the following words: "Received from William Claxton $150, as security deposit on situation. Salary $70 per month. J. H. Tomlinson." At the same time the defendant, without request therefor, gave Claxton a promissory note for the sum of $150, payable 60 days after date. The reason given by the defendant for requiring $150 security was that a previous employe, who had given no security, had embezzled and run away with $700, which he had collected. The defendant stated to the prosecuting witness that he was obliged to have a man, as he had more business than he could attend to himself, and, for anybody who could put up the security, it would be a good job; that it would be outside work for a week or so, until he got the run of the business, and then it would be inside work. Claxton testified that he did not know the party who went with him to the defendant's office from No. 7 Grant avenue, but had seen him repeatedly, since, in Tomlinson's office, "sitting at the desk, or sitting with Tomlinson, or around there. On or about January 12th, defendant informed Claxton that business was very dull, and that he would have to "lay him off" until the 1st of the month. All the defendant paid Claxton on account of wages was $11, and, of the $150, all that has been returned to him is the sum of $20, paid after his discharge. Mrs. Claxton testified that the defendant said, if her husband did not like the position, or should be discharged, the $150 would be returned to him. There are other circumstances, which need not be related, tending to show that the defendant was not acting in good faith. One act, in particular, which goes to show that he did not discharge Claxton because he had no work for him, was a communication written by him to one Switzer, replying to a letter dated January 20, 1892, inquiring about a position mentioned in an advertisement inserted in one of the San Francisco newspapers by the defendant, saying that he wanted a clerk at $70 a month, with $150 cash deposit, the applicant to apply at 777 Market street. Enough of the evidence has been stated, we think, to show that the prosecutor was induced to place his money in the hands of the defendant upon the assurance that he would have permanent employment, and that the defendant and his confederate conspired, feloniously, to procure the money of Claxton, and convert it to their own use. The only question is whether, upon the facts proved, a case of larceny has been established.

It is said that the verdict cannot stand because Claxton voluntarily parted with his money, and took a promissory note in lieu thereof, but the jury were justified in believing that defendant's voluntary presentation of the note was a mere trick to get possession of the money. The circumstances all show that Claxton did not intend to part with the ownership of the money. It was put in the hands of the defendant as security for the faithful performance of the services to be rendered. When Claxton was discharged, it was the duty of the defendant to return the money to him. The giving of a worthless note was doubtless a mere cover —a device or contrivance—to hide the real design. As Claxton did not intend to part with the money absolutely, but turned it over to the defendant for temporary use and a specific object, the taking of the money, with the intent to steal it at the time it was taken, was larceny. On the facts there must often be a very narrow margin between cases of larceny, obtaining money by false pretenses, and embezzlement, because the character of the crime depends upon the secret intention of the parties, which is often difficult to ascertain; but, so far as the law is concerned, the principles upon which the question of guilt or innocence is to be determined are plain, and too well settled to justify a review of the authorities. Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses. But where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny. It was a question for the jury to decide, in this case, whether the defendant feloniously took the money, and whether Claxton intended to part with the ownership of the same. People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Johnson, 91 Cal. 265, 27 Pac. 663; People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858.

The court did not err in admitting in evidence the advertisement referred to. The wages paid, and the security required, by the defendant, were the same as those mentioned in the card; and the party who was named in the advertisement as the one to apply to took the applicant to the defendant, and appears to have been thereafter closely associated with him. Under these circumstances the jurors were justified in believing that the act of one was the act of both.

It is claimed that the verdict ought to have been set aside because of a variance between the allegations of the information and the proof as to the ownership of the property taken. It was alleged in the information that the property belonged to William Claxton. The evidence shows that the money came to Mrs. Claxton as her separate estate, but that she gave it to her husband to enable him to provide the security required by the defendant. Irrespective of this, however, the contention cannot be sustained. People v. Nelson, 6 Pac. Coast Law J. 453; State v. Pettis, 63 Me. 124; Dignowitty v. State, 17 Tex. 521.

The court did not err in permitting the prosecution to introduce the letter written to Switzer. It tended, directly, to impeach defendant's claim of good faith in discharging the prosecuting witness, and the fact that it may have tended to show the commission of another offense by the defendant is immaterial. People v. Lane (No. 21,050; filed March 3, 1894) 36 Pac. 16.

Objection is made to that portion of the charge to the jury wherein the court said: "Now, the law is that when, by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained * * * from another, and the party obtaining this possession acquires it by means of this fraud and artifice, with the intention of stealing it when he gets possession of it, then the crime is larceny, provided the owner of the property, who has thus deposited and loses its possession, still remains the owner of the property, and has not parted with his title." It is said the court erred in not using the word "felonious" before the word "stealing." The word "steal," in common as well as in legal parlance, imports a larceny, and, when used in connection with property which is the subject of larceny, means the felonious taking. State v. Chambers, 2 G. Greene, 311; People v. Robertson, 3 Wheeler, Cr. Cas. 181. People v. Raschke, supra, cited by the appellant, does not support his contention. The instruction therein criticised, and held erroneous, did not make use of the word "steal," but, in lieu thereof, the words "intended to convert them to his own use, and did so convert them." Mr. Justice McFarland particularly pointed out that "nowhere in the instructions on that point were the jury told that the appellant, at the time possession of the goods was obtained, must have had a 'felonious intent,' nor was any language used which was the equivalent of 'felonious intent,' or which conveyed the idea of stealing." In People v. Urquidas, 96 Cal. 241, 31 Pac. 52,—a case of burglary,—it was claimed that the words "stole" and "stealing" are not equivalent to the word "larceny;" but it was held that, if the defendan entered a barn "with the intention of stealing hay therein," he entered "with intent to commit grand or petit larceny." In People v. Mitchell, 92 Cal. 592, 28 Pac. 597,—a case of forgery,—it was claimed that the indictment was defective because the word "falsely"—a word used in the statute defining the crime of forgery—was not used before the word "forge." But Mr. Justice Garoutte, in the main opinion, said: "The words 'forge,' 'forger,' and 'forgery,' when used in law, have no honest meaning, but imply fraudulent deceit." The instructions complained of are not, in our opinion, fairly obnoxious to the criticisms put upon them by counsel for the defendant. We do not think that the jury could have construed the language of the court as an intimation on its part that the defendant was guilty of fraud, or that, in its opinion, the publication referred to was made for the purpose of fraudulently obtaining the money of others.

There is no merit in the claim that the court erred in not excluding the jurors from the court room during the argument on motion for a nonsuit. The court does not, in overruling such motions, intimate to the jury any opinion of the guilt or innocence of the defendant, and there is no provision of the law requiring the exclusion of the jury on such occasions. It is for the court, always, in its discretion, to say whether the interests of the parties demand that the jury should not hear the argument on a motion for a nonsuit. The judgment and orders appealed from are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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101 Cal. 349

In re THOMPSON'S ESTATE. (No. 19,295.)

(Supreme Court of California. March 20, 1894.)

In bank.

Dissenting opinion. For majority opinion, see 36 Pac. 98.

BEATTY, C. J. (dissenting). The modification made in the judgment of the department in this case does not, in my opinion, rectify all the errors of which appellant has a right to complain, and is not, therefore, a sufficient ground for denying him a rehearing. Even allowing that he is justly chargeable with interest compounded annually at the rate of 10 per cent. on the funds in his hands, he is still entitled to be credited with the payments made by him at the dates when they were made. By the method of computation followed in arriving at the amount of the judgment now given, interest is calculated on the whole of each annual balance for a whole year, and from the amount of principal and interest all the payments made during the year are aggregated, and deducted as if they had all been made on the last day, instead of having been made, as the record shows they were, from time to time during the year. This error is partially compensated, it is true, by treating his receipts in the same way; but, since his payments were largely in excess of his receipts, the erroneous method of computation necessarily works to his disadvantage. This, however, is a trifling matter compared to the error—as I deem it to be—of allowing interest at the rate of 10 per cent., instead of the legal rate of 7 per cent. I know of no authority for allowing interest, as such, at any greater than the legal rate. It is of course, permissible in a proper case under pleadings properly framed to allow actual profits realized by a trustee upon trust funds, and there is, perhaps, no objection to computing or measuring such profits by compounding interest at any given rate. But this is no such case; certainly not on the pleadings; and, in my opinion, not even on the findings. The form of proceeding by petition to the probate court was, confessedly, a mistake; but, by what I cannot help regarding as too great a concession on the part of this court, the petition so filed, and the exceptions to the account filed by appellant, are treated as the equivalent of a bill in equity by a cestui que trust against a delinquent trustee, and it is assumed that they, together with the account filed by appellant, made issues, and, among others, an issue as to actual profits derived by the appellant from the trust fund. In my opinion, no such issue was made on the most liberal construction that can be given to the petition and exceptions, and therefore the superior court had no right to try it, or to decree actual profits. It is also a serious objection to the judgment that the proper parties to a suit in equity were not before the court, and on the evidence it does not seem to me that the appellant has been guilty of such misconduct as to call for the infliction of a penalty, or to entitle the petitioners to recover anything more than the fund received by the appellant, with legal interest, compounded. For these reasons I dissent from the order denying a rehearing.

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102 Cal. 208

BEHLOW et al. v. FISCHER et al. (No. 18,144.)

(Supreme Court of California. March 30, 1894.)

EQUITY—MISJOINDER OF PARTIES—CORPORATIONS—MULTIFARIOUSNESS OF BILL.

1. A copartnership composed of A., B., C., and D. formed a corporation to carry on its business. Forty thousand shares were issued to the partners in proportion to their respective interests, and 20,000 shares were held by the firm. Subsequently these shares were sold by the firm to B., who afterwards sold all his interest in the partnership and 22,500 shares in the corporation to D. A. also sold his shares to D. Thereafter A., B., and C. joined in a bill against D. and others, alleging that such sales had been induced by fraud, and praying that they be rescinded, that an accounting be had, and that the partnership be dissolved. *Held*, that the bill was bad for misjoinder of parties plaintiff and defendant, as plaintiffs were not jointly interested in the property sold, and the rescission of one sale would in no respect affect the other, or any of the defendants other than D. Paterson and Fitzgerald, JJ., dissenting.

2. A corporation has no interest in the individual ownership of its shares, and is not a proper party to a controversy between the claimants to a portion of its capital stock.

3. Where partners form a corporation to carry on the business of the firm, and a portion of the shares are issued to the partners individually, though by agreement between themselves they are interested therein as partners, and the remainder to the firm, a purchaser of shares in such corporation from the firm, or from any of the partners, without notice, is not bound by such agreement.

4. A bill for a rescission of a sale of one partner's interest to another, and for a dissolution of the firm, is multifarious.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Bill by Charles J. Behlow and others against Jacob A. Fischer and others to rescind certain sales, and for a dissolution of partnership. From a judgment for plaintiffs, defendants appeal. Reversed.

Scrivner & Schell and Wheaton, Kalloch & Kierce, for appellants. J. L. Crittenden, J. C. Campbell, and F. W. Street (Henry S. Foote, of counsel), for respondents.

HARRISON, J. In April, 1889, William G. Long, Jacob A. Fischer, Edward C. Loftus, and Charles J. Behlow formed a copartnership for the purpose of purchasing and working certain mining claims in Tuolumne county upon certain terms agreed upon between them, and thereafter acquired the mining properties contemplated by their agreement. September 1, 1889, these four partners agreed among themselves to form a corporation under the laws of this state, with a capital stock of 60,000 shares, for the purpose of carrying on the business of the partnership under a corporate name, and agreed that upon the organization of the corporation they would divide 40,000 shares of the capital stock between themselves according to their respective interests in the partnership, and that the remaining 20,000 shares should be disposed of as the partnership should determine. In pursuance of this agreement, a corporation was organized under the corporate name of the Consolidated Golden Gate & Sulphuret Mining & Development Company, and on the 4th of September of that year the copartners conveyed to it the aforesaid mining property; and of the 40,000 shares that the partners had agreed to divide among themselves, 15,000 were issued to Behlow, 15,000 to Fischer, 5,000 to Long, and 5,000 to Loftus. September 12, 1889, 19,200 of the remaining shares were issued to Behlow in consideration of his paying therefor the sum of $3.50 per share. November 27, 1889, Long sold and transferred to Fischer the 5,000 shares of the capital stock issued to him for the sum of $2,000; and September 12, 1890, Behlow sold and transferred to Fischer all his interest in said copartnership, and 22,500 shares of said capital stock, for the sum of $35,160. It is alleged in the complaint that these sales and transfers were made in consequence of fraudulent acts, concealments, and representations on the part of Fischer, and that but for such fraud they would not have been made; that these frauds were not discovered until November 20, 1891; that on the 4th day of January, 1892, Behlow and Long severally "gave notice of rescission, and rescinded the said sale and transfer to Jacob A. Fischer * * * on the ground of fraud, and tendered and offered to return and repay to said Jacob A. Fischer the consideration received as aforesaid for said sale and transfer, * * * and then and there demanded of said Fischer the return and transfer of their interest in the copartnership, and the return and transfer of said shares of stock." The complaint further alleges that Fischer had sold and transferred to defendant John Loftus 10,000 shares of the capital stock, and had transferred other portions thereof to other persons. The complaint also alleges that, although by the agreement for the division of the 40,000 shares of the capital stock of the corporation Behlow was to receive 20,000 and Fischer only 10,000 shares, yet Fischer, "with the intent to defraud said copartnership and his said copartners," caused 15,000 shares to be issued to himself, although he well knew that 5,000 of said shares belonged to and should have been issued to Behlow. The present case was commenced January 11, 1892, by Behlow, Long, Loftus, and Mariam V. Loftus; and in their complaint they ask for a judgment vacating and annulling the aforesaid purchases by Fischer from Behlow and Long of their interests in the copartnership and in the shares of corporate stock transferred by them to him; that it be adjudged that Fischer received and held in trust for Behlow the 5,000 shares of the capital stock of the corporation wrongfully issued to himself, and that he assign and transfer the same to Behlow; that Fischer account and pay over to Behlow and Long all the moneys which he may have received as dividends on said stock; that an accounting of the business and affairs of said corporation be had, and that said copartnership be dissolved; and that the property standing in the name of the defendant corporation be adjudged to be the property of said copartnership. To this complaint the defendants severally demurred, upon the grounds, among others, that there was therein a misjoinder of causes of action, a misjoinder of parties plaintiff, a misjoinder of parties defendant, and that it did not state facts sufficient to constitute a cause of action. Their demurrers were overruled, and, after answering the complaint, a trial was had, and judgment rendered in favor of the plaintiffs. From this judgment the defendants have appealed, bringing up the judgment roll alone.

The demurrer to the complaint should have been sustained. The cause of action in favor of Behlow for a rescission of the sale by him to Fischer was a matter entirely separate and distinct from the cause of action in favor of Long for similar relief. Behlow and Long were not jointly interested in the property sold, nor were the sales made by the same transaction, or for a single consideration, or to be established by the same evidence. Their ownership of an interest in the partnership, as well as of the shares of the capital stock held by them, was the individual property of each, and was capable of being disposed of at the will of each. If the sale by either of them should be rescinded, such rescission would in no respect affect either of the other parties, or either of the defendants other than Fischer. The corporation defendant has no interest in the individual ownership of its shares, and is not a proper party in a controversy between two claimants to a portion of its capital stock. Under the allegations in the complaint the 20,000 shares of the capital stock of the corporation which the parties agreed should remain unissued were a part of the partnership assets. Whenever these shares were disposed of, they ceased to be partnership assets, and became the individual assets of the purchaser. Hence, when Behlow purchased the 19,200 shares, they became his individual property, and were removed from all control by or in the interest of the copartnership. The 5,000 shares which he alleges were wrongfully issued by Fischer to himself out of the 20,000 to which he was entitled was a wrong in which only Fischer and himself were interested, and neither of the other parties to this action are interested in their controversy over this wrong.

Assuming that the corporation was but an agent of the copartnership, and that, so long as the original parties to its organization were the only ones interested in its affairs, it is to be managed in accordance with their agreement for its organization, yet the shares of its capital stock which were issued to these partners became their individual property. These shares of stock represented the assets of the corporation, and the owner of any portion of these shares became thereby the equitable owner of that proportion of those assets. It does not follow that, because the original owners of this stock were, as between themselves, and by virtue of their agreement, interested as partners in the assets of the corporation, every transferee of the stock was also a partner with the others. Partnership, whether mining or commercial, depends upon the intention with which the association is formed. A purchaser of the capital stock of a mining corporation does not, by the mere act of purchase, become a partner with the other stockholders; and, if it be conceded that the original partners hereto formed a corporation for carrying out the object of their partnership, and that others who succeeded to their interests are bound by an agreement of that character which they subscribed to, or of which they had notice, there is no averment in the complaint which sustains this theory. The only averment by which the defendants Martha F. Blake and Rosalia Fischer are connected with the other parties to this action is that certain shares of the capital stock of the corporation had been transferred to them by Fischer. In the absence of any averment that there was such an agreement as we have above referred to, they must be regarded merely as stockholders in the corporation, who have purchased their stock upon the faith that the assets of the corporation were its property, and that the stock held by them was capable of transfer and purchase like the stock of any other corporation. For the 19,200 shares of stock purchased from the corporation by Behlow there can be no claim that it was partnership assets, or that the transferees of Fischer to whom he sold it were in any respect interested in his dealings with Behlow, or in any other stock which he or the other members of the partnership might hold.

The averments relative to copartnership, and the prayer for an accounting and dissolution of such copartnership, did not authorize the joinder of these causes of action in favor of Behlow and Long against Fischer with the action for a dissolution of the partnership. The court could take jurisdiction of an action for the dissolution of the partnership only at the instance of a partner, and the joinder with Loftus of others as plaintiffs, who by their own averments had parted with all their interest in the partnership, did not give to the court jurisdiction to determine in the same action a controversy between them and their vendee respecting the validity of their sales. Until they had established their right to interfere in the management of the partnership affairs, the other partners were not liable to any action at their instance. If, as averred in the complaint, the corporation was only an agent of the partnership, it is only the partnership, or some one in its interest, who would have the right to ask for an account of its agency, or for a surrender of its assets. The rule that when a court of equity has jurisdiction of a matter it will determine in that action all questions that may arise, and will not remit the party to another tribunal, has no application. This rule applies only when the party seeking the relief shows by his bill that he has such a standing in a court of equity as entitles him to invoke the aid of the court. But when, by the averments of his complaint, it appears that he has no such standing, his bill will be dismissed for want of equity, and if it appears from his bill that the relief sought is twofold, and that the averments and proofs necessary to authorize the one are separate and distinct from those necessary to authorize the other, his bill will be dismissed for multifariousness. In the present case the relief sought by Behlow from a rescission of the sale by him to Fischer is utterly disconnected with the relief sought under the prayer for a dissolution of the partnership. Each of these species of relief is the matter of separate and distinct averment, and dependent upon different proofs. Behlow was not authorized to join the two causes of action in the same complaint, nor had the other plaintiffs any interest in the relief which he seeks against Fischer solely. The same remarks are applicable to the joinder of the two causes of action in favor of Long. This conclusion renders it unnecessary to determine whether the averments in the complaint are sufficient to uphold the judgment against the corporation defendant. The judgment is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.

PATERSON and FITZGERALD, JJ. We dissent. The complaint is sufficient, and the demurrer was properly overruled. The case presented is stronger than the one shown in Shorb v. Beaudry, 56 Cal. 446. The action is one in equity for the dissolution of a copartnership and an accounting between the copartners. All the parties are interested either in the copartnership or its assets. There is, therefore, no misjoinder of parties, either plaintiffs or defendants. Pom. Eq. Jur. §§ 113, 114. The fact that there are several separate and independent acts of fraud charged does not militate against the right of the parties to an adjustment of the affairs of the copartnership in which they are all interested. As the legal title to the partnership property was in the corporation, the latter was a proper and a necessary party. Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, and 12 Pac. 449. We think it was proper, too, to include all the transactions under which the rights of the respective parties have accrued to one or all of the plaintiffs, as against a part or all of the defendants, and growing out of partnership transactions, in order that, in closing up the copartnership affairs, the court might do full and complete justice to each and all of the parties interested. Equity, in such cases, does not adjudicate piecemeal. The several charges of misconduct all grew out of the conduct of the partnership affairs, and there is, therefore, in our opinion, no misjoinder of causes of action in uniting them in an equitable action in the same complaint.

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102 Cal. 229

PEOPLE v. MONAGHAN. (No. 21,042.)

(Supreme Court of California. April 19, 1894.)

CRIMINAL LAW—PLEA AFTER DEMURRER OVERRULED.

Defendant withdrew his plea of not guilty, and demurred to the indictment. His demurrer being overruled, time was given him to plead, but no further plea was made, and trial and conviction followed. *Held* no trial. The plea withdrawn was not reinstated by the overruling of the demurrer; nor could issue be had on the theory of a refusal to plead, without a formal entry by the court; nor could defendant's going to trial waive the need of a plea.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Joseph P. Monaghan, convicted of obtaining money on false pretenses, appeals. Reversed.

Kip & Massey, for appellant. Atty. Gen. Hart, W. S. Barnes, Dist. Atty., and Dunn & McPike, for the People.

TEMPLE, C. Appellant was indicted by the grand jury of the city and county of San Francisco for the crime of obtaining money by false pretenses. The record shows that defendant was duly arraigned July 23, 1892, and pleaded not guilty, and was allowed until July 30th to withdraw the plea. July 30th of the same year the plea was withdrawn, and a demurrer to the indictment entered, and time allowed to file briefs. The record shows that the demurrers were finally submitted, and December 28, 1892, it was ordered that the demurrer be overruled, and the cause continued to December 31, 1892, for defendant to plea. The record does not show that anything was done in the case on December 31st, but April 8th the cause was continued by consent to April 15th. No appearance is noted for April 15th, but on May 23d there is an entry in the clerk's minutes (after title of court and cause) in these words: "May 23d for trial." May 23d the defendant and his counsel were in court, and the trial commenced. A jury was impaneled, the indictment read to the jury, and a statement made to the jury by the clerk that a plea of not guilty had been entered. The trial then proceeded in due order—no objection being made on the ground that defendant had not pleaded to the indictment, but the defendant was tried in all respects as though the plea of not guilty had been entered. Evidence upon such supposed issue was put in both by the people and by the defendant. Whether the defendant asked for instructions does not appear, but his counsel made an argument in his behalf to the jury. The jury returned the verdict: "We, the jury, find the defendant guilty as charged in the indictment, and fix the value of the property obtained by the defendant to be one thousand ($1,000) dollars." When the time arrived for passing judgment, defendant's counsel objected because defendant had not been legally convicted, and the court could not make to the defendant the statements required by section 1200, Pen. Code, to wit, his plea. The defendant then made a motion in arrest of judgment, which was overruled, and a motion for new trial, which was denied.

The sole question raised on this appeal relates to the legality of the trial and conviction of the defendant without a plea. The people do not controvert the main proposition,—that a plea is necessary before there can be a trial. Until there is an issue, there is nothing to try. Blackstone tells us (4 Bl. Comm. 325) the great pains which were taken to compel a defendant to plead, and the terrible consequences which sometimes resulted from his standing mute. Wherever the common law prevails, criminal procedures have carefully provided for the arraignment of accused persons,—that they shall be fully informed of the charge against them, and of their right to plead. Some formalities are enjoined upon criminal courts, partly to have record evidence that there has been a fair trial, and partly to make it sure that an accused person has not been deprived of a substantial right through caprice or negligence of the judge or prosecuting officer. See Pen. Code, §§ 987 et seq., 1066, 1200. The action of the trial court is defended here on three grounds:

(1) It is said that, as the plea of not guilty was withdrawn to enable the defendant to demur to the indictment, it was naturally understood that when the defendant had had the benefit of his demurrer, and that had proven unavailing, the plea of not guilty would then stand as defendant's plea. People v. Bradner, 107 N. Y. 1, 13 N. E. 87, is cited as authority for this proposition. It is not claimed that any such understanding was expressed at the time by any one, but it is claimed that such understanding naturally results from the situation. But, unfortunately for this argument, the record conclusively rebuts such presumption, if it could otherwise have been indulged, for it shows that, upon the overruling of the demurrer, time was given to defendant to plead. Presumptively, this was upon the application of the defendant, and it shows that no one could have understood that there was already a plea of not guilty in the record, and I think it raises a presumption that defendant was not then prepared to plead not guilty. There were at least three other defensive pleas open to him.

(2) It is said that, upon the overruling of the demurrer, the defendant might elect to plead, or might decline to plead. If he declined to plead, judgment would go against him without further trial. Pen. Code, § 1011. If the fact be conceded, as assumed in this position, that after the demurrer the defendant declined to plead, such fact would not tend to prove the legality of the trial and judgment entered upon the verdict. An issue could not be made upon a refusal to plead, unless the court formally entered a plea for the defendant on the ground of his refusal to plead. But how can it be said that defendant declined to plead? Appar-

ently, he asked time to do so, and a time was appointed for that purpose. The record does not show that he was then or at any other time allowed the opportunity. Certainly judgment could not be pronounced upon him under section 1011, Pen. Code, unless he had in fact declined to plead after his demurrer was overruled.

(3) The argument is, although such point is not expressly made, that by going to trial without objection, by putting in evidence and arguing the case to the jury, the defendant has had the benefit of a plea of not guilty, has waived its formal entry, has shown his intention to rest upon such an issue, and having had the benefit of it is not prejudiced by the fact that it was not formally entered. As is sometimes held in civil cases, when all parties have gone to trial without objection, as though a certain issue were made in pleadings, and had every advantage at the trial which they could have had if the issue had been made by proper pleadings, they cannot afterwards claim that there was error in that no such issue was made by the pleadings. This position is inconsistent with the admission that a plea is necessary, for the argument would be just as persuasive had the defendant never been arraigned at all. It has been decided by this court. People v. Corbett, 28 Cal. 328; People v. Gaines, 52 Cal. 479. It has been decided over and over again in numerous cases, all holding against a respondent. Bish. Cr. Proc. § 733, and cases. In Missouri the question seems to have been often considered, and it is held that defendant cannot waive the plea, and going to trial on the merits without objection is not equivalent to a plea. In State v. Saunders, 53 Mo. 234, the plea was entered after trial, nunc pro tunc. It was held that this could not be done. The plea must precede the trial. In State v. Webber, 22 Mo. 321, after the jury had been sworn, it was discovered that no plea had been entered. The defendant was then arraigned and pleaded, and the jury was resworn. This proceeding was sustained on the ground that the trial was after the plea. See, also, State v. Montgomery, 63 Mo. 296; State v. West, 84 Mo. 440. In State v. Hunter, 43 La. Ann. 157, 8 South. 624, it is said: "The absolute requirement of the law, that the accused must plead personally to the indictment on arraignment, cannot be cured by the fact that he was brought into court and tried without objection." No authority has been cited to the contrary, and I think none can be found. That the defendant has been afforded an opportunity to plead is one of the facts in the process of the conviction of a criminal which our law, in its regard for life and liberty, requires to be expressly shown, and I believe that is one reason why it is made a fact which the judge must state to the convict before pronouncing judgment. The judge would not state it as a fact unless it were so, and he must so state to make it certain that it is a fact. I advise that the judgment and order be reversed and a new trial had.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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4 Cal. Unrep. 610

BARTLETT et al. v. O'CONNOR et al. (No. 15,399.)

(Supreme Court of California. April 19, 1894.)

WATER COURSE—RISING IN BOG—DRAINING.

Where one, in draining a marsh from which a stream runs onto another's agricultural land, in connection wherewith it has been used for irrigating and domestic purposes from time immemorial, diverts the water intentionally and without benefit to himself, he will be enjoined.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Suit by James Bartlett and others against Cornelius O'Connor and others for damages and an injunction. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. M. Mannon, for appellants. J. A. Cooper, J. Q. White, and W. P. Thomas, for respondents.

VANCLIEF, C. Action to recover damages for diversion of water from an alleged spring and natural stream, and to enjoin the defendants perpetually from such diversion. Judgment passed for plaintiffs, enjoining the defendants as prayed for, and for costs, but without damages. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The material facts are as follows: In February, 1891, the plaintiffs, being the owners of a large tract of land in Mendocino county, sold and conveyed a parcel thereof (130 acres) to the state of California, to be occupied and used as the site for the Mendocino State Asylum for the Insane. Upon the parcel thus sold to the state is a marsh or bog of about three acres, out of which arises a considerable quantity of water, which runs off from the west side of the bog, through a natural channel, across plaintiffs' adjoining land. The channel is hardly perceptible within the marshy land, but becomes distinct at the western edge thereof, and thence so continues through plaintiffs' land. The court found that at the head of the natural channel is "a living spring of water, * * * and that at the place, and in the vicinity of said spring, a large quantity of water rises and forms the source of a living stream of water; that the said water from said spring flows off in a natural, well-defined channel, through and over the lands of plaintiffs, and has been so wont to flow onto and over the lands of the plaintiffs in a natural and well-defined channel from time immemorial;" and that plaintiffs' lands are agricultural lands; and that the said water flowing through said natural channel has been used by plaintiffs for domestic purposes and for irrigation continuously for more than 20 years, until diverted by defendants in 1891. The court further found that in 1891 "the defendants willfully, and for the express purpose of drawing off the water that formed the spring, being the source of said natural stream, and for the purpose of drawing off said water and diverting it from said natural stream, cut an artificial ditch in and near said spring, and at a point before said water reaches the lands of the plaintiffs, and turned said water into said ditch, and diverted it from its channel and said ditch, and away from the stream in which it formerly flowed, so as to greatly diminish the quantity of water so flowing from said natural stream through and over the lands of the plaintiffs; and the defendants threaten to continue, and will, unless restrained by this court, continue, to divert said water from said natural stream and from the spring, the source of said natural stream, so as to diminish the natural flow of water from said stream, to the great and irreparable injury of plaintiffs." It is further found that the ditch dug by defendants is on the land purchased by the state from the plaintiffs, and the defendants were directors of said state asylum at the time they dug said ditch. The defendants testified that the water diverted through the ditch was not used or intended to be used for any purpose, and that the sole object of the diversion was to drain and reclaim the land for the purpose of cultivating the same. In answer to this the plaintiffs proved, and the court found, that, if the object was merely to drain the marsh, it could have been accomplished at much less expense by deepening the natural channel and outlet, in which there is a fall of 18 inches in the first 60 feet from the head, in the first 130 feet a fall of 3 feet, in the first 300 feet a fall of 4½ feet, and in the first 500 feet a fall of 6 feet and 5 inches; whereas, in the first 400 feet on the line of the ditch dug by defendants there is no fall. The head of the ditch dug by defendants is between 25 and 30 feet distant from the head of the natural channel, at which point it is 3 feet deep; and at a distance of 400 feet from that point it is from 5 to 6 feet deep. Then, connecting with the head of the ditch, at right angles therewith, is a ditch about 34 feet long, and another of the same length, and parallel therewith, about 14 feet therefrom, the natural effect of which is to divert water from the natural channel. These measurements were made and testified to by a surveyor, and were not disputed; so that the finding of the court that the object—at least one object—of the defendants was to divert the water from the natural channel and away from the plaintiffs' land by considerable unnecessary labor and expense if their only object was to drain the land, is amply justified by the evidence. And although the court, in its findings, did not use the word "malice," yet it substantially found that the defendants intentionally, unnecessarily, and without benefit to themselves or others, diverted the water to the injury of the plaintiffs. This the law characterizes as a malicious injury. Conceding that defendants were entitled to drain the land for the purpose of cultivating it, yet if, without inconvenience or extra expense, they could have adopted a mode or means of drainage not injurious to others, they had no right to adopt a mode which was not only injurious to plaintiffs, but intentionally so, as found by the court. In view of this conclusion it becomes unnecessary to consider the question principally argued by counsel, namely, whether the defendants diverted only such water as percolated through their own land or that of their principal, the state. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 617

SHEEHY v. CHALMERS. (No. 15,324.)

(Supreme Court of California. April 23, 1894.)

ACTION ON NOTE—EVIDENCE—JUDGMENT.

1. Under Code Civ. Proc. § 667, providing that judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein, a judgment payable in "U. S. gold coin" is not erroneous, when the note on which it is rendered is payable in "U. S. gold coin."

2. Where the answer to a complaint on a promissory note expressly admits its execution, it is unnecessary to introduce it in evidence.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; J. F. McCann, J.

Action by James Sheehy against W. P. Chalmers on a promissory note. From a judgment for plaintiff, and an order dismissing his motion for new trial, for want of prosecution, defendant appeals. Judgment and order affirmed.

Eugene N. Deuprey, for appellant. Julius Lee, for respondent.

BELCHER, C. On January 5, 1891, the defendant executed to the plaintiff his promissory note, whereby he promised to pay plaintiff, one day after date, $1,050 "in U. S. gold coin," with interest, etc. On December 1, 1891, the plaintiff commenced this action to recover the amount due on the note, and prayed judgment for the amount "in the gold coin of the United States." The complaint was verified, and a complete copy of the note was set out therein. The answer of the defendant "admits the making of the promissory note alleged and set forth in said complaint," and the only defense interposed is an allegation "that it was understood and agreed that the sum sued for in this action was not to become due or payable until after the defendant herein had received sixty days' previous notice, which notice should be given by plaintiff to defendant before the same should become due or payable;" and a further allegation "that the plaintiff failed and neglected to give sixty days' notice, and that the said sum sued for in this action, and that said promissory note, is not due or payable, and that the action herein is premature." At the trial the plaintiff testified that he was the owner and holder of the note sued upon, and that no part of it had been paid, and then rested his case. The defendant thereupon moved for a nonsuit, upon the ground "that there had not been any alleged promissory note, or aught pertaining thereto, introduced in evidence." The court denied the motion, and evidence relating to the affirmative defense set up in the answer was then introduced by both sides. The court found, among other things, "that there was not at any time any understanding or agreement whatever between the parties hereto respecting said note sued on, or the time of the payment thereof, other than or different from, that expressed in said note," and gave judgment for the plaintiff according to the prayer of his complaint. The defendant moved for a new trial, which was dismissed for want of prosecution, and has appealed from the judgment and order dismissing his motion. Two points only are made for a reversal. They are (1) that the judgment was erroneous in so far as it made the amount adjudged to be due payable "in the gold coin of the United States;" and (2) that the court should have granted the defendant's motion for a nonsuit because, "at the trial, no note was offered in evidence, and there was no attempt to account for its absence."

1. The Code provides that: "In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein." Code Civ. Proc. § 667. This action was on a contract in writing for the direct payment of money, made payable in "U. S. gold coin." There was no error, therefore, in making the judgment payable in the kind of money specified in the contract. Carpentier v. Atherton, 25 Cal. 564.

2. It was not necessary to introduce the note in evidence, or to exhibit it at the trial. Its execution was expressly admitted by the answer, and the rule is elementary that no proof is required as to matters not in issue. It is said that "the plaintiff totally ignored the law as to the distinction between primary and secondary evidence," but no question as to primary and secondary evidence arose in the case. No good purpose would have been subserved by producing the note, and the court, therefore, did not err in denying the motion for nonsuit. We see no merit in the appeal, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, and the respondent is allowed $50 damages as a part of his costs on the appeal herein.

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4 Cal. Unrep. 613

MONTEREY COUNTY v. SEEGLEKEN et al. (No. 15,076.)

(Supreme Court of California. April 19, 1894.)

SPECIFIC PERFORMANCE—CONDITIONS PRECEDENT—REVIEW ON APPEAL.

1. A covenant in a contract to convey land to a county for a highway and bridge, binding the county to furnish a cattle-way to the river, need not be performed in advance as a condition to a conveyance.

2. Findings of fact by the trial court will not be reviewed on appeal.

3. The discretion of the trial court in granting the reformation of a deed will not be reviewed, except in a very plain case.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action by Monterey county against John and Henry Seegleken to reform a deed. From a judgment for plaintiff, defendants appeal. Affirmed.

W. A. Kearney, for appellants. B. V. Sargent, S. F. Geil, and J. J. Wyatt, for respondent.

TEMPLE, C. This action was brought to reform a deed. Plaintiff avers that it purchased from the defendants a tract of land, which the complaint specifically describes, for the consideration of $1,000, which was then paid to the defendants; that on the day on which it paid said money to defendants they executed a deed to it, intending thereby to convey the tract of land above alluded to, but, through the mistake of the scrivener in writing the deed, they in fact conveyed to plaintiff, contrary to the agreement and understanding of the grantors and grantee, another tract, which is also specifically described in the complaint; that the mistake was not discovered by plaintiff for several months after the execution of the deed; that defendants refused to rectify the mistake by executing a deed for the tract of land which plaintiff purchased; wherefore plaintiff demands a decree that the deed be reformed, and for such relief as may be just and equitable. The answer is a general denial. The court found for plaintiff all the facts averred in the complaint, but it also found that, as part of the consideration for the deed, plaintiff agreed to give to defendants a sufficient cattle-way from their lands to the Salinas river, between the bridge across Salinas river and the lands of F. S. Spring; and that plaintiff had not complied with that part of its agreement, and had not left a sufficient cattle-way for defendants to the river. Thereupon an interlocutory order was made, requiring plaintiff to provide a cattle-way according to the agreement and to the approval of the court, which, when done, would entitle plaintiff to the decree as prayed for. Subsequently a final decree was entered, in which, among other things, it is recited that a cattle-way has been provided for defendants. The decree then proceeds to award the relief prayed for. Defendants moved for a new trial, and now appeal from the order denying their motion. Three points only are made on this appeal: (1) The alleged contract was not proven, and the contract which was proven had not been performed by plaintiff; (2) the contract proven is so uncertain and indefinite that a court of equity will not enforce it; and (3) the misunderstanding, if there was any, was not mutual.

The county of Monterey, the plaintiff, purchased the land for a highway. It is a strip 60 feet wide along the river, at the westerly termination of which, it appears, a bridge was to be built across Salinas river. The plaintiff contends that the strip purchased extended to Spring's land, which is some 100 feet further down the river than the strip described in the deed extends. The bridge was built by the county below the land decribed in the deed, and within about 30 feet of Spring's boundary.

1. The charge that the contract alleged was not proven, and that the contract proven had not been performed by plaintiff, has reference to the finding that one consideration for the deed was a covenant to furnish a cattle-way to Salinas river. There is a slight misapprehension here, I think, on the part of appellant. The consideration was not the cattle-way, but the agreement to furnish one. The way was to be upon the very land conveyed, and was an agreement to allow the defendants the use of so much of it as would afford a cattle-way. In the nature of things, the contract could not be performed until after the conveyance was made; therefore it was not a covenant which it was incumbent upon the plaintiff to perform before it became entitled to a conveyance. Since, however, the plaintiff had taken possession and had constructed its bridge, and not left a convenient cattle-way, it was proper for a court of equity to require it to do so before reforming the deed. Considering the proceeding, however, as a suit for specific performance, and the act one which plaintiff was required to perform before being entitled to his deed, the result would be the same. According to some of plaintiff's witnesses, the bridge was located without objection on the part of defendants. The county had performed the most important part of its contract, had expended considerable money on the land, and the act for which plaintiff was in default could still be performed. It does not appear that inconvenience or loss has resulted from the delay. The plaintiff had already provided a cattle-way which it claimed was sufficient, but the court, holding otherwise, granted the relief conditionally. Defendants are not injured. Hoppough v. Struble, 60 N. Y. 430.

2. I presume that appellant, by his second point, really means that the proof that a mistake was made is insufficient; that the proof was so balanced that the court could not say with sufficient certainty that a mistake had been made. This was a question almost entirely for the court below. Unless the evidence be clear and convincing, the trial court should decline to grant the relief. But, in the nature of things, it must be a very plain case to justify the interference of this court with that discretion. Ward v. Waterman, 85 Cal. 504, 24 Pac. 930.

3. The point that the mistake was not mutual is perhaps the same point in a different form. The evidence of the members of the board of supervisors is quite clear as to their understanding. Looking only to the testimony on the part of the plaintiff, it is equally clear as to the understanding of John Seegleken. As I understand the evidence, the controversy concerns him, and not the other defendant. Field and Sheehy, who were members of the board of supervisors of Monterey county when the land was purchased, testified for plaintiff very clearly and positively as to the understanding of John Seegleken. Certain witnesses for the defendants contradicted this testimony, but that only made a case of conflict, and this court will not interfere. I advise that the order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

102 Cal. 245

DONOVAN v. OAKLAND & BERKELEY RAPID-TRANSIT CO. (No. 15,373.)

(Supreme Court of California. April 21, 1894.)

INDEPENDENT CONTRACTORS—GUARDING COMPLETED WORK.

Defendant, which had a franchise to erect poles on a street, bargained with a con-

tractor for the digging of holes of a specified size, as directed by defendant's superintendent, and in places named by him. Into one of the holes, dug several days before, and left unguarded, plaintiff fell, on a dark night. The superintendent, who had been by every day, did not recollect that any objection had been made to that hole. *Held*, that a nonsuit was error, since, even if the contractor was independent, if his work on that hole had been done and accepted at the time of the accident, defendant would be liable.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Patrick Donovan against the Oakland & Berkeley Rapid-Transit Company for damages for personal injuries. Nonsuit granted. Plaintiff appeals. Reversed.

Edward C. Robinson and Edward A. Holman, for appellant. J. E. McElrath, for respondent.

VANCLIEF, C. Action to recover damages for a personal injury alleged to have been suffered by plaintiff through the negligence of the defendant,—a private corporation. The cause coming on to be tried by a jury, at the conclusion of plaintiff's evidence in chief the defendant moved for judgment of nonsuit, which was granted; and plaintiff appeals from the judgment, and from an order denying him a new trial.

That the evidence was sufficient to prove that defendant fell into an open hole in Grove street, in Oakland township, in the nighttime, and thereby suffered the injury complained of (fracture of the pelvis or hip bone), and that Grove street is a public street, there is no question. Nor is there any question that defendant caused the hole to be dug, and that it was unguarded by any light, or otherwise, to warn travelers of the danger of falling into it, during the night of the accident. It appears, however, that the hole into which plaintiff fell was one of 500 post holes dug by Spence & Bryant under a contract with defendant, in which holes defendant intended to set poles for the support of electric wires for its electric railroad along and upon Grove and other streets, for which road a franchise had been granted to defendant by the county of Alameda. The record shows that the motion for nonsuit was made on the following ground, only: "That it appears by the testimony that the holes were dug by an independent lot of contractors, and that the relation of master and servant did not exist between Spence & Bryant and the company. Unless it did,—unless there was that relationship of agent and principal, or superior and subordinate,—defendant cannot be held liable."

The following is a copy of the written contract under which the hole was dug by Spence & Bryant for the defendant:

"Oakland, November 16, 1890. Oakland and Berkeley Rapid Transit Co.—Gentlemen: We will dig 500 post holes, more or less, for your company, along the route of your road on Shattuck avenue, and also on Grove street. Said holes to be from 5 to 6 feet deep, according to instructions of your superintendent, and placed where he may designate. The holes are to be 14 inches square, and of sufficient size to admit of poles 11x11 being placed in them, and room to tamp well. The whole work to be subject to the approval of your superintendent. Consideration to be one dollar for each hole dug and accepted by your superintendent; 75 per cent. of the work performed to be paid each Monday; and 12 holes to be dug each day; the work to commence at once. Yours, W. G. Spence. Joseph Bryant.

"Accepted. Oakland and Berkeley Rapid Transit. Supt. H. L. Coleman."

The evidence tends to prove that the particular hole into which the plaintiff fell was dug and finished according to the contract, several days before the accident. Henry L. Coleman, the superintendent of the work for defendant, testified: "I marked out the place where this hole should be dug. I did it as superintendent. Spence & Bryant dug the hole under a contract entered into with the company. It was done under my direction, as superintendent of the company. * * * I did not employ any laborers. Spence & Bryant had to dig the holes. * * * I did not control in any way the digging of the holes, excepting to see that they were dug according to the specifications in the contract. Beyond that, I exercised no control over it whatever. * * * I had nothing to do with the man who dug the holes. I had dealings with Spence & Bryant as principals under the contract. They were hired by the company at so much a hole. I probably saw the hole on Monday preceding the accident. I drove past there very often,—two or three times a day. Neither I nor the company attempted in any way to place a guard or light, or anything, to warn pedestrians of there being a hole, and to prevent accidents at this place. * * * If the holes were not up to that contract, they had to fix them according to the contract. I think the hole was up to the contract. I don't think they had to do any more work on it. I never knew the company to raise any objection to this particular hole. * * * I suppose we placed the hole there under and by virtue of the franchise. We built the whole road under the franchise granted by the board of supervisors." I think the granting of the nonsuit was an error. It will not be denied that it was the legal duty of the defendant to guard the hole in such a manner as to notify and warn travelers by night of the danger of approaching it, unless that duty had been transferred or shifted from defendant to Spence & Bryant by the contract above set out. But conceding, without deciding, that such duty might have been so shifted by contract, still the contract in this case did not have that effect, even while the contractors were digging the particular hole into which plaintiff fell; much less, after they completed all they had contracted to do on that hole. The contract obligated Spence & Bryant to dig each hole 14 inches square, at a place to be designated by defendant's superintendent, and to a depth of 5 to 6 feet, according to instructions of said superintendent, and nothing more. Nothing as to the place, size, or other quality of the hole was intrusted to the judgment or discretion of the contractors. All these were dictated by the defendant. And the evidence strongly tends to prove that the hole into which plaintiff fell had been completed according to the contract, two or three days before the accident. The contract did not require the contractors to guard the hole for the protection of travelers on the street, nor for any other purpose, in any manner, at any time,—certainly not after it was finished; and, since the negligence which caused the injury was that of failing to guard the hole after it was finished by the contractors, it must be imputed to the defendant. Darmstaetter v. Moynahan, 27 Mich. 188; Whart. Neg. §§ 179–187, and cases there cited.

I find nothing opposed to this view in the California cases cited by respondent. In Du Pratt v. Lick, 38 Cal. 691, the contractor was repairing defendant's sidewalk at the time of the accident, and was in no wise subject to the orders, or under the control, of the defendant. Besides, the terms of the contract do not appear. It does not appear that the hole in the sidewalk into which plaintiff fell was contemplated by the defendant, or provided for in the contract. The case was decided upon the authority of Boswell v. Laird, 8 Cal. 469, which is perfectly consistent with the views above expressed. In O'Hale v. Sacramento, 48 Cal. 212, cited by respondent, the defendant had let a contract to construct a sewer; and the contractor (Fuller) made an excavation partly across K street, into which plaintiff fell, and was injured. The plaintiff was nonsuited on the ground that the statute required the sewer to be constructed under a contract to be let as therein provided, and, inasmuch as the contract had been so let to Fuller by the defendant city, it was held not liable for the negligence of the contractor. But the terms of the contract do not appear. Undoubtedly, the contractor had the entire control of the excavation, and consequently the duty of properly guarding it while the sewer was being constructed devolved upon him. However this may be, it is quite clear that it is not a precedent applicable to the facts of this case. There was no statute requiring or regulating the letting of the contract in this case, nor had the contractors in this case control of the manner in which the work should be done, even while they were doing it, and surely not after it was completed. The case of Andrews v. Runyon, 65 Cal. 630, seems directly in point as to the effect of the contract upon the liability of the defendant. In that case the defendant had let a contract to repair a levee. The contractor dug earth from a public road with which to repair the levee, and thereby made an excavation in the road, into which plaintiff drove his team and buggy, and was seriously injured. The court said: "If it was a part of the contract that the road was to be dug up to build the levee, Runyon [who let the contract] would certainly be bound." See, also, Williams v. Irrigation Co., 96 Cal. 14, 30 Pac. 961; Colgrove v. Smith, 36 Pac. 411. Assuming that the digging of the hole was expressly or impliedly authorized by the franchise, it was not necessarily a nuisance, and could only become such by improper use, or by being negligently left in a condition dangerous to travelers, without being properly guarded; and in these respects, only, is negligence charged in this action. I think the judgment should be reversed, and a new trial granted.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and a new trial granted.

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102 Cal. 251

PEOPLE v. WAITE. (No. 21,015.)

(Supreme Court of California. April 23, 1894.)

ELECTIONS—APPOINTMENT OF DEPUTY REGISTRAR.

Under Pol. Code, § 4112, authorizing county officers to appoint deputies, if necessary for the discharge of the duties of their office, a registrar may appoint a deputy with power to administer oaths.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

G. W. Waite was convicted of perjury, and appeals. Affirmed.

Wm. S. Barnes and Atty. Gen. Hart, for appellant. Aug. Tilden, for respondent.

McFARLAND, J. Appellant was charged in the information with, and convicted of, the crime of perjury, committed by swearing falsely in an affidavit made by him for the purpose of being registered as a legal voter; and he appeals from the judgment, relying on the judgment roll to show reversible error. The charge is that he swore falsely before a deputy registrar in the city and county of San Francisco; and the only point made is that the registrar had no power to appoint a deputy who could administer oaths, because such appointment was not "necessary for the faithful and prompt discharge of the duties of his office," as provided by section 4112 of the Political Code. The contention is that an applicant for registration can make the requisite affidavit before any other officer qualified to administer oaths; that the duty of administering oaths is not specially enjoined on the registrar; and that, therefore, it is not "necessary" for him to perform that duty, or to have a deputy to do it. We see no real merit in this contention. It would apply to nearly all other county officers; for, generally, the law merely confers upon such officers the power to administer oaths. Administering the necessary oaths to those coming to the registrar to be registered is as much the duty of the registrar as of any other officer; it naturally belongs to his office, and it was evidently contemplated by the act creating such office. The number of his deputies was limited only by his discretion. Pol. Code, § 877. The judgment and order denying motion in arrest of judgment are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

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102 Cal. 188

CHUNG KEE et al. v. DAVIDSON et al.

(No. 18,228.)

(Supreme Court of California. March 30, 1894.)

MINING PARTNERSHIP—WHAT CONSTITUTES—CONSTRUCTION OF CONTRACT.

1. An agreement under which one who has mortgaged mining property to secure a debt is to remain in possession and turn over the result of each "clean-up" to the mortgagee, the latter to apply it to the mining expenses and to the payment of the mortgage debt, does not constitute them mining partners, nor render the mortgagee unconditionally liable for the expenses of working the mine.

2. Under such agreement the proceeds of the "clean-up" must first be applied to the mining expenses, and the balance applied on the mortgage debt.

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Chung Kee and Mook Sow against L. Davidson, S. C. Peek, and others on a claim assigned for work and labor and on an account stated. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Reversed.

Loutitt, Woods & Levinsky, for appellants. Reddick & Solinsky, for respondents.

HAYNES, C. This is a second appeal. The opinion of the court upon the first appeal is reported in 73 Cal. at page 522, 15 Pac. 100. The complaint contained a cause of action upon each of three claims assigned to plaintiffs, and three counts upon each cause of action. The first trial was confined to the first count upon each cause of action, and involved the liability of the defendants to them upon the contract hereinafter referred to. Upon the second trial no evidence was given by the plaintiffs under the first count, but they based their right to recover upon the second and third counts of each cause of action. The second count, after alleging the indebtedness of the Cooks to plaintiffs' assignors upon an account stated, alleged, in substance, that the Cooks delivered to defendants L. Davidson and S. C. Peek gold dust to the value of $5,500, "it being at the time of said delivery of said gold dust to said defendants understood and agreed by and between said defendants A. Cook and W. Cook on the one side and the defendants L. Davidson and S. C. Peek on the other that out of said $5,500 in gold dust the said Davidson and Peek should pay and discharge the claim and demand of plaintiffs' assignors." The third count was based upon the theory that the defendants and the Cooks were mining partners, and, as such, were liable for the labor in the mines for which the indebtedness sued for accrued. The answer of defendants raised certain issues upon the several counts of the complaint, and these issues were tried by the court without a jury. Findings and judgment went for defendants, and plaintiffs appeal from the judgment and order denying their motion for a new trial. The Cooks were made defendants, and, upon their default, judgment was entered against them.

The third count may be disposed of in a few words. There was no partnership between the respondents and the Cooks. It is true that, if any profit resulted from the mining operations conducted by the Cooks, it was to be received and retained by the respondents, as they were to receive all the gold produced; but such profits were not to be received as profits, but to be applied as payment pro tanto of the prior indebtedness of the Cooks to them. No single feature of a partnership existed. Respondents were not co-owners, but incumbrancers, of the mines, and were not in possession, and were interested in the work done only as creditors, for advancements made and to be made; and, if any profits resulted, the Cooks received the whole benefit by its application to the payment of their pre-existing debt. Of the proceeds which were not profits, but which represented the cost of production, we shall speak in another connection.

The second count proceeded upon the theory that respondents received from W. Cook and A. Cook $5,500 of gold dust, and that respondents agreed with the Cooks to apply it to the payment of the claims of plaintiffs' assignors. If this state of facts is sustained by the evidence, the plaintiffs should have had judgment. Whether the findings of fact show such a case, or whether, if the findings do not show such a case, they are justified by the evidence, must therefore be considered. The findings, so far as they are not excepted to, show the following facts: (1) That in December, 1881, the defendants W. and A. Cook were the owners and in possession of certain hydraulic mines, reservoirs, water ditches, tools, etc., and were then indebted to L. Davidson and S. C. Peek and to the firm of Davidson & Peek, and for the purpose of securing said indebtedness executed a deed of all said property to L. Davidson and S. C. Peek, said deed being intended to operate as a mortgage. (2) That the Cooks continued at all the times mentioned in the case in possession of the property, and Davidson and Peek continued to hold the said deed. (3) That respondents were not at any time interested in working the mines, nor owned any property therein, and were not partners therein or in the working thereof. (4) That on August 3, 1882, L. Davidson and S. C. Peek entered into the written contract with W. and A. Cook which is set out in plaintiffs' complaint, and that said contract was continued in force and effect at all times mentioned in the complaint. (5, 6, 7) That W. and A. Cook continued to work said mines on their own account, and in doing so contracted with plaintiffs' assignors to furnish men to work upon the mines, and became indebted therefor to plaintiffs' assignors in the several sums alleged in the complaint, and that these claims were assigned to plaintiffs. (8) That said contracts for labor were not made with the knowledge or consent of respondents, and that respondents were not interested in the employment of the men. (9) That on August 7, 1884, the Cooks, pursuant to said written agreement, "cleaned up" from said mines the sum of $5,500 in gold dust, and delivered the same to L. Davidson and S. C. Peek pursuant to said agreement. The remainder of this finding is excepted to, viz. that it was never understood or agreed by Davidson and Peek, or either of them, at the time of the delivery of the gold dust, or at any other time, that the claims of plaintiffs' assignors, or any of said claims, should be paid out of said sum of $5,500, or out of said gold dust, "before the payment of any indebtedness owing to" respondents. (10) Finds the claims were duly assigned to plaintiffs. (11) That said labor and services were rendered at the special instance and request of the Cooks, and for their use and benefit; and *that said W. and A. Cook are solely indebted therefor.* (The italicized portion of this finding is specified as not supported by the evidence.) (12) This finding is to the effect that at the time of the delivery of the gold dust the Cooks were indebted to the respondents in a sum exceeding the value of it. (13) "That the said defendants L. Davidson and S. C. Peek, pursuant to said written agreement, applied the whole of the proceeds of said gold dust so received to the payment of said indebtedness due and owing to the said defendants L. Davidson and S. C. Peek, and defendant L. Davidson, and the firm of Davidson & Peek, as far as the same would go."

The agreement set out in the complaint, and made part of the fourth finding, provides that the grantees in said deed will reconvey upon payment of all promissory notes, obligations, and accounts of indebtedness which may be owing to respondents; and further provides that the second parties, W. and A. Cook, shall have the possession and management of the mines, water ditches, etc.; that the second parties agree to clean up the flumes and undercurrents in the mines once a month, and turn over to the first parties "the entire result of each clean-up" as soon as made, in default of which they shall surrender possession to the first parties; and that "the result of each clean-up shall apply to the defraying of the expense of running and working said mines, and the payment of said promissory notes, obligations, and accounts of indebtedness due said parties of the first part and the firm of Davidson & Peek. This agreement did not bind the first parties thereto absolutely or unconditionally to pay the expenses incurred by W. and A. Cook in operating the mines, but did bind them to do so to the extent of the proceeds of the same turned over to them. The mere fact that the Cooks employed labor and incurred debts therefor did not give the plaintiffs the right to sue upon the contract as an agreement made expressly for their benefit, as was correctly held upon the former appeal; but the delivery to respondents of the entire proceeds of the labor of plaintiffs' assignors, pursuant to the agreement, did give a right of action. If the operations of the mine had been wholly fruitless, no obligation could have arisen on the part of respondents to pay any part of plaintiffs' claim; but to the extent to which such proceeds came to their hands they became, under said agreement, trustees for all who furnished the labor by which it was produced. The liability of respondents does not rest solely upon the written agreement with W. and A. Cook. It did not create a liability against respondents to pay a pre-existing debt of the Cooks to the plaintiffs. If it had done so, an action in favor of plaintiffs would have lain immediately upon the agreement. There was nothing in the hands of respondents, at the date of the agreement, belonging to the Cooks, which in equity they were bound to pay or deliver to the plaintiffs, nor was there then existing any claim in favor of plaintiffs against the Cooks to which such promise to pay could relate. What, then, was that agreement, as read and construed in the light of the surrounding circumstances? The Cooks were the owners of the mines, and were largely indebted to respondents. They had conveyed to Davidson & Peek all their mining property, tools, etc., as security for that indebtedness. They were still in possession and desirous of operating their mines, but were without means to do so. Respondents agreed that the mines should be worked, but required that the entire proceeds of the work should be delivered to them, in order to secure the appropriation of whatever profits might result to the payment of the then existing indebtedness. But, if the Cooks should turn over to them all the gold produced, to be applied on the prior indebtedness, they would be without the means or ability to prosecute the work or pay the labor necessary to obtain the gold. Hence it was agreed that "the result of each clean-up stipulated shall apply to the defraying of the expenses of running and working said mines, and the payment of said promissory notes, obligations, and accounts of indebtedness due said parties of the first part and the firm of Davidson & Peek." It is contended that this agreement does not require that the proceeds of the work shall be "first applied" to the expenses, and that, therefore, respondents had the right to apply the proceeds to the payment of the prior indebtedness. But such construction casts a serious reflection upon both parties to the agreement. Upon the part of the Cooks, it is equivalent to saying that they were willing to employ laborers to work the mines, and produce gold, and apply the proceeds to the payment of their prior debts to respondents which were already secured by mortgage, knowing their utter inability to pay for that labor; and, so far as respondents are concerned, such construction would make them parties to the fraud, and enable them to profit from the unrewarded labor of those whose sweat they coined into gold to cancel the debt of another. Such construction does violence to the language they used, as well as to common honesty, and cannot be sustained. Respondents were to attend to the payment of the working expenses. The entire proceeds of the working of the mines was to be immediately delivered to them, and, if applied to expenses, could only be so applied by them. It is true, they did not become responsible for any of these expenses further than the proceeds might be sufficient to pay them; but to the extent required to pay such expenses they were not the owners of the gold dust, but trustees to convert it into money, and pay the expenses incurred in producing it. It is money which respondents have received, and which in equity and good conscience they were not entitled to retain, and for which an action for money had and received for plaintiffs' use would lie; and the second count of the complaint, though not in the form of the common count for money had and received, states facts which show such right. The labor was performed for the Cooks, to whom the gold belonged until it was delivered to respondents; and, as it was delivered for a specified purpose, the respondents could hold it for no other purpose. They did not become the owners of it, but were, under the agreement, the disbursing agents of the Cooks so far as it was required to defray the expenses of producing it. It was not necessary that respondents should have known of the employment of plaintiffs' assignors, or that they should have made an express promise to pay these plaintiffs or their assignors. In Lewis v. Sawyer, 44 Me. 337, the court, quoting from Hall v. Marston, 17 Mass. 575, said: "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to the action of money had and received, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise." In Stoudt v. Hine, 45 Pa. St. 30, it was held that one in whose hands money is placed by a debtor for the payment of a debt is liable in an action for money had and received at the suit of the creditor to whom the payment was to have been made, and, as the defendant was liable as agent, rather than as surety, it was not necessary that his promise should be in writing. In Donkersley v. Levy, 38 Mich. 54, it was held that where an employer reserved a certain amount from the wages of his employes under an arrangement by which he was to pay their grocery accounts, but did not pay the grocers, the latter had an action against him for money had and received. In Pope v. Porter, 33 Fed. 7, the facts were that Cheney gave his promissory note for a certain sum to plaintiff, and secured the same by a chattel mortgage upon a lot of corn. The defendant bought the corn from Cheney, and agreed with him to pay the debt due Pope as part of the purchase price. Porter sold the corn, but did not pay the debt due from Cheney to Pope. Shiras, J., held that defendant was liable to Pope "for money had and received for the use and benefit of plaintiff, as well as upon the express promise to pay the debt as part of the purchase price." The supreme court of the United States, after conceding the general rule to be that privity of contract is necessary to the maintenance of the action of assumpsit, said: "But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third party. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise." Second Nat. Bank v. Grand Lodge, 98 U. S. 123. In McLaren v. Hutchinson, 18 Cal. 80, it was held that, where the defendant purchased land, and as a part of the consideration agreed to pay certain debts of the grantor, the creditor of the grantor could not maintain an action against the grantee for want of privity. But that case was overruled in Lewis v. Covillaud, 21 Cal. 189, and the latter case was approved in Lumber Co. v. Wagner, 67 Cal. 295, 7 Pac. 705.

The second count alleged that at the time the gold was delivered to respondents it was understood and agreed that plaintiffs' claims should be paid, while the latter part of the ninth finding is it was not then or at any time so agreed. The fourth finding, however, states the making of the written agreement, and that it was in force at the time the gold was delivered; and, as that agreement was that the proceeds of the mines should be applied to the payment of the expenses, it related directly to the delivery, and only became operative thereby. The agreement having been incorporated in the findings, the ninth finding, that there was no agreement as alleged is simply a misconstruction of the written agreement, and an erroneous conclusion of law. That part of the eleventh finding which states that W. and A. Cook are solely indebted to the plaintiffs is an erroneous conclusion of law when considered in connection with the facts stated in the other findings; and the same remark applies to that part of the thirteenth finding which says that the whole of the proceeds delivered to respondents was applied to the indebtedness of the Cooks to them, "pursuant to the agreement." The agreement being in writing, and before the court, whether the delivery was pursuant to the agreement is a conclusion of law. The conflicting oral evidence given in relation to the way in which the agreement was intended to be or was understood or interpreted by the parties to it cannot affect it.

It does not appear from the pleadings or findings what the entire expense of producing this gold was, nor whether any expenses were incurred other than that of the plaintiffs; but from the evidence contained in the record it appears without any conflict that the gold dust produced was slightly less than the expense of producing it, and that $1,702.94 was applied to the payment of the prior indebtedness of W. and A. Cook to the respondents. As the money paid out on account of expenses was paid to many persons who are not parties to the action, and most of it paid in advance of the receipt of the gold dust by respondents, an accurate adjustment would be impossible, and that substantial justice will be done by ordering judgment for plaintiffs for the amount applied to the prior indebtedness. We therefore advise that the judgment and order appealed from be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and a new trial granted.

102 Cal. 254

BLYTHE v. AYERS et al. (two cases. Nos. 15,411, 15,528).[1]

(Supreme Court of California. April 24, 1894.)

New Trial—Appeal—Question for Trial Court—Legitimation of Bastard.

1. In a proceeding to determine heirship, parties who do not except to or attack a finding that they are not akin to decedent are not "parties aggrieved" within Code Civ. Proc. §§ 657, 938, providing that, for enumerated causes, a new trial shall be granted on the application of the party aggrieved, and that such party may appeal in certain cases.

2. Where, on an issue whether plaintiff was decedent's child, her mother testified positively that she was, and to facts which, if true, showed that she could not have been mistaken, and, on the other hand, there were circumstances tending to show that the story of plaintiff's mother was improbable, it was for the trial court to determine whether her statements were to be believed.

3. Plaintiff's putative father was at all times domiciled in California, her mother at all times domiciled in England, and plaintiff was born in England, and resided there continuously till her father's death. *Held* that, as the father was domiciled in California both at the time of her birth and at the time he performed acts alleged to have resulted in her legitimation, and as California laws authorize the legitimation of bastards by the doing of certain acts, plaintiff was at all times possessed of capacity for legitimation under Civ. Code, § 230. 31 Pac. 915, affirmed.

4. Where plaintiff's putative father, who was never married, on all occasions declared her to be his, acknowledged her paternity, had her christened by his name, and corresponded with her as his daughter, and furnished her a fixed sum yearly, and made a will providing for her, which was subsequently lost or destroyed, his acts constituted a full adoption and legitimation, within Code, § 230. 31 Pac. 915, affirmed.

5. Where a putative father wrote and signed letters, in the presence of a competent witness, to the child, addressing her as "my darling child," and signing himself "From your loving father," and also wrote to her grandfather with reference to having her christened in his name, he acknowledges himself to be her father within Civ. Code, § 1387, providing that every illegitimate child is an heir of any person who, in writing signed in the presence of a competent witness, acknowledges himself to be its father. 31 Pac. 915, affirmed.

6. A contention that the court did not specifically find that at the precise times when the father read and signed the letters acknowledging himself to be plaintiff's father, in the presence of the witness, such witness was "competent," is without merit where the letters were written in witness' presence June 15, 1881, and April 3, 1883, and the court found specifically that on February 25, 1883, witness was a competent witness.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding by Florence Blythe against Ayers and others to establish her right to the estate of Thomas H. Blythe, deceased. From a judgment for plaintiff, and from an order denying a new trial, the Blythe Company appeals. Affirmed.

For prior report, see 31 Pac. 915.

Geo. W. Towle, Jr., D. M. Delmas, Timothy J. Lyons, J. C. Campbell, and S. W. & E. B. Holladay, for appellant. W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, W. W. Foote, and Henry I. Kowalsky, for respondent.

McFARLAND, J. No. 15,411 is an appeal by the Blythe Company, a corporation, from a judgment rendered in favor of the respondent, Florence Blythe; and No. 15,528 is an appeal from an order denying a motion for a new trial in the same case. Both appeals are here considered and determined. A number of other appeals, taken by various other defendants, were argued and submitted at the time of the argument and submission of said appeals, Nos. 15,411 and 15,528; and said other appeals will follow, and be determined by the conclusions arrived at in this present opinion.

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[1] Affirmed on rehearing. See 36 Pac. 844.

The proceeding upon which these appeals arose was instituted and prosecuted to judgment by the respondent, Florence Blythe, under the provisions of section 1664 of the Code of Civil Procedure, to establish her right to the estate of Thomas H. Blythe, deceased. Nearly 200 defendants appeared claiming to be collateral kin of the said decedent, Thomas H. Blythe, and, as said kin, entitled to his estate. They were mostly associated in certain groups, as the "Williams" claimants, the "Jones" claimants, the "London Savage" claimants, the "Gipsy" claimants, etc. Their claims to heirship were mostly inconsistent with and hostile to each other; each group contending that the deceased, Thomas H. Blythe, was descended from parents different from those alleged by either of the other groups. The court found that the respondent, Florence Blythe, was the daughter and heir of the deceased. It also found that the Williams claimants were related to the deceased as alleged in their answer, and "that none of the defendants herein, other than those named and enumerated in finding number 18, was, nor is any of them, in anywise related to, or in any manner akin to, said Thomas H. Blythe, deceased." The Williams claimants appealed from the judgment, and brought up the evidence in a bill of exceptions; and their appeal has been heretofore disposed of by this court. See Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915. The opinions there delivered make an extended statement of the case here unnecessary.

We do not deem it necessary to pass upon the contention of respondent that appellant's notice of appeal should have been served on all the parties to the proceeding. Neither is it necessary to pass upon the contention that, as appellant was allowed to appear in the Williams appeal, and did file an argument therein, it is bound by the decision on that appeal.

But, on these present appeals, respondent contends that the appellant, the Blythe Company, who was substituted for the Jones claimants, is not a "party aggrieved," and therefore has no standing as an appellant, because it did not except to, and does not attack, the said findings 18 and 20; and that the fact being established and unassailed that none of the defendants except the Williams claimants are "in any wise related to, or in any manner akin to, said Thomas H. Blythe, deceased," the appellant is in no position to inquire about any errors which the trial court may have committed in arriving at the conclusion that respondent is the rightful heir, and entitled to the estate. Appellant's predecessors based their right to contest for the estate upon their certain alleged kinship to the deceased; but, when it appears by an unchallenged finding that there is no such kinship, what, asks the respondent, does it matter to appellant where the estate goes, and how can it be prejudiced or aggrieved by any ruling made by the court in favor of another claimant? We confess that we can see no successful answer to this contention. Section 1664 was clearly intended to provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily and finally determined in one proceeding. In re Burton, 93 Cal. 461, 29 Pac. 36. The first step in the proceeding is taken by a claimant filing a petition (not a complaint), "praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made." Thereupon the court is to make an order that notice be served on all persons "interested in said estate" to appear on a day named, in which notice shall be set forth, among other things, "the names of all who may have appeared claiming any interest in said estate in the course of the administration of the same up to the time of the making of said order, and such other persons as the court may direct; * * * and requiring all persons named, or not named, having or claiming any interest in the estate of said decedent, * * * to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership or interest in said estate to said court;" and, upon proof of service of the notice, "the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property." All persons desiring to appear shall, within the time limited, "file their written appearance;" and, after the expiration of the time, the court shall enter an order adjudging the default of all persons not appearing. Within 20 days thereafter, "any of such persons so appearing" may file his complaint, "setting forth the facts constituting his claim of heirship, ownership or interest in said estate with such reasonable particularity as the court may require;" and it must be served on the other parties appearing. "The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing the complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings; and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership or interest in said estate with such particularity as the court may require, and serve a copy thereof on the plaintiff." It is further provided, in terms, that "the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant therein or thereto, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased." It is further provided that questions which have not been determined under the provisions of said section 1664 may be raised on final distribution; "but where such questions shall have been litigated under the provisions of this section, the determination thereof as herein provided shall be conclusive in the distribution of said estate." It will be observed that while, of the "parties appearing," the one who chooses to proceed first and file a complaint is, for convenience, to "be treated" as plaintiff, and the others as defendants, the provision as to what the pleading of each party—whether plaintiff or a defendant—is to contain is exactly the same. The plaintiff is to file a complaint "setting forth the facts constituting his claim of heirship, ownership or interest in said estate with such reasonable particularity as the court may require." And the defendants "shall set forth in their respective answers the facts constituting their claim of heirship, ownership or interest in said estate with such particularity as the court may require." It is clear, therefore, that the alleged right of each party, whether nominally a plaintiff or defendant, is as much before the court for final adjudication as is the alleged right of either of the other parties; and it is the plain duty of the court to determine the alleged claim of each party to the proceeding. No party has a standing in the trial court unless he has averred "his claim of heirship," etc., and has set forth the facts constituting such claim; and he would not be there heard to contest the right of another claimant, if he did not set up any right in himself. But the appellant occupies the same position in this court that it would have occupied in the court below if it had there undertaken to contest the right of respondent, or of any other claimant, without averring any right in itself. The predecessors of appellant acquired a status in the court below by averring a claim to the estate founded upon a certain alleged kinship to the deceased; but the court having found that there was no such kinship, and that finding not being controverted, the appellant has no status here. Having no "claim of heirship, ownership or interest in the said estate," the appellant is not a "party aggrieved" within the meaning of sections 657 and 938 of the Code of Civil Procedure, and is not prejudiced by any ruling or judgment made or rendered touching the rights of respondent or of any other claimant.

The foregoing views are determinative of these two appeals against the appellant; but, as it is claimed in one or two of the other appeals which are to be determined by this opinion that sufficient exceptions were there taken to said findings 18 and 20, we will notice some of the other points argued by counsel for the various appellants. Very powerful arguments are made to the point that the evidence is insufficient to warrant the finding that respondent is the child of the decedent. These arguments were, no doubt, presented in all their force by the very able counsel to the learned judge of the trial court. The question here now is not whether the judge of that court weighed the evidence with absolute accuracy, and arrived at the only conclusion justly possible, —the same conclusion to which any other judge or jury would have been forced to come. The question is, was there such a manifest conflict of material evidence on the point as threw the determination of the fact, under the established rule, entirely within the province of the trial judge? It is needless to cite here the numerous decisions of this court to the point that we cannot disturb a finding of fact by a jury or trial judge which is the result of the consideration of evidence that is really and materially conflicting. Of course, we have in a few instances set aside a finding when, in our judgment, the apparent conflict of evidence was not substantial; but in Field v. Shorb, 99 Cal. 666, 34 Pac. 504, where we went as far in that direction as, perhaps, in any other case, we said that a finding should not be disturbed, whatever we might think of the preponderance of the evidence, "where there is presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of an unsound judgment." The point now under discussion comes within that rule. It cannot be fairly said that there was no substantial evidence upon which to rest the conclusion of the court below. We do not propose here to notice the evidence in detail. It is sufficient for the purpose in view to say that the mother of respondent testified positively that respondent is the child of the decedent, and testified to facts which, if true, show that she could not have been mistaken as to such paternity; and that the decedent, who had several months' opportunity to observe her surroundings and conduct after his first sexual relations with her, was satisfied that respondent was his child. Counsel for appellant marshal a mass of circumstances from which they argue, no doubt with a great deal of force, the improbability of the story of respondent's mother; but, after all, the argument is merely the array of improbabilities, not conclusive, against the direct statements of a living witness, who could not be mistaken as to the main facts to which she testified. Whether or not, under the circumstances, her statements should be believed, was just such a question as the law leaves with the trial judge. With him was the power, and upon him rests the responsibility. The foregoing views also apply to the contention that there is not sufficient evidence that certain letters of the decedent were written and signed in the presence of the witness W. H. H. Hart. Hart testified to the fact; and it would be going beyond all precedent for us to hold here that he should not have been believed by the trial judge. It is to be observed, also, that the motions for new trials now pending here on appeal were denied in the lower court long after the decision of this court in Blythe v. Ayres had been rendered, which placed respondent's right upon section 1387, and was dependent, of course, upon the finding of the lower court on that point, based on the testimony of said Hart.

With respect to the two main propositions of law in the case, to wit, (1) was respondent adopted by the decedent under section 230 of the Civil Code? and (2) did decedent constitute her his heir under section 1387 of said Code? we do not desire to add anything to what was said in the opinions delivered in Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915. Those questions were as elaborately argued in that case as in the present appeals, and were there most carefully considered by the court. Nothing has occurred since to shake our confidence in the correctness of the decision in that case.

We need not consider the elaborate arguments of counsel to the point that the complaint does not state facts sufficient to show an adoption of respondent under section 230. As to that question the justices of the court were divided in opinion at the time of the decision of Blythe v. Ayres, and there is still a division of opinion upon that subject. Indeed, it is doubtful whether, under the peculiar language of section 1664, strict rules of pleading apply to the proceeding instituted by that section. But all the justices qualified to act in the case agree, as all the justices acting in Blythe v. Ayres then agreed, that respondent is the heir of the decedent under section 1387.

The only new point made as to respondent's heirship, under section 1387, is that the court did not specifically find that at the precise times when the decedent read and signed the letters acknowledging himself to be the father of respondent, in the presence of W. H. H. Hart, the said Hart was a "competent witness." The letters were written in Hart's presence on June 15, 1881, October 21, 1881, May 16, 1882, and April 3, 1883; and the court did find, specifically, that intermediate those times, viz. on February 25, 1883, said Hart was a competent witness. The said W. H. H. Hart is mentioned a great many times in the record. He was a witness in the case, and an attorney of record. In each of the findings about the writing of the letters in his presence the court finds that "said W. H. H. Hart * * * was not by said Blythe called upon to witness the writing of the same, and said Hart did not attest the same as a subscribing witness thereto;" but there is no intimation that he was not a competent witness. It is hardly possible to imagine a court gravely making such a finding, if Hart had not been considered a sane human being, over 10 years of age. If we were to order any further finding on the subject, it is evident that the finding would have to be the same as the one relating to the date of February 25, 1883, in favor of his competency. Indeed, we see no substantial merit in the point.

There is also submitted, with the others, an appeal of Alice Edith from the judgment, but that appeal presents no new points. There was also a brief filed by leave of court, on behalf of the state, claiming an escheat of the Blythe estate. But if the state could be heard at all on this appeal, to which it is not a party, its contention is covered by the foregoing views. There are no other points presented in the briefs and arguments which call for special attention.

In the appeal No. 15,411 the judgment is affirmed, and in the appeal No. 15,528 the order denying a motion for a new trial is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.; FITZGERALD, J.; DE HAVEN, J.

(102 Cal. 199)

ESHELMAN v. HENRIETTA VINEYARD CO. et al. (No. 3,180.) SAME v. MALTER et al. (No. 3,593.) HENRIETTA VINEYARD CO. et al. v. ESHELMAN et al. (No. 3,653.)

(No. 18,200.)

(Supreme Court of California. March 30, 1894.)

SPECIFIC PERFORMANCE—UNRECORDED DEED—DELIVERY.

1. Where a contract of sale of land was taken to two persons, but the deed ran to one only, who, for the purposes of a manufacturing company controlled by him, and operating in connection with the land, conveyed to the company, and took back a deed to himself and the other owner, which was not recorded, a purchaser from such other can enforce specific performance and partition against the company and its controlling member.

2. Delivery of a deed to one of two joint purchasers is a delivery to both.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Suit by M. D. Eshelman against the Henrietta Vineyard Company and G. H. Malter for specific performance; consolidated with a suit between the same parties for partition, and a suit by the company and Malter against I. S. and M. D. Eshelman for ejectment. Judgment for the Eshelmans. The company and Malter appeal in each case. Affirmed.

Edward Lynch, for appellants. Tupper & Tupper, for respondents.

PATERSON, J. The appeals in these three cases all rest upon the same statement of facts. Action 3,180 is for the specific performance of a contract to sell certain lands. No. 3,593 is for the partition of 14.46 acres of land, which embraces the 8.06 acres for which specific performance is sought. No. 3,653 is an action brought by the corporation and Malter to eject the plaintiff in the first action from the possession of the same 14.46 acres of land. In Eshelman v. Vineyard Co. (No. 18,018, this day filed) 36 Pac. 775, M. D. Eshelman appealed from that portion of the judgment entered in the court below denying her prayer for specific performance. In No. 3,180 the defendants on this appeal attack a part of the same decree on the ground that there is no evidence to show that the respondent became the owner of an undivided one-half interest in the land, as found by the court below. In addition to the facts stated in Eshelman v. Vineyard Co. (No. 18,018), the court below found the following: The board of directors of the vineyard company consisted of five persons, of whom Malter was one. The latter was president of the corporation, and owner of all the capital stock except a small amount, which he furnished to four other persons to enable them to qualify and act as directors. These persons were controlled in their action entirely by the wishes of Malter. By direction of Malter the corporation sold and conveyed the 14.46 acres of land described in the complaint to Malter and Rogers, the deed being executed to them on or about January 21, 1886. The deed was thereafter kept by Malter among his private effects, and was never recorded. Rogers conveyed to the plaintiff on April 1, 1891. As conclusions of law, the court found that the plaintiff was not entitled to judgment for specific performance, because estopped by the acceptance of the deed from said corporation of January 21, 1886, but that she became, by the transfer to her of Rogers' title, a tenant in common with defendant Malter in said 14.46 acres of land, and the owner of an undivided interest therein. The court also found that the vineyard company had no title or interest in said tract of land, but that the defendants should be compelled to perfect title in plaintiff to said undivided half interest, and that said corporation and Malter should be required to execute proper instruments necessary to show of record that the title transferred by the corporation to Malter and Rogers had been, as to said Rogers' interest, vested in the plaintiff.

It is contended by the appellants that the evidence is insufficient to support the findings of fact and the conclusions of law as to the title and interest of E. B. Rogers in the winery tract, regardless of the question whether that tract is composed of 14.46 acres, as described in the deed, or of 7.04 acres, as contended for by respondent; but we have carefully examined the evidence, and think there is sufficient to sustain the decision. It tended to show that Malter and Rogers were joint owners, and that the vineyard company was used as a means to the more successful operation of the winery plant. Malter was the owner of practically all the stock of the corporation, and its officers were, in fact, simply his agents. He put the legal title of the property in the name of the corporation as a matter of convenience. The contract of purchase from Chapman in 1881 was in the name of both Malter and Rogers, but the deed was taken in the name of Malter alone. The latter claimed that Rogers was to pay for his interest out of the profits of the firm, but that he never did so, having greatly overdrawn his account; but it was for the court to say, on all the circumstances, whether this was so. There is evidence of acts and declarations by Malter showing that Rogers and himself were joint owners. It is unnecessary for us to recount them here. Some of them are specified in respondents' brief, and, in view of the circumstances showing the real relation of the parties to the corporation, we think that the evidence was admissible.

Being joint owners, the delivery of the deed to Malter was a delivery to both.

Upon the evidence, findings, and stipulations of counsel, we think the judgments in all the cases should be affirmed, and it is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

(102 Cal. 283)

SAWYER v. COLGAN, Controller. (No. 18,068.)[1]

(Supreme Court of California. April 25, 1894.)

STATE BONDS—APPROVAL OF STATE EXAMINERS—LIMITATIONS—INTEREST.

1. State bonds and coupons issued under a statute directing their payment, and providing a fund for that purpose, need not be presented to the state board of examiners for approval, as they are not claims within the meaning of Pol. Code, § 672, prohibiting the controller from drawing warrants for claims until approved by such board.

2. Under St. 1852, p. 59, authorizing an issue of bonds to pay expenses of expeditions against the Indians, bonds and coupons were issued, payable at the office of the state treasurer in 10 years, "provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States." Congress did appropriate money to pay these bonds, but provided for payment at the national treasury, and imposed certain reasonable conditions, to prevent imposition and fraud. *Held*, that the liability of the state of California was contingent upon the failure of congress to provide for the payment of such bonds, and, congress having provided for their payment, the state never became liable thereon.

3. Under Act Feb. 15, 1851, §§ 1, 7, authorizing a loan to pay expense of Indian wars, and providing that any money in the treasury not otherwise appropriated is set apart for the payment of such bonds and coupons, bonds were issued maturing in 10 years. From their maturity until 1889 there was never any money in the treasury which had not been appropriated for some specific purpose prior to its receipt by the treasurer. *Held*, that as the bonds were payable out of a particular fund, which was not provided until 1889, the statute did not commence to run against such bonds and coupons until that time. De Haven and Harrison, JJ., dissenting.

4. Civ. Code, § 1917, providing that debts shall bear interest, does not apply to indebtedness of the state, and the state is not liable to pay interest on its debts, unless it has contracted to do so.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Application by Sawyer for a writ of mandate commanding Colgan, as controller of the state, to issue a warrant upon the treasury for the payment of a certain bond and coupons. From a judgment denying the writ, plaintiff appeals. Reversed.

W. C. Belcher and Geo. E. Bates, for appellant. Wm. H. H. Hart, Atty. Gen., and Barham & Bolton, for respondent.

PATERSON, J. The appellant applied to the court below for a writ of mandate, commanding the respondent, as controller of the state, to issue a warrant upon the state treasury for the amount claimed to be due on a certain bond and on certain coupons. Judgment was entered denying the prayer of the petitioner, and from that judgment he has appealed to this court.

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[1] For memorandum amending opinion, see 36 Pac. 834.

The bond mentioned was issued July 15, 1854, under an act approved May 3, 1852 (St. 1852, p. 59), authorizing the state treasurer to issue bonds to an amount not exceeding $600,000, for the payment of the expenses of certain expeditions against the Indians. Bonds to the full amount authorized by the act were issued, and made payable May 2, 1862, with annual interest coupons attached. It was stipulated in the bonds that they should be payable at the office of the state treasurer, "provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States, with interest at the rate of seven per cent. per annum, payable at the state treasurer's office on the surrender of the annexed coupons on the 1st day of January, A. D. 1853, and annually thereafter." Some of the coupons presented were attached to this bond; others were detached from other bonds issued under the same act, and the remainder were detached from bonds issued under the act of February 15, 1851, hereinafter referred to. It is claimed by the respondent that the bonds and coupons are not audited claims, and that the controller, by the provisions of section 672, Pol. Code, is prohibited from drawing his warrant for such claim until it has been approved by the state board of examiners; but, after careful consideration of all the provisions of the Code, and the decisions bearing upon the subject, we are satisfied that the point is not well taken. Meyer v. Porter, 65 Cal. 67, 2 Pac. 884; Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646. Section 1 of the act of 1852 (St. 1852, p. 59) reads as follows: "Section 1. A sum not exceeding six hundred thousand dollars is hereby appropriated and set apart as an additional war fund, payable in ten years out of any money which may be appropriated by congress to defray the expenses incurred by the state of California, and interest thereon at the rate of seven per cent. per annum, in the suppression of Indian hostilities, or out of the proceeds of the sale of any public lands which may be donated or set aside by congress for that purpose; and should no such appropriation or donation be made, or if an amount sufficient should not be appropriated or donated within the said ten years, then the bonds authorized to be issued by this act shall be good and valid claims against the state, and shall be paid out of any moneys in the treasury not otherwise appropriated to pay the expenses of the expeditions mentioned in this act." We think it clear that the liability of the state upon the bonds thus provided for was conditional; they were conditioned upon the failure of congress to make an appropriation to pay them. Upon the failure of congress to do so, and not before, were they to become good and valid claims against the state. They were to be paid within 10 years; and, if congress within that time made no appropriation to pay them, they were to be paid out of money in the state treasury not otherwise appropriated. Congress did make an appropriation to pay these bonds. Section 9 of the act of congress of August 5, 1854, provided as follows: "Section 9. And it is further enacted that the secretary of war be and he is hereby authorized and directed to examine into and ascertain the amount of expenses incurred and now actually paid by the state of California in the suppression of Indian hostilities within the said state prior to the first day of January, A. D. 1854, and that the amount of such expenses when so ascertained be paid into the treasury of said state; provided, that the sum so paid shall not exceed in amount the sum of $924,259.65; which amount is hereby appropriated out of any money in the treasury not otherwise appropriated." But it is said that subsequent acts of congress imposed conditions which were not in any way binding on the bondholders, and that in any event the condition was not complied with until the funds provided by the act of congress were paid into the state treasury.

Neither of these contentions we think is sound. Section 8 of the act of congress passed August 18, 1856, provides: "That the secretary of war is hereby authorized and directed to pay to the holders of war bonds of the state of California the amount of money appropriated by act of congress, approved May (August), 1854, in payment of expenses incurred and now actually paid by said state of California for the suppression of Indian hostilities within the said state prior to the first day of January, A. D. 1854, under the following restrictions and regulations: Before any bonds shall be redeemed by the secretary of war they shall be presented to the board of commissioners, appointed by the legislature of said state by an act approved April 19, 1856, and the amount due and payable on each bond will be endorsed thereon by said commissioners. Upon presentation to the secretary of war of any bond or bonds thus indorsed, it shall be his duty to draw his warrant in favor of the holder or holders thereof for the amount certified to be due upon the same by said commissioners, upon the secretary of the treasury, who is hereby directed to pay the same; provided, that said amounts in the aggregate shall not exceed the amount of money appropriated by the act of congress approved August 5, 1854. Said bonds, after redemption, and after taking off the coupons that remain unpaid, shall be delivered to the secretary of war to be canceled." The conditions therein provided were not unreasonable, but were merely such precautionary measures against imposition and fraud as congress had a right to take. The act of May 3, 1852, contemplated action on the part of congress, and the bondholders must have known when they accepted the bond that, if congress made an appropriation to pay it, some safeguard would be provided to prevent fraud and imposition. Furthermore, by an act passed June 23, 1860 (12 St. p. 104, § 4), congress provided as follows: "That the secretary of war be and he is hereby authorized to pay out of the unexpended balance of appropriation for the war debt of the state of California, made by the last section of the act approved August 5, 1854, entitled 'An act making appropriation for the support of the army for the year ending the 30th of June, 1855,' any outstanding and unpaid bonds, and coupons issued by said state for said war debt prior to the passage of said act, but bearing date subsequent to the 1st day of January, 1854; provided, that no payment shall be made beyond the unexpended balance of said appropriation now remaining in the treasury." This act was passed about two years prior to the maturity of the bond in suit. There is no additional condition imposed therein, and we are unable to see why the amount of petitioner's bond and coupons could not have been collected out of this unexpended balance. It is not sufficient answer to say that this balance was insufficient to pay all the outstanding bonds and coupons; it is enough to know that petitioner's bonds and coupons would have been paid if they had been presented at the proper time. Prior to the passage of this last act referred to there had been presented, and paid by the United States, bonds and coupons amounting to the sum of $914,071.02. Again, on July 25, 1868, congress passed an act (15 St. p. 175) "To reappropriate an unexpended balance of an appropriation made by an act approved August 5, 1854, to refund to the state of California expenses incurred in suppressing Indian hostilities, said balance having lapsed and been covered into the treasury on the 30th day of June, 1863, $10,183.63; provided, that nothing shall be paid except subject to existing provisions of law, and upon the finding and certificate of the third auditor that the same is actually due." From June 23, 1860, therefore, down to the time the unexpended balance lapsed into the treasury, this amount, $10,183.63, was in the treasury, and applicable to the payment of bond 420 and the coupons mentioned in section 4 of the act. Eight years later that amount was reappropriated. See, also, 21 St. p. 510. Bond No. 420 was dated July 15, 1854. The coupons taken from said bond and others issued under the act of May 3, 1852, were all for interest, which became due at least a year subsequent to January 1, 1854. If any of these obligations were not paid by reason of erroneous rulings on the part of the officers of the departments, it is sufficient to say that the result is not due to any fault of the state or its officers. The latter have a right to rely upon the acts of congress. The condition upon which the state was to be liable has not arisen. The act of 1852 did not stipulate that the bonds would be paid by the state, if the money appropriated by congress was not paid into the state treasury. The construction contended for is too strict. The act appropriates such moneys as congress may appropriate to defray the expenses incurred, without stating the manner of appropriation which might be adopted by congress. The state acquiesced in the action of congress, and recognized the propriety of the method chosen for the payment of the claims by appointing commissioners to represent the state and exhibit the vouchers required. It cannot be claimed in reason that congress, with the duty resting upon it to pay the expenses, had not the right to scrutinize the claim and to take reasonable precautions against the fraudulent demands. The bond on its face provides for payment by the state, "provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States." It was understood that congress might pay the money over to the state, and in that event the bonds would be payable at the office of the state treasurer, but it was not unreasonable to suppose, and such was anticipated, doubtless, that the demands should be made payable by congress at the national treasury. It was the duty of the general government under the constitution to defend the states from invasion or insurrection, and when the state of California found it necessary to raise funds in order to defend itself, the general government became in duty bound to reimburse the state for the cost of such defense. The state, however, recognized its obligation to pay those who had enlisted in its defense, if the general government failed to discharge its obligation to the state. Therefore, it was provided that, if congress did not within 10 years make provision for the payment of the bonds, the state would pay them. Our conclusion is that the state of California never became liable to pay bond 420 or its coupons, or any of the coupons of bonds issued under the act of 1852.

The question as to the liability of the state upon the coupons of bonds issued under the act of 1851 is not so clear. Sections 1 and 7 of that act read as follows: "Section 1. By virtue of the power given to the legislature by the constitution of this state—article VIII.; 'in case of war to repel invasion or suppress insurrection'—a loan not exceeding five hundred thousand dollars is hereby authorized to be negotiated upon the faith and credit of the state, payable in ten years, and at any period after five years, at the pleasure of the state; said loan to pay a rate of interest not exceeding twelve per cent. per annum, payable annually or semiannually, at such place as the contracting parties may agree; provided, however, that the interest of the first year may be paid in advance out of the loan thus made." "Sec. 7. Any claim which this state has now, or may hereafter have, upon the general government for moneys expended out of this loan, for the purposes aforesaid, shall be and the same is hereby set apart and pledged for the payment of the principal and interest accruing upon said bonds, together with all other moneys in the treasury not otherwise appropriated, or so much thereof as may be necessary." Respondent claims that, if the act provided for an appropriation to pay the bonds and coupons therein referred to, which is denied, then, it having been shown that there has been at all times since the maturity of the coupons in suit in the general fund sufficient money with which to pay these coupons, the action is barred by the statute of limitations. But the court found that "from 1862 to 1889, both inclusive, there was not in any year any surplus in the general fund in the state treasury, in excess of appropriations for current expenses, and special appropriations for particular purposes for that year," and we know from the public records that in every year, except 1889, since the obligations in suit matured, there has been levied upon the property of the state an amount equal to, and specifically appropriated by the legislature for, the expenses of the state during the fiscal year for which the tax was levied. There has never been, prior to the year 1890, any money in the state treasury which had not been appropriated by the legislature to some specific purpose for the support of the state government prior to the time of its receipt by the state treasurer. The findings show that in 1890, for the first time, a surplus of about $500,000 was received into the state treasury. Prior to that time the petitioner never could have maintained a mandate for the payment of his coupons, and, this being so, of course the statute of limitations is no bar to the proceeding. The words of the act, "not otherwise appropriated," cannot be taken to mean "not heretofore otherwise appropriated." The bonds were not to mature until the expiration of 10 years, or at the option of the state after 5 years. It was intended that the obligations provided for by the act should be payable out of any money which should at their maturity or thereafter be found in the state treasury, and which at the time it reached the treasury had not been appropriated to some other purpose. Humbert v. Dunn, 84 Cal. 57, 24 Pac. 211. Sufficient funds must be reserved to defray the expenses of the government,—the ordinary expenses of the legislative, executive, and judicial departments of the state. Respondent claims that interest is one of the expenses of the state as much as salaries of the judges, the governor, and other state officers, and cites in support of the proposition In re Appropriation by General Assembly, 13 Colo. 316, 22 Pac. 464; but the constitution of that state, in providing for the necessary appropriations to defray the expenses of the executive, legislative, and judicial departments of the state government for each fiscal year, expressly includes "interest on any valid public debt," and the case cited is authority in support of the proposition that the appropriations to defray the expenses of the government for a particular fiscal year are entitled to preference over any other appropriations from the general public revenue of the state, without reference to the dates of their passage. It is a general rule that when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued. 1 Wood, Lim. (2d Ed.) p. 363; County of Lincoln v. Luning, 133 U. S. 529, 10 Sup. Ct. 363; Underhill v. Trustees, 17 Cal. 172; Freehill v. Chamberlain, supra. No provision was made by the state for the payment of these bonds until the year 1889, and we are of the opinion, therefore, that the statute did not begin to run against the bonds or coupons until that time. If the petitioner had presented his coupons for payment prior to that time, his demand would have been refused on the ground that there were no funds. He could not sue the state, because there never was any act authorizing him to sue. "His remedy—if remedy it may be called—still lay in the voluntary exercise of the taxing power of the state. In other words, the state, by reason of her sovereignty, still held control of the question of payment as to all its incidents of time, mode, and measure." Sharp v. Contra Costa Co., 34 Cal. 284; Rose v. Estudillo, 39 Cal. 275; People v. Miles, 56 Cal. 401.

It is contended by the appellant that his bonds and coupons bear interest from the time of their maturity until payment; but section 1917 of the Civil Code, cited, does not apply to an indebtedness of the state, and the state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers. U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920; Carr v. State, 127 Ind. 204, 26 N. E. 778. In mandamus the controller can be required to draw his warrant only for what is expressly authorized by the statute. Auditorial Board v. Arles, 15 Tex. 72; Davis v. Porter, 66 Cal. 658, 13 Pac. 874, Davis v. Yuba Co., 75 Cal. 452, 13 Pac. 874, and 17 Pac. 533, was an action brought to recover the sum of $5,600 and interest; it was not a case of mandate. The appropriation made by the act of 1851 was not repealed by the act of 1852, as claimed by respondent. The latter act expressly provides that "the repeal in no wise affects the war loan bonds already issued under the provisions of the act so repealed." In view of what has been said, it is unnecessary to consider the contention of the respondent that the act of 1852 is unconstitutional because it created a debt or liability against the state exceeding the limit provided for in article 8, Const. 1849, and it is not claimed that the act of 1851 is unconstitutional on that or any other ground.

We think that petitioner is entitled to a warrant for payment of the coupons issued under the act of 1851, but is not entitled to a warrant for the payment of bond No. 420, or any of the coupons issued under the act of 1852. The judgment is reversed, with directions to the court below to issue a peremptory writ of mandate to respondent, commanding him to draw his warrant upon the state treasurer, payable out of the general fund, in favor of petitioner, for the sum of $1,800, and to further adjudge that petitioner herein recover from the defendant the costs of this proceeding.

We concur: McFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.

DE HAVEN and HARRISON, JJ. We dissent from the judgment because, in our opinion, the only appropriation made by the act of February 15, 1851, for the payment of the bonds issued thereunder was such money not otherwise appropriated as might be in the state treasury at the date of the maturity of such bonds. Upon all the other points which it discusses we fully concur in the foregoing opinion of Mr. Justice PATERSON.

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4 Cal. Unrep. 619

BLANCHARD v. PACIFIC ROLLING-MILL CO. (No. 15,430.)

(Supreme Court of California. April 24, 1894.)

Goods Sold to Arrive by Ship — Delivery at Purchaser's Wharf — Delay — Liability for Expenses.

Where plaintiff sold to defendant iron, to arrive by a certain ship, then on her way,—the iron to be delivered at defendant's wharf, and received by him, as discharged,—defendant is liable to plaintiff for the necessary charges paid by him for the use of the ship and wharfage while awaiting, after arrival, opportunity to discharge, defendant's wharf being occupied by other vessels.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. O. Blanchard against the Pacific Rolling-Mill Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. Page & Eells, for respondent.

GAROUTTE, J. Macondray & Co. sold to defendant, Pacific Rolling-Mill Company, 500 tons of scrap iron, to arrive by ship Titan, then on her way to San Francisco from Hong Kong, said iron to be delivered to defendant at defendant's wharf, and received by purchaser from the ship's side when discharged. The ship arrived in due course, and defendant was notified that the iron was on board, ready to be discharged, but, owing to the fact that defendant's wharf was occupied by other vessels, Macondray & Co. were unable to deliver the iron for several days after its arrival, and after the ship was ready to discharge it. Owing to this delay, Macondray & Co. were compelled to pay the owners of the ship for the use thereof while said iron remained in the hold awaiting discharge and delivery, and also were compelled to pay an additional amount for wharfage, the entire sum being $724.70. The plaintiff, as assignee of Macondray & Co., sued the defendant and appellant for the amount of money so expended. This amount so paid to the master of the ship was found by the court to be a reasonable charge for such use. The foregoing facts are all substantially found by the court, and we think the evidence is entirely sufficient to sustain the findings as to such matters. The case of Dibble v. Corbett, 5 Bosw. 202, seems to be directly in point as to all the questions here involved. In that case the following instruction of the court was upheld: "The rule of damages in this case does not depend upon the charter party of the schooner, but the plaintiff's right to have simply the necessary expenses of taking care of the property, and keeping it, during the period of unreasonable delay, and nothing more can be recovered." And again: "It does not excuse the defendants for delay in receiving the goods that their vessel was not in readiness to receive them. If the defendants designated the Valleyfield as the ship to receive the goods, and that vessel was not ready, it was their duty to find another, or receive the goods at some other place." See, also, Story, Sales, §§ 394, 404. If Macondray & Co. were liable to the owners of the vessel for the use of the hold for storage purposes, then this defendant is liable to Macondray & Co. to the same extent, for such would be the amount of damage actually suffered by them. The evidence discloses that the charge made by the owner of the ship was a customary charge, and also a reasonable charge, under the circumstances of the case; and, as we have seen, the court finds the charge to be a reasonable one. We think the liability of Macondray & Co. to the master of the ship necessarily follows from these facts, and, such liability existing, the liability of the defendant to Macondray Co. follows, as a matter of course. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

102 Cal. 234

PERINE v. ERZGRABER. (No. 15,344.)

(Supreme Court of California. April 19, 1894.)

SUBJECT OF ACT—STREET IMPROVEMENTS—ASSESSMENTS.

1. St. 1889, p. 157, providing for levying and collecting assessments for work upon streets, and, by section 8, that the warrant, assessment, certificate, diagram, and affidavit of demand and nonpayment shall be held prima facie evidence of the regularity of the assessment, embraces but one subject, within Const. art. 4, § 24.

2. The notice of a resolution for street improvements required by St. 1889, p. 157, § 2, "stating that the resolution was passed, and describing briefly the improvements proposed," is sufficient if it states work to be done on curbs and sidewalks, although the resolution, in addition to the work described, stated that a portion of the roadway would be paved.

3. An assessment for street improvements under St. 1889, p. 157, can be made only on the lots on which the work abuts.

4. In an action to recover an assessment for street improvements under St. 1889, p. 157, which, by section 8, makes the warrant, assessment, certificate, and diagram, with affidavit of demand and nonpayment, prima facie evidence of the regularity of the assessment, plaintiff need not introduce evidence as to each act in the series.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by G. M. Perine against Catherine Erzgraber to recover an assessment for street improvements. From a judgment for plaintiff, and order denying her motion for new trial, defendant appeals. Affirmed.

Horace W. Philbrook, for appellant. J. C. Bates, for respondent.

SEARLS, C. Action to recover a sum of money due upon a street assessment, and to foreclose the lien thereof upon a lot of land in the city and county of San Francisco. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

The proceedings alleged in the complaint were based upon the act of March 18, 1885 (St. 1885, p. 147), as amended by the act of March 14, 1889 (St. 1889, p. 157). At the trial, plaintiff offered in evidence the assessment, diagram, warrant, certificate of the engineer, affidavit of demand and nonpayment, with proof of their filing, recordation, etc. Defendant objected to the introduction of these documents upon various grounds, which may be condensed by saying upon the grounds that no proof had been made of the passage of a resolution of intention by the board of supervisors to order the work to be done, or any resolution ordering the work to be done, or that the board ever acquired jurisdiction to order said alleged work to be done; that the affidavit of demand is inadmissible to prove a demand; that the charges of $33 for engineering and $20 for inspectors' pay are unauthorized, etc. The objections were overruled, the documents admitted in evidence, whereupon plaintiff rested his case. Defendant moved for a nonsuit upon grounds involving substantially the question raised by the objection to the proffered evidence, which motion was denied by the court. These rulings of the court are assigned as error by the defendant.

It is provided by section 8 of the act of March 14, 1889 (St. 1889, p. 168), which amends section 12 of the act of 1885, that in actions to recover assessments in such cases "the said warrant, assessment, certificate and diagram, with the affidavit of demand and non-payment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the proper proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action." The contention of appellant is that this provision of the statute is in violation of the mandate of section 24 of article 4 of the constitution, which is as follows: "Every act shall embrace but one subject, which subject shall be embraced in its title.[1] But if any subject shall be embraced in an act, which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." The precise question raised here was under discussion in the similar case of McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71, recently decided contrary to the contention of appellant. In justice to counsel for appellant in this case it should be said his brief was filed prior to the decision in McDonald v. Conniff, supra, the decision in which is in the face of nearly every point made by him here. The evidence was properly admitted, and, when admitted, was prima facie evidence of all the facts going before and necessary to be proven in the case. It follows that the motion for a nonsuit was properly denied.

The resolution of intention passed by the board of supervisors described the work intended to be ordered as follows: "That granite curbs be laid on Locust avenue, between Larkin and Polk streets, where not already laid; that bituminous rock sidewalks be laid thereon where not already laid, and except where artificial stone sidewalks are now laid; and that the roadway thereof be paved with bituminous rock where not already so paved." The only evidence offered by the defendant to impeach the prima facie case made by plaintiff related to the notice of the resolution of intention which was posted upon the street, and which the evidence showed was in the following words: "Notice of Street Work. Public notice is hereby given that the board of supervisors of the city and county of San Francisco passed, on the 23d day of March, 1891, a resolution of intention, No. 4,894 (third series), providing that granite curbs be laid on Locust avenue, between Larkin and Polk streets, where not already laid; that bituminous rock sidewalks be laid thereon where not already laid, and except where artificial stone sidewalks are now laid; and that the roadway where not already so paved crossing. And all parties interested are referred to said resolution for further particulars. James Gilleran, by E. Owens, Deputy." The only objection urged to the notice as posted is that it does not sufficiently describe the work or improvement proposed. The statute (section 2 of act of 1889) requires the notice to "state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars." It will be observed that the notice as posted contained a complete description of the improvement to be made, except that in describing the work to be done on the roadway the words "be paved with bituminous rock" are omitted after the word "roadway" and before the word "where." The statute does not require an accurate and full description of the work to be contained in the notice. The evident object is an identification of the work, its locality, the fact of the passage of the resolution, and its date, with a reference to the resolution for further particulars. The statute evidently contemplates the existence of particulars in the resolution which are not contained in the notice, otherwise there would be no need of a reference to the resolution to obtain them. In the present instance the notice was precise as to the specific facts required by the statute, accurately described the portion of the street to be improved, and contained such brief description of the work as, with the reference to the resolution, could not fail to inform all parties in interest. This was a substantial compliance with the terms of the statute, and was sufficient. The assessment and diagram show that the work was all done on the north side of and north of the center line of Locust avenue, and in front of the lot of defendant. The contention of appellant that the assessment was void by reason that it was levied upon the lot on one side of the street only is met by the statute and by the decision upholding it in McDonald v. Conniff, supra, and need not be further noticed.

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[1] The title to St. 1889, p. 157, is as follows: "An act to amend sections two, three, four, five, six, seven, eight, nine, twelve, twenty-four, twenty-six, thirty-four and thirty-seven of an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks and for the construction of sewers within municipalities,' approved March 18, 1885, and to add a new section thereto, to be called section twelve and one-half, relating to the payment of work in instalments."

The judgment is supported by the findings. The specifications of the insufficiency of the evidence to support the findings are evidently predicated in the main upon the theory that it devolved upon the plaintiff to prove all the separate steps taken up to and including the assessment. In one sense, this is true; but it is not true in the sense that he must introduce independent evidence as to each act in the series. When he introduced the "warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment," he in fact introduced what the statute has made prima facie evidence of all the necessary acts and of his right to recover in the action. Defendant having failed to successfully impeach this prima facie case, the court was justified in finding the allegations of the complaint to be true. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

102 Cal. 264

WYATT v. STEPHENS. (No. 21,101.)

(Supreme Court of California. April 24, 1894.)

DISBARMENT—APPLICATION—WHEN ENTERTAINED.

A proceeding to disbar, on application of a client, who claims that he engaged the attorney to settle a claim for half the amount collected; that he settled for $500, told his client that he settled for $300, gave him $125, and failed to keep his promise to give him $25 more,—will not be entertained till the truth of the matter has been settled in a criminal prosecution, or an action to recover the money.

Application of James J. Wyatt for disbarment of John J. Stephens. Charge dismissed.

BEATTY, C. J. This is a proceeding for the disbarment of an attorney who is accused by a former client of fraudulently appropriating money collected for the latter. It is alleged, in substance, that Wyatt, having a claim for damages on account of personal injuries against a railway company, entered into an agreement with Stephens (and other attorneys, who are exonerated from all blame in the matter), by which he was empowered to make a settlement of said claim on such terms as he and his associates might consider reasonable, they (the attorneys) to retain as compensation for their services one-half of the amount collected; that, in pursuance of said agreement, Stephens settled the claim for $500, which sum he received from the corporation on the 9th day of February, 1894; that he represented to Wyatt that he had settled for $300, and paid him only $125, promising, but failing, to pay him the balance of $25; that he afterwards paid to his associates $100, retaining for himself $275; that his statements in regard to the settlement were willfully false, and made for the purpose of defrauding, etc.

So far as these allegations tend to show that the accused attorney has been guilty of a criminal offense, the charge here falls within the rule announced in the Case of Tilden, reported in 25 Pac. 687, in which we distinctly announced that we would not investigate such charges until after regular proceedings in the courts having jurisdiction of the offense. The present case presents even stronger objections to the proceedings which we are asked to institute. If the facts alleged are true, the accuser has an undoubted right to recover in a civil action, by the verdict of a jury, the money of which he claims to have been defrauded. But without making any attempt to establish his right, or the guilt of the accused, in the ordinary tribunals, by either criminal or civil process, he asks this court to lay aside the important and pressing business with which every moment of its time is fully occupied, in order to investigate, in the first instance, a charge which may be tried and determined in the courts of the county. We should feel entirely justified in refusing to accede to such a demand, even if the pressure of more imperative engagements did not render it necessary. When an accusation of this kind is preferred, not by a bar association, or any responsible public officer charged with the conservation of the public interest, but merely by a party complaining of a private injury, we must decline to investigate it until such party has shown his good faith by first resorting to regular proceedings in the ordinary tribunals. In the recent Case of Burris, 36 Pac. 101, the charge was not filed here until after investigation in the probate court, and refusal to pay over the money in controversy. In other cases the charge has either been made by a representative and quasi public body, such as the bar association, or the charge has been of the breach of some obligation resting upon attorneys alone, as distinguished from ordinary breaches of duty. It ought, perhaps, to be stated, in view of the publicity given to this charge, that Mr. Stephens has voluntarily appeared without a citation, and requested a speedy investigation of the matter. We cannot, however, consent to depart from the rule above announced, which, as we have said, is necessary to enable us to attend to the business before us. The charge is dismissed.

We concur: PATERSON, J.; HARRISON, J.; DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

102 Cal. 252

CLARK v. SVEA FIRE INS. CO. (No. 15,355.)

(Supreme Court of California. April 24, 1894.)

ACTION ON POLICY — OWNERSHIP OF PROPERTY — SALE IN FRAUD OF CREDITORS — PROPERTY INSURED AS FIXTURES.

1. In an action on a fire policy, assigned to plaintiff with the approval of the company, when the insured property was sold to plaintiff, defendant cannot show that the sale was in fraud of creditors, and therefore no title passed to plaintiff.

2. Where property is insured as fixtures, insurance can be recovered thereon as such, whatever it is as between insured and his landlord.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by William Clark against the Svea Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. C. Van Ness, for appellant. E. P. Cole (E. W. McGraw, of counsel), for respondent.

GAROUTTE, J. This is an action upon a policy of fire insurance, and defendant appeals upon a bill of exceptions from a judgment rendered against it.

1. It is insisted that the court erred in its rulings upon the admission of evidence as to the ownership of the property covered by the policy. The policy was issued to the Brown-Steele Packing Company upon a stock of meats, and also upon the office fixtures and furniture situated in the building used by plaintiff in the conduct of the business of storing meats, etc. Plaintiff's title to the property is derived by a bill of sale from the Brown-Steele Packing Company, and the policy was assigned to plaintiff at the time the bill of sale was made, and such assignment was duly approved by the defendant company. At the trial, defendant offered to show that the property was transferred to plaintiff for the purpose of defrauding the creditors of the Brown-Steele Packing Company, and that, consequently, the bill of sale carried no title. This line of evidence was rejected by the court, and, we think, most properly rejected. The subject-matter covered by the evidence offered was of no concern to the defendant. The creditors of the plaintiff's vendor were the only parties injured by the transfer, and they only could complain. Defendant has cited no case to support his claims in this regard, and we know of none. The law all looks the other way.

2. It is claimed that the court erred in excluding evidence tending to show that certain fixtures were not within the protection of the policy. The burned premises were occupied by the plaintiff as a tenant, and appellant claimed that certain fixtures were so attached to the building as to become an integral part thereof, and hence the property of the landlord. This property was insured by the company as fixtures, and the premiums therefor received by it. Appellant's position in this regard commends itself to the court as one deserving but little consideration. Aside from any question of estoppel, there is nothing in the point. The plaintiff was a tenant of the premises at the date of the fire, and these fixtures were trade fixtures placed in the building by himself. As against all the world, save the landlord, they were without doubt the property of the ten-

ant. If the terms of the policy were not broad enough to cover them, and no claim was made by plaintiff for their loss, the whole matter was immaterial. If they came within the provisions of the policy, and were insured as fixtures, then fixtures they are as far as the present litigation is concerned.

3. The amount of the damage suffered by plaintiff was fairly submitted to the jury under clear and unequivocal instructions of the court, and we are not prepared to say that the verdict is in excess of the damage proved.

There are a few other matters relied upon for a reversal of the cause, but they are of minor importance. We find no substantial merit in the appeal. For the foregoing reasons, it is ordered that the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(102 Cal. xvii)

BLYTHE v. AYRES et al. (Five cases. Nos. 15,433, 15,437, 15,479, 15,532, and 15,611).

(Supreme Court of California. April 24, 1894.)

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Florence Blythe against Abbie Ayres and others. Judgment for plaintiff. Appeals by William and David Savage, by "the London Savages," and by Abbie Ayres and others. Affirmed.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellants. W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, W. W. Foote, and Henry I. Kowalsky, for respondent.

PER CURIAM. Upon the authority of Blythe v. Ayers (Nos. 15,411 and 15,528, this day decided) 36 Pac. 522, the appeals herein from the judgment are affirmed.

(102 Cal. xvii)

BLYTHE v. AYRES et al. (No. 15,534.)

(Supreme Court of California. April 24, 1894.)

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Florence Blythe against Abbie Ayres and others. Judgment for plaintiff. J. W. Pearce appeals. Affirmed.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellant. W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, W. W. Foote, and Henry I. Kowalsky, for respondent.

PER CURIAM. Upon the authority of Blythe v. Ayers (Nos. 15,411 and 15,528, this day decided) 36 Pac. 522, the appeal herein of J. W. Pearce from an order denying motion for new trial is affirmed.

(102 Cal. xvii)

BLYTHE v. AYRES et al. (No. 15,550.)

(Supreme Court of California. April 24, 1894.)

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Florence Blythe against Abbie Ayres and others. Judgment for plaintiff. From the judgment, "the Gipsy Blythes" appeal. Affirmed.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellants. W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, W. W. Foote, and Henry I. Kowalsky, for respondent.

PER CURIAM. Upon the authority of Blythe v. Ayers (Nos. 15,411 and 15,528, this day decided) 36 Pac. 522, the appeal herein of Henry T. Blythe and others, "the Gipsy Blythes," from order denying a new trial is affirmed.

(102 Cal. xvii)

BLYTHE v. AYRES et al. (No. 15,472.)

(Supreme Court of California. April 24, 1894.)

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Florence Blythe against Abbie Ayres and others. Judgment for plaintiff. Henry T. Blythe and others appeal. Affirmed.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellants. W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, W. W. Foote, and Henry I. Kowalsky, for respondent.

PER CURIAM. Upon the authority of Blythe v. Ayers (Nos. 15,411 and 15,528, this day decided) 36 Pac. 522, the appeal herein by Henry T. Blythe and others from the judgment is affirmed.

4 Cal. Unrep. 621

DORMAN v. SOTO. (No. 15,478.)

(Supreme Court of California. April 24, 1894.)

Sale of Personalty—Delivery and Change of Possession.

Where plaintiff's son-in-law gave to her a bill of sale of articles on his ranch, which remained there, and were used by him, there was no delivery and change of possession that would defeat an attachment of the property in an action against the son-in-law, though, with the bill of sale, there was given to plaintiff a deed of an undivided half of the ranch, and, before the attachment, plaintiff visited her son-in-law.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Asenath Dorman against Frank Soto. Judgment for plaintiff. Defendant appeals. Reversed.

R. H. Latimar and C. Y. Brown, for appellant. W. S. Wells and Cary Howard, for respondent.

VANCLIEF, C. This action was brought to recover certain personal property (8 horses and 40 tons of hay), or the value thereof. The defendant appeals from the judgment in favor of plaintiff, and from an order denying his motion for a new trial. The defendant, a constable, justifies the taking and detention of the property by virtue of a writ of attachment issued by a justice of the peace at suit of Williams against Thurber and wife, alleging that the horses and hay were the property of Thurber and wife, and denying that plaintiff was the owner, or entitled to the possession, thereof. Plaintiff claimed title to the property by purchase from Thurber and wife, Thurber being her son-in-law. The purchase was evidenced by a bill of sale executed by the husband alone, as follows: "Know all men by these presents: That for and in consideration of the sum of one dollar ($1) to me in hand paid, and other valuable consideration to me moving, I have this day sold, assigned, set over, transferred, and delivered unto Asenath Dorman (widow), of Alameda county, state of California, the following described personal property, now in Contra Costa county, state of California, on the premises this day conveyed by myself and Ellen D. Thurber (my wife) to said Asenath Dorman, to wit: Eight work horses; all hay on said premises owned or belonging to me. Witness my hand this 20th day of August, 1892. A. S. Thurber. Witness: Cary Howard."

The appellant contends that there never was any delivery of the property described in the bill of sale, and consequently that the transfer was not followed by any actual change of possession, and is therefore void as against Williams, the attachment creditor; and I think this point is well taken. Since it appears that, at the time of execution of the bill of sale, Thurber and wife had the possession and control of the property, were then indebted to Williams, the plaintiff in the attachment suit, and that the attachment proceedings were regular, the burden of proving an immediate delivery, followed by an actual and continued change of possession of the property described in the bill of sale, devolved upon the plaintiff. Yet there is no evidence sufficiently tending to prove a delivery and continued change of possession to raise a substantial conflict with the evidence to the contrary. Indeed, it is neither alleged, nor found as a fact, that there was any delivery or change of possession. But conceding that an allegation and finding that plaintiff was the owner, and entitled to the possession, is sufficient to uphold the judgment, yet such finding is not justified by the bill of sale alone, which was executed in Oakland, Alameda county, while the property described therein was on Thurber's ranch, in Contra Costa county. The plaintiff rested her case on the bill of sale and her own testimony. Her testimony in chief is as follows: "I am the plaintiff in the above-entitled action. This paper (paper shown witness) was delivered to me by A. S. Thurber on the 20th day of August, 1892. It is a bill of sale for property contained in the complaint. I continued to be the owner of this property on the 8th day of September, 1892." Cross-examination: "I live in Oakland, and sometimes in Alameda. I have lived in Oakland for about the last six years continuously. My home has been with my daughter Mrs. Soto, in Oakland; but, since Mrs. Thurber has moved to Alameda, I have visited some at her house. I have lived with my daughter Mrs. Soto in Oakland, and stop sometimes with my daughter Mrs. Thurber, wife of A. S. Thurber. The bill of sale was made and delivered to me on the 20th day of August, 1892, at my daughter's home in Oakland, by A. S. Thurber. The consideration of this bill of sale was twenty dollars in money, and, A. S. Thurber being my son-in-law, I went on his note for five thousand dollars to six thousand dollars; and this transfer was to pay me for the twenty dollars in money which I had already paid him, and which I may be called upon to pay out on any of the notes which I had indorsed for him. The horses and hay were on the ranch known as the 'Treat Ranch,' in Contra Costa county, state of California. At the time the bill of sale was made, I was very intimate with A. S. Thurber, he being my son-in-law. I visited at his home, and I was getting uneasy about his affairs,—whether his fruit crop would be sufficient to pay off his indebtedness and the notes I went security for, so I would be released,—and he was getting uneasy about not being able to pay off his debts, and about being able to release me; and I wanted a bill of sale of his personal property, because I thought I might have to pay these notes I went security for him. This stock was kept on the ranch continuously, and is there yet. I went to the Thurber ranch a few days after the receipt of the bill of sale from Thurber to me, and stayed there until about November 13, 1892, when I left on business. I stayed there until I came down to Martinez to pay my taxes; and the sheriff met me down there, and served a summons on me in the Treat suit. Then I went to Oakland to hunt me a lawyer, to know what to do. Then I caught cold, and was detained in Oakland. I put my son Charles Dunn in charge of the property for me, when I received the bill of sale, and he stayed there all the time. I went to the ranch soon after the bill of sale was made, and stayed there until November. Mr. and Mrs. Thurber remained also until I left, about the 13th day of November, 1892, when they moved to Alameda." The testimony on the part of the defendant showed that Thurber used the property on his ranch after the execution of the sale, continuously, until it was attached, as he had used it before. The plaintiff, in rebuttal, testified: "I sent this paper to my son Charles Dunn about the time I bought the property from Thurber: 'Oakland, Cal., August 20, 1892. Chas. Dunn, Esq., Concord, Cal.—Dear Sir: You are hereby requested and directed to take possession of the land and premises next formerly owned by Alfred S. Thurber and wife, near Concord, with all personal property thereon, owned or claimed by them, or either of them, except wearing apparel and household furniture, and the same to hold, as my agent, and subject only to my orders and control. Yours, truly, Asenath Dorman.'" Charles Dunn, having been called as a witness for defendant, testified: "I lived during the year and fall of 1892 on the Treat ranch. Thurber and wife lived there also. ['Treat Ranch' being the name of the ranch owned by Thurber and wife.] I claimed an undivided one-half of the hay Soto attached, * * * and served notice on Soto, the constable. The other half belonged to Mrs. Thurber, wife of A. S. Thurber. * * * The share of Mrs. Thurber was hauled away in November, 1892." Being called by plaintiff in rebuttal, Charles Dunn testified that his mother's letter to him of August 20, 1892, was given to him by Mr. A. S. Thurber a few days after its date; but he did not testify that he took possession or charge of the property for the plaintiff, or that he did anything directed by that letter, nor is there any evidence that he did. On what ground he claimed one-half of the hay at the time of the levy, does not appear, nor why, if the other half belonged to Mrs. Thurber, as he testified it did, her half was not subject to the attachment. Plaintiff, also, in rebuttal, introduced a deed to her from Thurber and wife for one-half of the Treat ranch, undivided, which appeared to have been recorded August 22, 1892; and it is claimed by appellee that this deed was sufficient evidence of a delivery and continuous possession of the horses and hay described in the bill of sale, as they were on the ranch from the date of the bill of sale until they were attached. But this contention is answered by several cases in this state. Cahoon v. Marshall, 25 Cal. 197; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167. I think the judgment and order should be reversed, and a new trial granted.

We concur: SEARLES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

102 Cal. 308

PEOPLE v. McREYNOLDS et al. (No. 15,400.)

(Supreme Court of California. April 26, 1894.)

BAIL—LIABILITY OF SURETIES.

1. Sureties on a prisoner's bail bond are discharged where, after having delivered him into the custody of the sheriff pursuant to an order of the court under Pen. Code, § 1129, he is released by another order, made without their application or knowledge, and escapes.

2. In such case the sureties need not satisfactorily excuse the prisoner's neglect to appear, as provided by Pen. Code, § 1305, as a condition precedent to their release.

Department 2. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by the people against James McReynolds and others. From a judgment for plaintiff, defendants appeal. Reversed.

D. R. Gale and Rutledge & Pressley, for appellants. Emmet Seawell and J. R. Leppo, for the People.

McFARLAND, J. Defendants were sureties on a bail bond conditioned for the appearance, etc., of one R. Lee McReynolds, who had been committed by a magistrate upon a charge of grand larceny. An information was thereafter duly filed in the superior court, charging said R. Lee with said crime. He appeared in said court on September 7, 1891, and was arraigned, and pleaded not guilty; and the cause came on regularly for trial on November 10, 1891, at 10 o'clock a. m., at which time the said R. Lee was present in court with his counsel. Thereupon, on motion of the district attorney, the court duly made an order that said R. Lee "be, and he is hereby, committed to the custody of the sheriff of Sonoma county, Cal., pending the trial of the above-entitled matter;" and under said order the said sheriff took said R. Lee into his custody. Afterwards the court, on motion of the district attorney, "without the application, knowledge, or consent of said defendants," made another order setting aside the said order committing said R. Lee to the custody of the sheriff; and under said last order the sheriff "released and discharged from and out his custody the said R. Lee McReynolds, and permitted him to go at large, and did not deliver the said R. Lee McReynolds into the custody of said defendants, or either of them." The trial of the cause was continued until the next day, at which time the said R. Lee was not present; and, having been called at the door, and not appearing, the court made an order forfeiting the bond. Afterwards the present action was brought to recover of defendants the amount named in the bond, and judgment was rendered against them for said amount, the case having been tried without a jury. They appeal from the judgment and from an order denying their motion for a new trial.

In our opinion, the judgment and order must be reversed. The liability of appellants upon the undertaking ceased when the said R. Lee was taken into the custody of the sheriff under said order of the court, which was an order the court had power to make. Pen. Code, § 1129. Upon the release of a person on bail he is in the custody of the sureties, and the consideration of the bond, accruing to the sureties, is his freedom from any other custody. The responsibility of the sureties is based upon their custody of the person bailed, and their rights and powers under such custody. If they are at any time fearful that he may not appear, they can have him arrested and surrendered, or he may surrender himself; and, in either event, they are exonerated. Pen. Code, § 1300. When the court orders him into the custody of the sheriff, and the latter takes him, the same result follows. Vacating the order did not, by operation of law, restore him to appellant's custody. The fact that in the case at bar the sheriff had the said R. Lee in his custody, under the order, for only a short time, is immaterial. It makes no difference whether the time was 10 minutes or 10 months. The theory upon which the case seems to have been decided—that appellants should have shown affirmatively that the custody of the sheriff actually prevented them from afterwards producing the said R. Lee—is not sound. When he was taken into the sheriff's custody they were released from any further care as to his whereabouts. He probably absconded for the very reason that he considered the sureties exonerated by the said order committing him to the custody of the sheriff. We have discovered no decisions in this state where the point here involved was directly passed upon, unless Babb v. Oakley, 5 Cal. 94, be one, where the court said that "the offer of the defendant Oakley to surrender himself in discharge of his sureties was a good surrender, and discharged them from all liability;" but the facts in that case are very meagerly stated. There are, however, direct authorities to the point in sister states. State v. Orsler, 48 Iowa, 343; People v. Stager, 10 Wend. 431; Medlin v. Com., 11 Bush, 605. See, also, Reese v. U. S., 9 Wall. 13. The position of respondent that appellants could protect themselves only under section 1305, Pen. Code, is not tenable. That section relates only to a case where the defendant or his sureties are able to come before the court and "satisfactorily excuse his neglect" to appear. Of course, that could not have been done in the case at bar. The defendant ran away without any excuse that could be given for him. The judgment and order appealed from are reversed.

We concur: BEATTY, C. J.; DE HAVEN, J.

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102 Cal. 298

PEOPLE ex rel. WELLS v. TOWN OF BERKELEY. (No. 15,527.)

(Supreme Court of California. April 26, 1894.)

MUNICIPAL CORPORATION — REORGANIZATION AS CITY—ELECTION—VALIDITY—PETITION FOR SUBMISSION.

1. Under St. 1883, p. 93, § 4, providing for submission to a vote at the next general election of a proposition to reorganize a town as a city whenever a petition shall be presented to the board, signed by one-fifth of the qualified electors, a petition to which the required number of signatures was obtained by attaching thereto signatures cut from other petitions, identical in form, gives the board no jurisdiction to submit such proposition.

2. A regular annual election provided by law for the election of municipal officers, though no state or county officers are chosen, is a "general election," within the meaning of such statute.

3. Under Const. art. 11, § 6, authorizing towns to reorganize under the general laws relating to municipal corporations "whenever a majority of the electors voting at a general election shall so determine," a majority of all the electors voting at such election, and not merely a majority of those voting on such proposition, is required.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Quo warranto, on the relation of one Wells, against the town of Berkeley, to test the legality of the proceedings taken to reorganize such town as a municipal corporation of the fifth class. From a decree declaring such proceedings void, defendant appeals. Affirmed.

Edw. C. Robinson (W. Laird Hill and Edw. A. Holman, of counsel), for appellant. Atty. Gen. Hart and T. F. Graber, for respondent.

BELCHER, C. This is an appeal from a judgment on the judgment roll, and the only contention of appellant is that the judgment is not supported by the findings. The action was instituted by the attorney general upon the relation of one Wells, challenging the legality of the proceedings taken for the reorganization of appellant, as a municipal corporation of the fifth class, under the general laws of the state. The court found the facts to be, in substance, as follows: The town of Berkeley was organized as a municipal corporation in 1878 under an act of the legislature approved April 1, 1878, and entitled "An act to incorporate the town of Berkeley, in Alameda county;" and thereafter it continued to exercise its corporate franchise, under and by virtue of said act, until June 28, 1893. On April 3, 1893, at a regular meeting of the board of trustees of the town, there was presented to said board, read, and placed on file, a petition asking that the question of the reorganization of the town as a city of the fifth class, under the general laws relating to municipal corporations, should be submitted to the electors thereof at the next general election to be held therein. This petition was signed by only 47 qualified electors of the town, but attached to it were seven other sheets of paper, signed by qualified electors of the town, numbering in the aggregate 165. The signatures were obtained as follows: Prior to April 3, 1893, eight separate petitions, identical in form and language, were circulated by different persons, and signatures were obtained to each of them. After these petitions had all been signed, the signatures on seven of them were cut off and detached by a person having no authority to do so, and were then attached to the other one so that they appeared to constitute a part of it. The petition to which the seven detached sheets were thus attached was then, by the same person, presented and filed, as aforesaid, as and for a genuine petition containing 212 signatures. The whole number of votes cast at the last prior municipal election held in the town was 1,055. On the day the said petition was presented, April 3d, the board of trustees, acting upon the same, passed an ordinance submitting to the electors of the town at the next general election to be held therein, to wit, on the 8th day of May, 1893, the question of the reorganization of the town as a city of the fifth class. The election on May 8th was the annual election provided for by the charter of 1878 for the election of municipal officers; and at that election 1,287 electors voted for town officers, and 533 in favor of reorganization, and 517 against reorganization. In due time the board of trustees canvassed the vote, and declared the proposition to reorganize carried, and thereupon caused their clerk to make, and transmit to the secretary of state, a certified abstract of such vote. Thereafter, the said board called a special election for the election of the officers required by law to be elected in cities of the fifth class, and the election was held on June 26th. On June 28th the board canvassed the vote, and declared the result; and from and since the said last-named date the defendant has been, and still is, holding and exercising the franchise of a municipal corporation of the fifth class, under and by virtue of the proceedings hereinbefore set forth, and not otherwise. And, as conclusions of law, the court found "that said defendant has never been legally organized as a city of the fifth class, and that all the steps, proceedings, and elections held in that behalf, as in the findings of fact herein are stated, were and are void; that defendant has usurped, intruded into, and unlawfully held and exercised, the franchise of a municipal corporation of the fifth class, and is now usurping, intruding into, and unlawfully holding and exercising, such franchise." Three questions are presented, and counsel on both sides earnestly ask that each of them be considered and decided. They are: First. Was the petition presented to the board of trustees sufficient to give it jurisdiction to submit the proposition of reorganization to a vote of the electors? Second. Was the election at which the proposition was submitted a general election, within the meaning of the statute? Third. To carry the proposition, was a majority of all the electors voting upon it sufficient, or was a majority of all those voting at the election necessary?

1. The constitution provides: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." Section 6, art. 11. In obedience to this mandate of the constitution, an act was passed by the legislature, and approved March 13, 1883, entitled "An act to provide for the organization, incorporation and government of municipal corporations." St. 1883, p. 93. Section 4 of this act provides: "The common council, board of trustees, or other legislative body of any city and county, city or town, organized or incorporated prior to the first day of January, eighteen hundred and eighty, at twelve o'clock meridian, shall, upon receiving a petition therefor, signed by not less than one-fifth of the qualified electors of such city and county, city, or town, as shown by the vote cast at the last municipal election held therein, submit to the electors of such city and county, city, or town, at the next general election to be held therein, the question whether such city and county, city, or town, shall become organized under the general laws of the state relating to municipal corporations of the class to which such city and county, city, or town may belong." It is clear that under these provisions a municipality could only be reorganized in the manner and after a compliance with all the conditions prescribed. It follows, therefore, in this case, that a petition was necessary, and that, unless one signed by the requisite number of electors was presented to the board, it had no jurisdiction to submit the question of reorganization to the electors, and they had no right to vote upon it. As before stated, the number of votes cast at the last municipal election held in the town was 1,055. It was necessary, therefore, that the petition be signed by at least 211 electors. The petition presented was signed by only 47; and, unless the signature on the attached sheets could be counted, it was clearly insufficient. Probably, if the several petitions, as signed, had been presented, they might and should be regarded and treated as "a petition," within the meaning of the statute; and in a similar case it was so held by the supreme court of Florida. McKinney v. Commissioners, 26 Fla. 267. In Fox v. Board, 49 Cal. 563, the same question now in hand arose; and it was held that "if two petitions identical in language are circulated and signed, and, to make the required number of names, the signatures on one petition are cut off and pasted onto the other, which is presented, the board have no authority to order the election." The court, by Wallace, C. J., said: "The petition presented to the board must be that petition which was signed by the petitioners. Both signature and presentation are necessary. In this view, the identity of the instrument presented as being that which came from the hands of the petitioners is indispensable. To say that, though the signers did not affix their names to the petition presented, they did affix them to another and similar petition, not presented to the board, is no answer. Nor does it satisfy either the terms of the statute, or its obvious policy,

which was to shut the door against frauds which would inevitably occur if the practice of detaching signatures from one petition, and attaching them to another, were permitted." And Crockett, J., in a concurring opinion, also said: "If numerous petitions with similar headings be circulated for signatures, and if the headings from all the petitions, except one, be cut off, and all the names, without the knowledge or consent of the signers, be pasted to the one heading, and in that form presented to the board, it is clear that the paper thus presented was not 'signed' by those whose signatures were affixed to it by pasting. Whether they signed another paper with a similar heading will rest entirely in parol, and can only be ascertained by oral proofs. If such proof will suffice as to a portion of the petitioners, it will be equally effective as to all. We might then have the case of a petition never in fact signed by any one, and the omission could be supplied only by oral proof that the petitioners had signed other similar petitions. If a practice of this kind was tolerated, it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing." There are some conflicting authorities in other states, and counsel for appellant insist that the decision in the Fox Case should be overruled. It has, however, so far as we know, remained unquestioned in this state for nearly 20 years, and seems to be based on sound and convincing reasoning. It should therefore, in our opinion, be upheld and followed.

2. The election held on May 8, 1893, was the annual election provided for by law for the election of municipal officers, and in our opinion it was a general election, at which the question of reorganization might properly be submitted. It is true that the words "general election" are ordinarily used to designate one at which state and county officers are elected, but we know of no provisions in the constitution or statutes limiting them to such an election. Two classes of elections, only, are spoken of,—general and special; and a regular annual municipal election cannot be included in the latter class, but must be treated as a general election. In Ruggles v. Trustees, 88 Cal. 430, 26 Pac. 520, application was made for a writ of mandate to compel the trustees to call and provide for the holding of an election of city officers. The court said: "Prior to May 6, 1890, the city of Woodland, in Yolo county, was a municipal corporation under a special charter. On that date a proposition to reorganize as a city of the fifth class, under the general incorporation act approved March 13, 1883, was duly submitted to the electors of said city, and approved by a majority vote." And it was held that a peremptory writ should issue. No general state or county election took place on May 6th, but the court must have considered the election held on that day a general election, or it could not have said that the proposition to reorganize "was duly submitted to the electors."

3. At the election held on May 8th, a majority of all the electors who voted upon the proposition to reorganize were in favor of it, but not a majority of all who voted at the election. The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, "whenever a majority of the electors voting at a general election shall so determine." These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. And such was evidently the interpretation placed upon this provision by the legislature when it passed the general municipal incorporation act of 1883. Section 4 of that act, after providing for the presentation of a petition, the submission of the question at the next general election, etc., proceeds as follows: "The votes so cast shall be canvassed at the time and in the manner in which the other votes cast at such election are canvassed. If upon such canvass a majority of all the electors voting at such election shall be found to have voted for such reorganization, the said council, board or other legislative body shall, by an order entered upon their minutes, cause their clerk, or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show the whole number of electors voting at such election, the number of votes cast for reorganization, and the number of votes cast against reorganization." This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize. Counsel on both sides have argued the question at great length, and have cited numerous authorities, but we do not deem it necessary to follow their arguments further, or to review the cases referred to. It follows that the court below drew correct conclusions from the facts, and that the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

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102 Cal. 277

MOORE v. SLEEPER et al. (No. 15,309.)

(Supreme Court of California. April 25, 1894.)

SHERIFF'S INDEMNITY—JUDGMENT AGAINST SURETIES.

1. Code Civ. Proc. § 1055, providing that a judgment against a sheriff for an act done, by virtue of his office, after notice to the sureties on an indemnity bond, is conclusive of his right against them, and the court may, on notice, enter judgment, with costs, against them, does not require a joint judgment, if the sureties' bond be several, and for different amounts, nor

forbid a judgment for less than that against the sheriff, if the sureties are bound for less, but in such case judgment should be entered against the sureties for the amount of the bond, and for which each has bound himself, not to exceed the judgment against the sheriff, and costs.

2. On motion for judgment over on a sheriff's indemnity bond, the burden is on the sureties to show that the judgment against the sheriff had been satisfied by themselves, or by a return of the property seized, or that the property to satisfy it still is, or ought to be, in the sheriff's possession.

3. The fact that each indemnitor is bound for less than $300 does not deprive the superior court of jurisdiction to give judgment against each on supplemental motion, under Code Civ. Proc. § 1055, in an action against the sheriff, of which it has jurisdiction.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

In the matter of the action of Albert W. Lewis against L. A. Young and others. On motion by Gawn Moore, sheriff, against J. M. Sleeper and others, for judgment over on his indemnity bond in the attachment. Motion denied, and Moore appeals. Reversed.

J. H. Seawell and T. B. Bond, for appellant. T. J. Sheridan, for respondents.

DE HAVEN, J. Appeal from an order denying a motion made under section 1055 of the Code of Civil Procedure, to have judgment entered in favor of a sheriff, and against sureties named in a bond indemnifying him against liability on account of the execution of a writ of attachment. The indemnity bond was given in an action brought by one Albert W. Lewis against L. A. Young and others, and recites that said Lewis, as principal, and the respondents, as sureties, are jointly and severally bound to the appellant in this proceeding in the sum of $1,000; and then, after referring to the fact of the delivery to the appellant, as sheriff, of the writ of attachment issued in the action of Lewis v. Young et al., and of the attachment of certain personal property thereunder, the bond proceeds to specify the particular liability of each of the sureties, as follows: "The said Robert Bucknell is bound in the sum of $200, and the said R. C. Tallman is bound in the sum of $200, and the said J. M. Sleeper is bound in the sum of $200, and the said E. Burk is bound in the sum of $100, and the said W. W. Dunton is bound in the sum of $100, and the said M. L. Thompson is bound in the sum of $100." After the execution of this bond the claimants of the attached property brought an action against the appellant for its recovery, and obtained a judgment against him for the return of the property or its value, $850, and also for $278.50, costs of the action. The respondents here were duly notified of the pendency of that action, and were requested to defend the same, and were further notified that, in case judgment was recovered against the appellant, he would move for a judgment against the respondents here, under section 1055 of the Code of Civil Procedure. The motion appealed from seems to have been denied by the superior court upon the ground that the sureties in the bond were bound in different amounts, and each for a less sum than the judgment against the obligee in the bond, and that section 1055 of the Code of Civil Procedure does not authorize a several judgment in different amounts against sureties upon a bond of indemnity, or any judgment against such sureties for less than the whole amount of the judgment recovered against the obligee named in such bond. It will be noticed that the indemnifying bond is somewhat ambiguous as to the extent of liability assumed by the sureties. In the first paragraph, it is stated that they are jointly and severally bound with the principal in the full sum of the penalty named in the bond; but this is followed by a more particular statement to the effect that certain of the sureties are severally bound in different amounts, each for a less sum than $1,000,—the penalty of the bond. We think the last or more particular statement is to govern in ascertaining the liability of the sureties; and, while the superior court correctly construed the bond in this respect, we think it was in error in holding that section 1055 of the Code of Civil Procedure would not permit a several judgment to be entered against the sureties in accordance with the terms of the bond. The language of that section is: "If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court may on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs." This does not necessarily require that the judgment thus provided for shall be a joint judgment when the obligation of the sureties is several, and they become liable for different amounts, or that the judgment to be entered shall not be for a less amount than the one recovered against the sheriff obligee, if the sureties upon the indemnity bond have not bound themselves for so great a sum. The section should be construed as authorizing the entry of a judgment against the sureties for the amount named in the bond, and for which each has become liable. but not to exceed the amount of the judgment recovered against the sheriff, including costs of the action. We certainly can see no reason why the same character of judgment may not be entered against the sureties under this section as might be in an ordinary action against them to recover upon the bond.

The respondents further contend that the order should be affirmed because it was not shown that the appellant had paid the judgment recovered against him, or had not satisfied all of it, except the portion thereof relating to costs, by a return of the property, or that he did not retain the property with which to satisfy it. It was not necessary for the sheriff to show these facts. He became liable when the judgment was rendered against him, and it was against this liability that he was indemnified by the respondents; and he made out a prima facie case, under the statute, by the production of the indemnity bond, the judgment against him, and proof of notice to the respondents to appear and defend the action in which the judgment was recovered. And in order to overcome this prima facie case the burden was on the respondents to show that the judgment against the appellant had been satisfied by themselves, or by a return of the property, or that the property with which to satisfy it was, or ought to have been, still in the possession of appellant. This conclusion is in harmony with the principle underlying the decision in Pieper v. Peers, 98 Cal. 42, 32 Pac. 700, and that case may be regarded as an authority in support of our views on this point.

It is lastly claimed by the respondents that the superior court was without jurisdiction to render a several judgment against them in this proceeding because each of them is a surety on the indemnity bond for a sum less than $300. But this proceeding is not an independent action. It is simply a supplemental motion made for judgment against the sureties in an action of which the superior court had jurisdiction, and in which it had already proceeded to judgment against the nominal defendant. The provision in section 1055 of the Code of Civil Procedure, permitting such a motion as this to be made, proceeds upon the theory that indemnitors are the real parties defendant when a sheriff is sued for an official act for which they have indemnified him, and that when they have notice of the pendency of such an action the judgment against the sheriff is conclusive of his right to recover against them; and, this being so, the statute permits the sheriff to have judgment entered against them at once upon a motion in the action, without the expense and delay of prosecuting an action upon the bond of indemnity, and such a motion is not to be regarded as the commencement of an independent action against the sureties. Order reversed.

We concur: BEATTY, C. J.; McFARLAND, J.

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102 Cal. 276

PIERCE v. HILTON. (No. 19,344.)

(Supreme Court of California. April 25, 1894.)

COMPLAINT IN EJECTMENT — SUFFICIENCY OF DESCRIPTION—RES JUDICATA.

1. A complaint in ejectment, in describing the land sued for, need not specify the character in which a surveyor mentioned in such description established lines referred to.

2. A complaint in ejectment for a portion of a rancho, describing the land sued for as "tracts A and B, as designated on the map accompanying the referee's report in the partition suit of said rancho," in the superior court, is not bad for insufficiency of description.

3. Where plaintiff in ejectment shows title to the whole tract in suit, and that defendant is in possession of a portion, defendant cannot complain of a judgment for plaintiff for such portion on the ground that the judgment does not sufficiently describe it.

4. A judgment of dismissal on plaintiff's own motion, and without defendant's consent, does not bar another action for the same purpose.

Department 1. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge.

Ejectment by one Pierce against one Hilton. From a judgment for plaintiff, defendant appeals. Affirmed.

B. F. Thomas, for appellant. Wright & Day, for respondent.

HARRISON, J. Ejectment for a tract of land in Santa Barbara county, a portion of the Rancho Lomas de la Purificacion. The plaintiff had judgment, and the defendant has appealed directly from the judgment, without any bill of exceptions. 1. The land is described in the complaint, and also in the judgment, as follows: "Commencing at the N. E. corner of said rancho, and in the center of the Santa Ynez river, and thence meandering the center of said river as follows [16 courses]; thence leaving said river bed S. 34.36 chains to the center of Sec. 21, as established by A. S. Cooper, surveyor, T. 6, R. 30 W., S. B. B. & M.; thence S. 45 degrees E. to the center of the Calabasor creek; thence southerly about one mile and a half to a point directly south of the line between sections 21 and 22, T. 6 N., R. 30 W., S. B. M., as established by A. S. Cooper, surveyor; thence south to the southern line of the Rancho Lomas de la Purificacion, as patented; thence along the same N. 75½° E., 305.75 chains to the S. E. corner of said rancho; thence N. 198 chains to the point of beginning." The defendant demurred to the complaint upon the ground of uncertainty, in that it did not appear in what capacity or for whom Cooper acted when he established the center of section 21 or the line between sections 21 and 22. His demurrer was overruled, and he thereafter answered the complaint. In its judgment the court makes the same description of the land of which it finds the plaintiff the owner, and the appellant makes the same objection to the judgment as was made in his demurrer, and also urges that the description is itself uncertain. It was not necessary in describing the land to specify the character in which Cooper acted when establishing the lines therein referred to. We cannot say as a matter of law that the description is uncertain or defective. For all we know, these lines may be landmarks well known in that vicinity, and may be themselves designated by substantial monuments. Whether Cooper was a private or a public surveyor is immaterial.

If in fact the point and line referred to had been established, it is as much a matter of proof as though the reference had been merely to a pile of stones erected by Cooper. If the lines were never established, or cannot be ascertained, this fact could have been shown by the defendant at the trial. Irrespective of these references, however, the description of the land is not incapable of ascertainment. The northeast corner of the rancho, as patented by the United States, is capable of location, and is the northeast corner of the tract. The easterly line of the tract runs due south 198 chains to the southerly line of the rancho as patented, and the southerly line of the tract is the southerly line of the rancho as patented, running south 75½ degrees west for the distance of 305.71 chains from the southeast corner of the rancho. The northwesterly line of the tract is the Santa Ynez river, and the boundaries between the Santa Ynez river and the southern boundary of the rancho, as they are described in the complaint, can be readily ascertained by a surveyor. The tract of land is still further described in the complaint and in the judgment as "tracts A and B, as designated on the map accompanying the referee's report in the partition suit of said rancho," in said superior court. This reference is certain, and, for aught that appears in the record, capable of exact designation. No objection appears to have been taken at the trial to its sufficiency, or to the sufficiency of the evidence by which the court finds this to be the description of the plaintiff's land, and it cannot be said that on its face it is incapable of ascertainment. See De Sepulveda v. Baugh, 74 Cal. 473, 16 Pac. 223.

2. The court finds that the plaintiff was the owner in fee, and entitled to the possession, of the tract sued for, and that while so the owner, and entitled to the possession, the defendant entered into and upon "that portion of said premises lying immediately north of the southerly line of said tract, and ousted and ejected the plaintiff therefrom, and has withheld and still withholds said premises from the plaintiff; that at the time of the commencement of this action the plaintiff was entitled to the possession of the premises of which he had been so ousted," and rendered its judgment that the plaintiff recover from the defendant the possession "of all that portion of said tract lying north of the southerly line thereof of which the said defendant was on the 25th day of August, 1891, the date of the commencement of plaintiff's action herein, in possession." The defendant urges that the judgment is so uncertain that it cannot be enforced; that, inasmuch as the court does not designate the exact boundaries of the portion of which he is in possession, the judgment cannot be executed. It does not, however, lie in the mouth of the defendant to make this objection. If the plaintiff is entitled to the possession of the entire tract, and has been ousted of a portion thereof by the defendant, the defendant cannot complain that the judgment requires him to restore the possession of only this portion. The judgment is limited to the restoration of that portion of the tract of which the defendant was in possession at the commencement of the action, and, as the defendant does not establish a right to any portion of the tract, he could not complain even if he should be ejected from the entire tract. It is very evident from the entire record that the controversy between the parties had reference to the southern boundary of the plaintiff's tract, and that plaintiff, believing that the defendant had encroached upon his land, but not knowing the exact extent of the encroachment, described in his complaint the whole of the tract of which he claimed to be the owner. The defendant did not disclaim as to any portion of the land sued for, but denied the plaintiff's title to any part thereof, and pleaded the statute of limitations, and an adverse title in himself to the whole. He ought not now, after a trial upon these issues in which he failed to establish any of his defenses, to complain that the plaintiff merely showed that he had ousted him of a portion of that tract immediately north of the southern boundary, and not of the entire tract. Under its findings of fact, the court would have been authorized to render a judgment that the plaintiff have possession of the entire tract, and the defendant cannot complain that he is only required to deliver possession of that portion of which he had ousted the plaintiff. Vallejo v. Fay, 10 Cal. 377.

3. The defendant pleaded in his answer that the predecessor of the plaintiff had commenced an action against him to recover the same property on the 17th of June, 1887; that summons was issued in said action and served upon him, and that on the 7th day of July, 1887, he filed his answer therein, denying every allegation in the complaint; that on the 23d of July, 1888, the attorney for the plaintiff in said action entered and signed a dismissal thereof upon the register of actions kept by the clerk, and that thereafter, October 3, 1891, the court by its judgment formally dismissed said action. To this defense the plaintiff demurred, and the court sustained the demurrer. The defendant now contends that this was error, for the reason that the judgment in the former action operated as a bar to the prosecution of the present action, and cites Merritt v. Campbell, 47 Cal. 542, in support thereof. In that case, however, the judgment was rendered upon the agreement by the parties for the dismissal of the cause, and that each should pay his own costs. In the present case the action was dismissed by the plaintiff of his own motion, and without the consent of the defendant. Under such circumstances, the judgment entered upon the dismissal cannot be regarded as a bar to another action for

the same purpose. Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916. While the court held in Merritt v. Campbell that the facts of that case authorized it to hold that the dismissal was a bar, it also qualified its ruling by saying: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even, entered by consent, would have that effect, but only that a judgment of dismissal when based upon an undertaking in pursuance of the agreement of the parties must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action." The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

102 Cal. 320

FAIRCHILD et al. v. KING et al. (No. 15,447.)

(Supreme Court of California. April 30, 1894.)

AGENT—DELEGATION OF AUTHORITY—SUFFICIENCY OF COMPLAINT—COSTS.

1. A person employed to secure a tenant for a ranch is not such an agent that he may delegate his authority; Civ. Code, § 2349, providing for such delegation of authority only in certain exceptional cases.

2. A complaint alleging an existing indebtedness on October 21, 1889, filed October 21, 1891, does not show an existing indebtedness on the latter date.

3. Where a nonsuit is granted in a civil case, the court may order plaintiff to pay the jury fees.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by M. D. Fairchild and others against C. H. King and others. From an order granting a nonsuit, plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. A. P. Van Duzer, for respondents.

GAROUTTE, J. This is an action by Fairchild, Lawton, and Mathison, as brokers, to recover $10,000 commissions for services performed in finding a tenant for a certain tract of land belonging to defendant King. Plaintiffs were nonsuited by the trial court, and the evidence upon which they relied at the trial for a recovery is stated by their counsel, in a most favorable light for them, as follows: "Defendant King owned the ranch referred to in the pleadings and evidence. He authorized defendant Jackson to secure a tenant for said ranch. Defendant Jackson communicated with and authorized plaintiff Fairchild to secure a tenant for said ranch, and told him of defendant King's willingness to pay a liberal commission. Plaintiff Fairchild employed plaintiffs Lawton and Mathison to assist in securing a lessee; and said Lawton, Mathison, and Fairchild did negotiate with one A. L. Reed. Said Reed was introduced to defendant King by said Lawton, and defendant King entered into a lease of said ranch with said Reed." The evidence further disclosed that King had promised Jackson certain compensation if he produced a tenant. Upon this statement of facts, the judgment of nonsuit was properly granted in favor of defendant King. The plaintiffs were strangers to him. He never directly or indirectly contracted in any manner for their services. It is not claimed that Jackson was specially authorized to appoint sub-agents for the purpose of securing a tenant, as may be done in certain cases under section 2349 of the Civil Code. This case does not furnish one of the exceptions laid down in that section to the general principle that delegated power cannot be delegated. Wharton on Agency (section 709) thus states the rule: "A broker, like an attorney, is selected, as a specialist, on account of his presumed skill and discretion, and of the confidence bestowed on him by his principal. He therefore cannot depute his duties, so far as they are discretionary, to another." Plaintiffs also were properly nonsuited as to defendant Jackson. Their evidence, throughout the case, expressly repudiates the idea that defendant Jackson ever agreed to pay them anything for their services as brokers.

The complaint contains the following allegation: "That on the 21st day of October, A. D. 1889, said defendants became and were indebted to said plaintiffs, in the sum of $10,000, for services rendered said defendants at their special instance and request, as brokers, in finding a person ready and willing to lease, and in effecting a lease for the term of seven years of, a certain rancho in the county of Monterey, generally known as 'King's Rancho.'" It is now insisted that the facts therein recited must be deemed admitted, upon the ground of insufficient denials thereof. Conceding the denials of such a character as to avail nothing, still we think this allegation of the complaint of a character utterly valueless. The complaint was filed October 21, 1891. The allegation of the complaint attempts to set up an indebtedness existing October 21, 1889. An allegation of indebtedness of that date is no evidence of an existing indebtedness upon the date of the filing of the complaint two years later.

The court was justified in ordering the plaintiffs to pay the jury fees. Lukes v. Logan, 66 Cal. 33, 4 Pac. 883.

The remaining grounds relied upon for a new trial are unimportant. There is no merit in the appeal. Order affirmed.

We concur: PATERSON, J.; HARRISON, J

102 Cal. 333

BAILEY v. COX et al. (No. 15,416.)

(Supreme Court of California. May 1, 1894.)

CHANGE OF VENUE.

An action by stockholders of a corporation against other stockholders, the directors, and a mortgagee, to set aside the mortgage as fraudulently given by the directors for too large an amount, and to determine the amount of indebtedness to the mortgagee, is one which the mortgagee may have tried in the county of his residence, it being a personal action, and he being the only defendant against whom relief is sought.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by C. E. Bailey against E. J. Cox, John Tuohy, and others. From an order denying the motion of defendant Tuohy for a change of venue, he appeals. Reversed.

Daggett & Adams, for appellant. H. V. Morehouse and Hiram D. Tuttle, for respondent.

SEARLS, C. This is an appeal from an order of the superior court in and for the county of Santa Clara denying a motion of defendant Tuohy to transfer the cause from said county of Santa Clara to the county of Tulare for trial. The defendant the Buena Vista Fruit & Vineyard Company is a corporation organized June 6, 1891, under and pursuant to the laws of the state of California, and having its principal place of business at Tulare City, in the county of Tulare, state of California. The defendants John Tuohy, D. W. Madden, E. De Witt, P. F. Wood, N. A. Hummel, J. F. Boller and R. B. Bohannon were directors of the corporation. The other defendants, with perhaps one or two exceptions, were stockholders in the corporation. The prayer of the complaint asks the court to establish fraudulent dealings on the part of the directors; to set aside and cancel two certain mortgages given by the corporation to John Tuohy, who was president of said corporation, upon land in the county of Tulare, upon the ground that they are fraudulent; for a decree fixing the indebtedness of the corporation to defendants Tuohy, Cox, Wood, and De Witt; to account with and settle the rights of the corporation to and with said last-named defendants, the rights of the creditors and stockholders of the corporation.

The facts may be briefly stated thus: Defendant Tuohy was the owner of 720 acres of land and a few shares in the capital stock of two water companies, all worth $36,000, and situated in the county of Tulare. Tuohy had agreed to sell the property to defendants Cox, Wood, and De Witt, on or before September 1, 1891, for the sum of $36,000, and interest at 8 per cent. per annum. Thereupon the said Cox, Wood, and De Witt represented themselves to be the owners of the property, and by various devices, with the knowledge and consent of Tuohy, organized the corporation defendant, and agreed to sell and convey to it the property for $72,000, or double its value. Tuohy, Wood, and De Witt became directors in the company, and on the 16th day of September, 1891, Tuohy conveyed the property to the corporation for $72,000, receiving in payment $10,000 in cash, and two notes secured by mortgage on the land; one for $36,000 and the other for $26,000. Plaintiff avers that all this consideration in excess of $36,000 was fraudulent, and the result of the fraudulent acts of Tuohy, Cox, Wood, and De Witt, and many of the devices to perpetrate the fraud are set out. There are no facts stated showing indebtedness of the corporation to any person except to Tuohy upon the promissory notes secured by mortgage. Plaintiff is a stockholder in the corporation defendant, and a resident of the county of Santa Clara, as are some 14 other stockholders, out of, say, 50 stockholders made defendants in the action. Defendant Tuohy is a resident of the county of Tulare, and by timely demand, affidavit of merits, and notice moved for a change of the place of trial as before stated, upon two grounds: (1) Because the action is brought to determine the right and interest of said Tuohy as mortgagee in the lands described in the complaint, and that said lands are situated wholly within the county of Tulare. (2) Because said defendant John Tuohy is a resident of the county of Tulare, and is the only defendant against whom any relief is sought.

Under section 392 of the Code of Civil Procedure: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this code. (1) For the recovery of real property or of an estate or interest, and for injuries to real property. * * * (3) For the foreclosure of all liens and mortgages on real property." A mortgage lien upon real property is an interest therein, and the exercise by a court of the power of determining the validity of a mortgage upon such real property, with jurisdiction to annul or uphold such lien, is the determination of an interest in real property. Baker v. Insurance Co., 73 Cal. 182, 14 Pac. 686, and cases there cited. It is intimated that the court below was led to a denial of the motion for a change of the place of trial by the doctrine enunciated in Smith v. Smith, 88 Cal. 572, 26 Pac. 356. In that case the action was commenced in the county of Tuolumne against a defendant who was a resident of the county of Merced.

Defendant moved the court to change the place of trial to the county of his residence, and this court held, in substance, that the action was essentially an action for an accounting, which the defendant had a right, under section 395, Code Civ. Proc., to have tried in the county of his residence. The court further held that, in order to give the right of trial in the county where the property is situate, the action must be wholly local in character; and that, where a plaintiff unites in the same action a cause of action which is local with one which is transitory, the venue should be in the county of which the defendant is a resident. Also that the same result will follow in cause where the principal object of the action is the adjustment of questions personal in character, although as a sequence of their determination a conveyance of real property may be decreed. The distinction between Smith v. Smith and the present case is twofold: (1) Here the primary and principal object of the action is to attack and annul the lien of two mortgages upon the ground that they were conceived and brought forth in fraud of the rights of the plaintiff and other stockholders in the corporation defendant. (2) In the present case, the only defendant against whom plaintiff shows himself entitled to any practical relief is John Tuohy, who is shown to be a resident of the county to which the trial is sought to be changed. It is true that a considerable number of the defendants are residents of the county of Santa Clara, but they are made defendants without any other allegation in the complaint relating to them than that they are stockholders in the corporation defendant. As such they are proper, but not necessary, parties to the action. The defendants John Tuohy, Cox, Wood, and De Witt, according to the allegations of the complaint, planned and executed the fraud, but the defendant, Tuohy, reaped the fruits of it, and practically the only relief sought is against him; but, if it be conceded that the relief sought is against them all, and includes the other officers of the corporation defendant, the fact still remains that no defendant against whom any relief is sought is shown to reside in the county of Santa Clara. Under such circumstances, the order appealed from should be reversed, and the court below directed to enter an order transferring the cause to the county of Tulare for trial.

We concur: TEMPLE, C.; BELCHER, C.

PATERSON, J. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the court below directed to enter an order transferring the cause to the county of Tulare for trial.

HARRISON and GAROUTTE, JJ. We concur in the judgment upon the ground that the defendant Tuohy is the only defendant against whom any relief is sought, and, being a resident of Tulare county, has the right to have the cause tried in that county. The action is a personal action for the purpose of surcharging the amount of the indebtedness secured by the mortgages, and does not involve the determination of any right or interest in lands.

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102 Cal. 324

JOHNSON v. LA GRAVE et al. (No. 15,216.)

(Supreme Court of California. April 28, 1894.)

MECHANICS' LIENS—ABANDONMENT OF CONTRACT—MATERIAL MEN—TIME OF FILING CLAIMS.

Code Civ. Proc. § 1187, provides that every person save the original contractor, claiming a mechanic's lien, must, within 30 days after "the completion" of any building, file his claim of lien, and that cessation from labor for 30 days on "any unfinished contract" shall be equivalent to a completion thereof. *Held*, that persons who furnished materials to a contractor who abandoned his contract were not entitled to mechanics' liens where their claims were not filed within 60 days after such abandonment, though the owner afterwards made a contract to complete the building with another who completed it.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by one Johnson against one La Grave and one Kearns to establish and enforce certain liens for materials furnished La Grave as a contractor for the erection of a building for Kearns. From a judgment for defendants, plaintiff appeals. Affirmed.

E. H. Wakeman, for appellant. John Flournoy, for respondents.

HARRISON, J. The respondent La Grave entered into a contract with his codefendant, Kearns, for the construction of a building in San Francisco for the sum of $4,956. After performing a portion of his contract, Kearns, on the 24th of October, 1891, gave to the appellant written notice that he abandoned the contract, and declined to proceed further in its execution, and thereafter did no work upon the building. La Grave subsequently made a contract with another builder for completing the construction of the building. The building was completed December 21, 1891, and the entire cost of its completion was $274 more than the original contract price with Kearns. Prior to the abandonment of the contract by Kearns, certain material men had furnished him materials for the construction of the building, which were used therein, and for which, in January, 1892, they filed, with the county recorder, claims for mechanics' liens. These liens were assigned to the plaintiff, who brought this action for their enforcement.

The court finds that, after the execution of the contract between Kearns and the respondent, and before work was commenced on the building, a sufficient memorandum of the contract was filed in the office of the county recorder, so that the right of the plaintiff to enforce his liens is limited by the contract between Kearns and La Grave. Section 1187, Code Civ. Proc., provides that "every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, file for record with the county recorder" his claim of lien, and that "cessation from labor for thirty days upon any unfinished contract * * * shall be deemed equivalent to a completion thereof for all the purposes of this chapter." As Kearns abandoned the contract October 24, 1891, and as no work was thereafter done upon the building under said contract, it was incumbent upon those who would claim any lien by virtue of his contract with La Grave to file their claim of lien with the county recorder within 30 days after the 23d of November, and, as the claims of lien held by the plaintiff herein were not filed until January, 1892, they did not create any lien upon the building, or constitute any charge against the respondents. Although the appellant has specified as one of the particulars in which the evidence is insufficient to justify the finding that there was a cessation of labor upon such unfinished contract for 30 days, he does not dispute these facts, but claims that, inasmuch as, after Kearns gave notice to La Grave that he would abandon his contract, La Grave made a contract with another for completing the building, under which work thereon was resumed, there was, therefore, no cessation of work for 30 days upon the building, and, consequently, the claims of lien could be filed within 30 days after the actual completion of the building. The statute, however, makes the cessation from labor for 30 days upon any "unfinished contract" equivalent to a "completion" thereof, for all who claim a lien by virtue of that contract, as fully as though the building was actually completed. Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648; Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 237, 29 Pac. 629. It is immaterial whether the building is subsequently completed by the owner or not; or, if completed, whether such completion is effected by the owner directly or through a contract with another. For the purposes of creating a lien thereon through the terms of the unfinished contract, the cessation from labor under that contract for 30 days is a statutory completion of the building, which sets the time running within which the claim of lien must be filed. For all purposes of claiming a lien the subsequent contract by La Grave is as disconnected with the one with Kearns as if it had been for the construction of a different building. The appellant's assignors had no connection with that contract, and did not furnish any materials for its performance, and it would be contrary to the manifest policy of the law upon this subject to hold that those who had furnished the labor and materials for the performance of this second contract should be postponed in the payment therefor until after the contract price of their contractor had been absorbed in the satisfaction of claims entirely disconnected with the contract under which they had furnished this labor and materials. The provision in section 1187 that cessation from labor for 30 days upon an "unfinished building" is equivalent to a completion thereof refers to cases in which the building is constructed by the owner without such contract as is required under the mechanic's lien law, and has no application if he has entered into a contract which limits the extent of his liability for liens. As the plaintiff is not entitled to enforce any lien upon the building, or to receive from the appellant any portion of the contract price, it is immaterial to him whether any portion of the moneys due to Kearns was unpaid at the time he abandoned the contract; nor is it any concern of his whether the respondent made a proper disposition of the unpaid portion of said contract price. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

102 Cal. xvii; 4 Cal. Unrep. 601

CAFFREY v. OMILAK GOLD & SILVER MIN. CO. (No. 15,441.)

(Supreme Court of California. May 1, 1894.)

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

For former opinion, see 36 Pac. 388.

Estee & Miller, for appellant. A. Morganthal, for respondent.

PER CURIAM. The judgment heretofore rendered upon the appeal herein is modified to read as follows: "The order appealed from is affirmed, and if, within fifteen days after the filing of the remittitur in the court below, the plaintiff shall file a stipulation remitting the sum of $525 from the amount of the verdict, in accordance with the terms of the order, the superior court is directed to modify the judgment accordingly, and, as so modified, the judgment will stand affirmed. Costs of this appeal to be borne by the appellant."

4 Cal. Unrep. 627

BUTTNER v. SMITH. (No. 15,427.)

(Supreme Court of California. April 30, 1894.)

OPTIONS—ACCEPTANCE—WHAT CONSTITUTES—INTEREST.

1. Defendant gave plaintiff a written option to purchase stock for $3,100 cash and the balance on time. On the last day of the option plaintiff said he would take the stock "according to the terms of the writing," but defendant, desiring time to get a portion thereof from one to whom it was pledged, indorsed an extension of 11 days on the agreement. After such extension, plaintiff let defendant have $3,100 to get the pledged stock, but he failed to do so,

and, after the expiration of the option, demanded the return of the $3,100. *Held* that there was no binding acceptance of the option.

2. Plaintiff is entitled to interest on the sum sought to be recovered from the date of his demand for its return.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Buttner against Smith to recover money paid defendant to assist him in getting possession of stock. From a judgment for plaintiff, and another denying a new trial, defendant appeals. From an order denying plaintiff's motion to add to the verdict interest on the amount from the date demand was made for its return to the date the action was begun, plaintiff appeals. Order denying a new trial affirmed, and judgment modified.

Kittridge & Krafft, for appellant. Thomas V. Cator, for respondent.

HARRISON, J. The appellant gave to the respondent the following agreement: "San Jose, Cal., May 24, 1889. I hereby grant to J. C. Buttner or assigns five days' refusal to purchase 490 shares of Union Mill and Lumber Co. stock for the sum of $15,100 on the following terms, to wit, $3,100 down on or before the 29th day of May, 1889, at 3 p. m.; $1,000, payable every six months thereafter, with interest on the whole balance, payable every six months, and the said 490 shares as security, and 20 shares additional; making 510 shares in all. * * * Chas. C. Smith." On the 29th of May the appellant desired further time to arrange about some of the stock that was held by one McCoy in pledge for an indebtedness of his, and made the following indorsement upon the foregoing instrument: "San Jose, May 29, 1889. The within agreement is hereby continued until the 9th day of June, 1889, at 3 o'clock p. m. C. C. Smith." This indorsement was made at the Garden City Bank, in San Jose, which at the same time held 170 shares of the stock in pledge for an indebtedness of the appellant, and where the respondent also had some money on deposit. After the above transaction, Buttner told Smith that he had some money to his credit at that bank, and, upon Smith's statement, in reply to Buttner's suggestion, that if he would let him have the money it would help him to get that stock, Buttner let him have $3,100. About ten days after this time, Smith saw Buttner, and told him he could not get the stock from McCoy; and about two weeks later Smith again went to Buttner, and proposed a change in the contract, by which Buttner could get the stock in some other way. This, however, was declined by Buttner. Smith failed to get the stock from McCoy, and, in August, Buttner demanded that he pay back the $3,100, and, upon his refusal, brought this suit. The case was tried before a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed.

As the accounts of the interviews and of the conversations between them given to the jury by the plaintiff and defendant, respectively, are conflicting, we must assume that in everything in which such conflict existed the jury gave credence to those statements which are necessary to support their verdict, and disregarded those in contradiction thereof. The appellant has not brought up with the record the instructions given by the court upon the issues before the jury, and we must also assume that the issues to be determined by them were fully and correctly presented and pointed out, and that they were also correctly instructed upon all matters of law arising in the case pertaining to these issues. Garrison v. McGlockley, 38 Cal. 78.

1. It is contended by the appellant that, although the instrument of May 24th was only an option, and binding upon Smith alone, yet its acceptance by Buttner on the 29th of May made it a mutual contract, binding upon him as well as upon the appellant; and that, consequently, he has no right of action for its breach until after an offer of performance on his part, and a refusal by the appellant. The evidence, however, fails to show that the option contained in the instrument was ever so accepted by Buttner as to give Smith the right to insist that he should take the stock. The statement of Buttner to Smith, on the 29th of May, that he was ready to take the stock "according to the terms of the writing," was conditioned upon the performance of those terms by Smith, and, if Smith had then tendered him the stock, he could have enforced the payment by Buttner; but when Smith told him that he was unable to close the transaction because a portion of the stock was held by McCoy, the conditional acceptance of Buttner ceased to have any effect, and did not become operative. The extension by Smith of his agreement until the 9th of June, which he then indorsed upon the original instrument, and gave to Buttner, had the same effect as if that date had been originally inserted in the instrument, and gave to Buttner until that date in which to accept the offer. While the transaction in which Buttner let Smith have the $3,100 involved in this action had reference to the negotiation for this stock, and may have been induced by the fact that the option had been given, it is shown by the evidence that it was made after this extension of time had been given, and was independent of the transaction. As the offer was never accepted by Buttner so as to become a binding obligation upon him, the appellant could not have been prejudiced by excluding his testimony in reference to any understanding respecting its terms.

2. When the cause was submitted to the

jury, the court instructed them to give interest upon the sum of $3,100 from the date when the action was begun, and also directed the jury to make a special finding of the date at which the plaintiff made demand from the defendant for the return of this money. The jury found that this demand was made in the month of August, 1889, and the plaintiff thereupon moved the court to add to the verdict interest upon said sum of $3,100 from September 1, 1889, to the date when the action was begun. The court denied this motion, and the plaintiff has appealed therefrom. As the defendant was not entitled to retain the money after the plaintiff's demand therefor, his refusal to comply with such demand made him liable for interest thereon from that date (Civ. Code, § 3287); and the judgment should be modified by increasing the same as of the date of its entry in the sum of $377.26, the interest on $3,100 from September 1, 1889, to May 27, 1891, the date when the action was commenced. The order denying a new trial is affirmed, and the court below is directed to modify the judgment as above indicated.

We concur: GAROUTTE, J.; PATERSON, J.

102 Cal. 327

PEOPLE v. NESBITT. (No. 21,076.)

(Supreme Court of California. April 30, 1894.)

CRIMINAL LAW—OBJECTIONS TO INDICTMENT—FALSE PRETENSES.

1. Objections to an information, that its allegations are uncertain, are waived, unless taken by demurrer before judgment.

2. An information for obtaining money by false representations concerning property sufficiently describes it, if it sets it out exactly as represented by defendant.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

C. A. Nesbitt was convicted of obtaining property by false representations, and appeals. Affirmed.

T. J. Crowley, for appellant. H. V. Reardon and Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant, Nesbitt, appeals from a judgment of conviction upon a charge of obtaining property by false and fraudulent pretenses and representations. No demurrer was filed to the information, and it is now insisted that it is not sufficient to support the judgment. The material allegations of the information are as follows: (1) The defendant willfully and feloniously, and with intent to defraud one M. L. Merry of his property, made to him certain false and fraudulent representations and pretenses. (2) These representations and pretenses were that he, the said defendant, and one Joseph Johnson, were the owners of certain machinery, consisting of boilers, engines, and pumps; that if the said M. L. Merry would execute, jointly with said defendant and said Johnson, a promissory note for the sum of $500, he, the said defendant, and said Johnson, would execute and deliver to said M. L. Merry a bill of sale of said machinery, as security for his joining in the execution of said note. And then and there the said defendant, for himself and said Johnson, executed and delivered to said M. L. Merry a bill of sale of said machinery. (3) Said Merry, believing said statements, and being deceived thereby, was induced to, and did then and there, execute and deliver, jointly with said defendant and said Johnson, to the Bank of Chico, his promissory note for the sum of $500, payable to the Bank of Chico, and said Bank of Chico paid defendant $500. (4) Said note was the property of Merry, and of the value of $500. The facts constituting the offense here charged are somewhat complicated, but we deem them quite well stated. In the absence of a demurrer, there is no serious objection to be urged to the pleading. A greater portion of appellant's argument, assailing the information as an unsound pleading, is addressed to its alleged ambiguities and uncertainties, but these matters can only be raised by special demurrer. Their presence in the information is not fatal to a judgment rendered upon the trial of the case. As an example of defendant's grounds of complaint, he insists that the property referred to in the information is not described with sufficient certainty. If such be the fact, it is the fault of the defendant, and not the fault of the pleader. A description of the property forms a portion of the false pretenses and representations; and the pleader was bound to set out these pretenses and representations in the information exactly as they were made by the defendant, regardless of the fact of their indefiniteness and uncertainty. We think the better practice would have been for the district attorney to have made a direct allegation in the information charging the defendant with having defrauded Merry of his note, and then the statute defining the offense here charged would have been literally followed. But this same question was fully discussed in the very recent case of People v. Weiger (Cal.) 34 Pac. 826, and an information similar to the present one in this regard was there upheld. In that case it is said: "Deception deliberately practiced for the purpose of gaining an unfair advantage of another is fraud. Goods obtained by such practices are obtained by fraud. One deprived of his property by such means is defrauded."

We see nothing upon the other branch of the case discussed by counsel demanding extended consideration. The judgment is affirmed.

We concur: PATERSON, J.; HARRISON, J.

102 Cal. 338

NEARY v. GODFREY et al. (No. 15,239.)

(Supreme Court of California. May 1, 1894.)

DIVORCE—ASSIGNMENT OF HOMESTEAD.

Under Civil Code, § 146, providing that, in case of divorce, if the homestead has been selected from the separate property of either, it shall be assigned to the former owner, subject to the power of the court to assign it for a limited period to the innocent party, the court cannot assign it to the innocent party for a longer period than his life, and an assignment to him for 10 years is on the implied condition that he lives that long.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Ejectment by Mary A. Neary against Alice E. Godfrey, administratrix, and others. Judgment for defendants. Plaintiff appeals. Reversed.

Henry E. Highton, for appellant. Wm. R. Davis (W. Laird Hill, of counsel), for respondents.

GAROUTTE, J. This is an appeal from a judgment in favor of the defendants, entered upon an order sustaining a demurrer to the complaint, and the refusal of plaintiff to amend. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the facts which were thus claimed to be insufficient to entitle plaintiff to relief were substantially as follows: In 1884, the plaintiff, being then the wife of one George Godfrey, and owning the premises described in the complaint as her separate property, united with her husband in a declaration of homestead, which was duly recorded. Subsequently an action for divorce was brought by plaintiff against her said husband, and in that action a decree was ultimately entered granting the defendant therein, the husband, who had filed a cross complaint, a divorce on the ground of the extreme cruelty of plaintiff. In that proceeding the homestead property was set aside to the husband for the period of 10 years, and the language of the decree is as follows: "Said homestead and homestead right, and the exclusive use and enjoyment thereof, are hereby assigned and awarded for a limited period, to wit, for the period of ten years from January 7, 1889, unto defendant, the innocent party; and the said homestead is thereafter to go, and it is assigned thereafter to go, to plaintiff as her separate property." Subsequent to this decree, the husband, Godfrey, continued to reside on the premises so awarded to him, but died within the 10 years. Before his death he again married, this second wife being the defendant administratrix in the present action. She was residing upon this property at the commencement of this action, and seven years of the ten-year term prescribed by the decree has not yet expired. The present action is in ejectment, brought by the first wife for the recovery of the property included in the aforesaid decree.

The power of the court in which the divorce proceedings were pending to award the use of the homestead (the separate property of the plaintiff) was derived from section 146 of the Civil Code, which declares: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead shall be assigned as follows: * * * (4) If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." This provision of the law, respecting the length of time for which the homestead selected from the separate property of one spouse may be set aside to the other, is in all respects similar to those provisions of the Codes regulating the rights of the survivors of a family in such homestead property. See Civ. Code, § 1265, and Code Civ. Proc. § 1474. It is unnecessary to discuss what effect a decree of divorce, of itself, has upon homestead property as a homestead. In the present case the property has been dealt with by the decree of the court, and this litigation will be effectually disposed of by a construction of the terms of the court's decree in making a disposition of the property. The court could not award this property to the husband for a longer period than life; and if this decree, read in the light of the statute, will bear the construction that the right to the use ceased upon the death of the husband, regardless of the unexpired portion of the term of years, we are bound to give it such construction, for that was the limitation of the power of the court, and we must presume that the court intended to keep within its powers. As was said in Simpson v. Simpson, 80 Cal. 241, 22 Pac. 167: "The law did not authorize the court to assign the homestead, or any equitable interest in it, to the children, nor to the wife in trust for any purpose; and, in the absence of a reasonably clear expression to the contrary, the court must be presumed to have intended to act within the scope of its authority, and not to exceed it." Again, the court had the power to set aside the homestead to the innocent party "for a limited period;" but it is not necessary for us in this case to determine the exact meaning of the phrase "limited period," for it is conceded by all courts that such period cannot extend beyond the life of the party to whom the property is awarded. This principle is fully recognized in Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071.

In this case the respondent, as the widow of the deceased, and as the administratrix of the estate, seeks under the decree of the court to hold possession of the property for a term of seven years after Godfrey's death.

If the decree, in terms, had set aside the homestead to Godfrey for life, and to his heirs for a term of seven years, thereafter it would have been void upon its face to the extent of the seven-year term at least, for such a decree would have been clearly beyond the power of the court to make. If a decree of that character would have been void, the same results should not be countenanced and approved through the present decree by any process of indirection, if those results can be avoided within the law. As is said in Simpson v. Simpson, supra: "The authority of the court, in actions for divorce, to transfer the property of either party to the other, or otherwise to dispose of it, is purely statutory; and the statute did not authorize the court to create a trust in the homestead or community property, but only to assign it directly to the innocent party, 'absolutely or for a limited period.'" In Bollinger v. Manning, 79 Cal. 11, 21 Pac. 375, we have this language: "So the fact that the court, by its order, set aside the property on which the homestead had been declared 'for the use of the family,' and not expressly to Mrs. Manning, is of no consequence. The property was community property, and on the death of the husband the title vested absolutely in the surviving wife. Code Civ. Proc. § 1474. The form of the order was, therefore, immaterial, as it did not and could not change or affect in any way the widow's rights, but simply excluded the property from administration." In Watson v. Creditors, 58 Cal. 556, it was said: "The law fixes the rights of the parties, and the title by which the property is held; and when the statute declares that the title shall vest absolutely in the survivor, no order of the probate court could make it the joint property of the husband and children of the husband and wife." This principle was aptly put in Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206: "Although it is a court of general jurisdiction, yet, in the exercise of these powers, its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority or submitted to its decision." But any question of excess of jurisdiction by the court in awarding a homestead property of the present character to the innocent party for a fixed term of years, regardless of the death of such party prior to the expiration of the term, may be waived in this case. Indeed, grave difficulties arise the moment it is attempted by collateral attack to impeach a judgment of this kind upon the ground of excess or jurisdiction; for, viewed from a certain angle, it would seem that the validity of the judgment as transcending the limits of the court's authority is assailed by facts occurring subsequent to its rendition, to wit, the death of the party to whom the homestead property was awarded. The scope and effect of this decree necessarily must be limited to the life of Godfrey. It was a right assigned to him alone. It was purely personal in its nature, and when he died the right was gone. It was a personal right to a use assigned to Godfrey, the innocent party. The court had no power to assign it to any one else; and, it being a right to his own personal use, the necessity for it ceased with his death. The benign object and purpose of the statute had been satisfied when he died; and, construing the decree as being within the law, its mission also had been accomplished and fulfilled at that time. Godfrey had no further use for a homestead. His death marked the termination of the right under the law; and, reading the decree with the eyes of that law, we think it may be fairly said that a life limitation is inseparably connected with it. We do violence to no principle of construction in so holding. Unless the alleged unexpired term is an asset of Godfrey's estate, defendant has no standing in court; and that it is not such an asset we have no doubt. Godfrey had no interest under the decree that could be sold, none that could be levied upon by execution, none that could be inherited. If his estate has no interest, it follows that this administratrix, as such, has no legal standing here; and as his wife, regardless of her status as heir, she has no legal standing here. Her claim to the possession as a wife could only be based upon alleged rights passing to her under the decree in the nature of a homestead interest. But, manifestly, her claims in that direction are fruitless. The husband and wife were the only parties to the divorce litigation. The second wife, the defendant herein, was an unknown quantity at that time. The decree was not made in view of the possibility of a second marriage. She was not in the mind of the court. The decree was for the benefit of the husband alone, and it is not possible that the second marriage could deepen and broaden the effect of that decree. The fact of a subsequent marriage of the divorced husband, or that the husband was awarded the custody and care of his children by the decree, is necessarily immaterial. The court's powers came from the statute alone, and under the statute its power to award the property was limited to the innocent party alone. If it had attempted to award the property to others, the decree would have been absolutely void, as in excess of the power of the court. These things being true, it will not be presumed that the trial court intended to exceed its jurisdiction, and the terms of the decree will not be construed to that effect if any other construction is justified by its language and the law. A construction of the decree within the law may be fairly had;

and the award of the homestead property by the decree to Godfrey was for a term of 10 years, "but not exceeding his life." The judgment is reversed.

We concur: HARRISON, J.; PATERSON, J.

(4 Cal. Unrep. 631)

NUMSEN et al. v. LEVI et al. (No. 15,342.)

(Supreme Court of California. May 2, 1894.)

SALE—PURCHASE THROUGH BROKERS—REPUDIATION BY PURCHASER.

Where merchandise brokers present to purchasers a memorandum of the sale, or "bought note," which is accepted by them, the latter cannot repudiate the sale seven days after part of the goods are shipped, and two days after they received invoices of such shipment, because the sellers did not give a certain guaranty required by the purchasers' contract with the brokers.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Numsen and others against Levi and others to recover the contract price of certain oysters sold and delivered by plaintiffs to defendants. From a judgment for plaintiffs, and from an order denying a motion for new trial, defendants appeal. Affirmed.

Wal. J. Tuska, for appellants. Pierson & Mitchell, for respondents.

PER CURIAM. In November, 1891, Duval & Co., merchandise brokers at San Francisco, claiming to represent plaintiffs, who were doing business as oyster packers at Baltimore, Md., offered for sale to the appellants a lot of canned oysters at a shade off current rates. The offer was accepted upon condition that the packers should execute a written guaranty to appellants that the goods were as good in pack and quality as the goods of Farren & Co. or Fait & Weinbrenner, well-known oyster packers. A written order was given for 460 cases of "selects" and 670 cases of "standards;" the prices for both lots being fixed at $2,000. The oysters were to be delivered at Baltimore, in unlabeled cans,—the purchasers being allowed the cost of labeling,—as follows: "60 cases of selects, made up of 40 cases of 12 oz. and 20 of 6 oz. cans; and 90 cases of standards, made up of 25 cases of 10 oz., 20 of 5 oz., 25 of 8 oz., and 20 of 4 oz., cans,"—to be delivered at the cars in Baltimore, and sent to San Francisco by freight, the balance of the order by sailing vessel. Duval & Co. did not communicate with the packers, as they agreed to do, but took the written order given them by the appellants, and, without the knowledge of the latter, wired E. C. Shriner & Co., brokers at Baltimore, as follows: "Levi—selects, 340 12's, 126's; standards, 225 10's, 125's unlabeled; Numsen's labels, 124's, 222 8's, $1.45. Getz—200 selects, 12's unlabeled. Have sent shipping directions. Selects must fully equal best sample. Standards must be as good as the pool. Express us samples of both. Credit us overcharge on all 8's. W. M. Duval & Co." Upon receipt of this dispatch, Shriner filled the order by purchasing from the respondents 345 cases of standards,—225 cases of the 10 ounce, and 120 of the 5 ounce,—at the prices agreed upon by appellants and Duval & Co., and by purchasing from other parties the balance of the order, and delivered to the respondents a memorandum in writing (or "sold note," as it is called) for that portion of the order purchased from them. The note reads as follows: "Baltimore, Nov. 19, 1891. Bought of William Numsen & Sons, for account of H. Levi & Co., San Francisco, Cal. (description of the goods), terms 60 days or cash, less one and a half per cent. Hold for shipping directions. E. C. Shriner & Co." Thereupon Shriner wired to Duval & Co., to the effect that the respondents confirmed the sale to Levi & Co., upon receipt of which Duval & Co. made out a memorandum of sale, called a "bought note," and delivered it to Levi & Co., who have ever since kept it, and have never offered to return it. This bought note is in two parts,—the one covering the shipment by rail, and the other by sailing vessel. Copies of this bought note were mailed to Shriner & Co., and received by the former on November 25th; and on the last-named day they wrote to Duval & Co., confirming the sale, but no written guaranty was ever furnished. Duval & Co. had no correspondence with plaintiffs on the subject, and had no instructions from them. On December 2d, in accordance with instructions from Shriner & Co., the respondents delivered the rail shipment at Baltimore, and forwarded to appellants the invoice by mail; and on December 10th delivered the balance of the goods, and forwarded the invoice by mail. In about a week after the sale the appellants complained to Duval & Co. that the respondents had failed to confirm the terms of the sale in that they had not given the guaranty required by the contract. On December 7th the appellants for the first time disclaimed the sale. At that time the market for standards had gone down. Upon receipt of the invoices the appellants wrote to Duval & Co. that, as they had not received a guaranty from the Baltimore packers as promised, they should decline to receive any goods they might pack for them under the memorandum. Upon receipt of this letter (December 8th) Duval & Co. at once wired Shriner that appellants were trying to repudiate the contract, but nothing of this was known to respondents until December 15th, when they received from the appellants a letter dated at San Francisco, December 9th, saying that they were surprised at the shipment, as they entered into negotiations only with Duval & Co., which were not consummated; that they had not even received any invoice; and that they declined to receive the shipment, and requested respondents to make some arrangement by mail relative to the same. Other correspondence followed, in which the appellants insisted there was not a sale, and refused to pay for the oysters, whereupon this action was brought by respondents to recover the sum of $1,074.62. Findings and decree were entered in favor of plaintiffs, according to the prayer of their complaint, and from this judgment, and an order denying their motion for a new trial, the appellants have appealed.

Upon the facts stated we think that the judgment was right, and should be affirmed. It is a well-established rule that the broker is the agent for both parties. When the bought note of November 19th was furnished by Duval & Co., and accepted by the appellants, the sale could not thereafter be set aside except by mutual agreement of the vendors and vendees. In procuring the confirmation of the sale by respondents, Duval & Co. acted as their agents, and in delivering the same to the appellants they acted as the agent of the latter within the well-established rule and the custom of brokers. We think the note was a sufficient memorandum of the sale within the provisions of subdivision 4, § 1624, Civ. Code. The mere fact that the name of the vendor did not appear in the bought note did not render the latter void, it being clear that Duval & Co. were acting as brokers for the vendor. The sold note delivered by Shriner & Co. to the respondents contains the names of both the vendor and vendee, and is sufficient, under the custom of the trade, if the names of the contracting parties appear upon either one of the notes. There is no contention, as we understand it, that the oysters were not as good as Farren & Co.'s or Fait & Weinbrenner's. The appellants did not repudiate the sale until the invoices of the first shipment had reached them, five days after the shipment; and the letter of December 9th shows that they waited two days after the receipt of the invoices before they wrote to the respondents repudiating the sale. This was twenty days after they had received the memorandum from Duval & Co., reciting that the goods had been sold to H. Levi & Co., and which gave a description of the goods, and the terms of the sale. Under these circumstances we think the respondents are now estopped from denying the validity of the sale. Judgment and order affirmed.

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102 Cal. 413

FLETCHER v. PRATHER et al. (No. 15,667.)

(Supreme Court of California. May 3, 1894.)

Amendment of Statute — Effect—Sewer Construction—Injunction — Sufficiency of Contract.

1. Const. art. 4, § 24, provides that laws can only be amended by re-enactment at length. Pol. Code, § 325, provides that a statute amended in part is not repealed, but the unchanged portions are considered as having been the law from the date of enactment, and the amended portion as dating from the amendment. *Held*, that the amendment of a statute does not have the effect of repealing it, so that a subsequent amendment of the original statute, without referring to the first amendment, is inoperative.

2. The construction of a sewer under St. 1885, pp. 150–151, will not be enjoined, at the instance of one liable to assessment therefor, because the bidder to whom the contract was awarded failed to advance the incidental costs, as required by St. 1889, p. 162, § 5, where the persons to whom such costs would accrue waived them, in writing.

3. A contract for the construction of a sewer under St. 1885, p. 151, is not void, as failing to fix the time for the commencement of the work, when the superintendent of streets, at the time it was executed, and with the knowledge of the contractor, wrote, "The work to be commenced within 14 days from date of contract," at the end of the contract.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by George R. Fletcher against W. L. Prather and others to enjoin the construction of a sewer. From a judgment sustaining a demurrer to his complaint, plaintiff appeals. Affirmed.

Fred. L. Button, for appellant. Davis & Hill, H. T. Creswell, and L. J. Welch, for respondents.

HAYNES, C. Under proceedings had by the board of supervisors of the city and county of San Francisco, a contract was let to the defendant Prather for the construction of a sewer constituting an outlet of a system of sewers in that part of the city known as the "Richmond District." The proposed sewer, or a considerable portion of it, is not to be constructed in a public street, but in private lands, the right of way for which has been granted by the owners. Fletcher, the appellant here, is the owner of lands within the assessment district, upon which the cost of constructing the sewer would be assessed, and brought this action to enjoin its construction. The several defendants demurred to the complaint, the demurrers were sustained, and, the plaintiff declining to amend his complaint, judgment was entered dismissing the action, and from that judgment he appeals.

The principal contention of appellant is that the statute under which the work was ordered is invalid. Section 24 of an act approved March 18, 1885, commonly known as the "Vrooman Act," authorized the construction of sewers "upon or in any street, lane, alley, court or place in such city," but did not enumerate, among the places in which sewers might be constructed, private property over which the right of way for a sewer had been secured. In 1889 the legislature passed an act entitled "An act to amend sections two, * * * twenty-four, * * * of an act entitled, 'An act to provide for work upon streets, * * * and for the construction of sewers within municipalities,' approved March 18, 1885." St. 1889, p. 157. The only change made by the amendment of 1889 in section 24 of the original act was made by inserting, in addition to sewers, culverts, etc., authorized to be constructed, the words "or cesspools." In 1893 another act was passed, entitled "An act to amend sections two, twenty-four and thirty-seven of an act entitled, 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885." St. 1893, p. 172. In said section 24, as amended in 1893, the following clause was inserted: "And also for drainage purposes, over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same." Appellant's contention is that, by the amendment of 1889, section 24 of the act of 1885 was repealed, and ceased to exist as such, and the act of 1893, which by its terms amended section 24 of the original act, was an attempt to amend a section which had ceased to exist; that, to accomplish the purpose intended, the act of 1893 should have amended "section 24 of the act of 1885 as amended by the act of 1889." It is perfectly clear that that which does not exist cannot be amended. If an entire act or an entire section is wiped out of existence by a repeal, there is nothing to amend. It is as though the act or the section had never been enacted. But it does not logically or necessarily follow that an amendment of a section of an entire act upon a particular subject has that effect. Whether by force of any provision of the constitution, or by settled rules of statutory construction, it has such effect, is the question to be considered.

The constitution provides as follows: "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." Article 4, § 24. In the absence of a constitutional provision of this character, a section of an act might be and often was amended in one or more of four ways: First, by striking out certain words; second, by striking out certain words and inserting others; third, by inserting certain words; and, fourth, by adding other provisions. This mode of amendment did not repeal or disturb the existence of the parts of the original section not stricken out; but the objection to this mode of amendment was that it tended to confusion and uncertainty, owing to the difficulty of correctly reading the original section with the amendments,—a difficulty which largely increased with each subsequent amendment. This uncertainty not only affected those who were called upon to interpret statutes thus amended, but it begat uncertain and confused legislation, since every legislator, before he could intelligently vote upon proposed amendments, must first know with certainty how the section, with all previous amendments, read, and what it meant. So far as the original provisions of the section remained unchanged, they were in force from the date of the original enactment; and, so far as they were changed, the new or changed provisions took effect from the date of the amendment. So far as this is concerned, no reason for any change in the operation of an amended statute is suggested in the provision of the constitution above quoted, nor is any reason for a change apparent. We therefore conclude that its whole purpose and effect are to avoid the evils resulting from the mode of amendment which might and did prevail in the absence of such provision, and that it was not intended that the section, as amended, should not take its place by its appropriate number in the original act. The provision in our first constitution in relation to amendment of statutes was the same as that contained in our present constitution; and in Billings v. Harvey, 6 Cal. 383, in commenting on this provision, it was said: "The re-enactment creates anew the rule of action, and, even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands, to all intents, as if absolutely and expressly repealed." Section 325 of the Political Code, afterwards enacted, as it is said, to meet the foregoing decision, is as follows: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." In Dillon v. Saloude, 68 Cal. 270, 9 Pac. 162, in speaking of section 3495, Pol. Code, which was amended in 1880 to conform to a provision of the constitution of 1879, after quoting the amendment, it was said: "The words quoted were added to the section, and 'are to be considered as having been enacted at the time of the amendment,' while 'the portions which are not altered are considered as having been the law from the time when they were enacted;'" citing the foregoing section of the Political Code. And, as if to emphasize the meaning of said section 325, section 330 of the same Code provides: "An act amending a section of an act repealed is void." Section 24 of the act in question, as amended in 1889, took the place of the original section 24 in the act of 1885; and though the reference to it in the act of 1893 would have been more specific if it had added, "as amended by the act of 1889," the intention of the legislature is evident, and the effect is to amend the amended section. This precise question arose in Com. v. Kenneson, 143 Mass. 418, 9 N. E. 761, where an act passed in 1886 purported to amend certain sections of the Public Statutes which had been amended in 1885, without any reference to the amendatory act of 1885. The argument there, as here, was that an amendment of a repealed statute is a nullity. It was held that the intention of the legislature was plain, and the amendment of 1886 was sustained. State v. Brewster, 39 Ohio St. 653, involved the same question. The syllabus upon this point correctly states the decision, as follows: "Where a section of the Revised Statutes is repealed, and re-enacted in a changed form, a subsequent statute, which, in terms, again repeals and re-enacts the original section in still another form, is, as a general rule, to be regarded as a repeal of the section in its amended form, and the section in its last form will take its place in the revision as part of the Revised Statutes." In Oshe v. State, 37 Ohio St. 501, section 6941 was amended March 9, 1880. After the amendment, Oshe was indicted for selling liquor "in violation of law, to wit, in violation of section 6941 of the Revised Statutes of Ohio," no reference being made to the amendment. The court said: "At the time of the passage of the amended section, it took the place of the original section of the revision, and was thereafter the only section 6941 of the Revised Statutes in force. The reference in the indictment, therefore, to that section of the Revised Statutes, must be understood as referring to the section then in force." See, also, Brigel v. Starbuck, 34 Ohio St. 280, and cases there cited. In State v. Warford, 84 Ala. 15, 3 South. 911, it was held that "a statute enacted in 1856 having been amended in 1868, and thereby repealed, under the constitutional provisions then in force, a subsequent statute, of 1885, amending the statute of 1856 by date and title, but not mentioning the former amendatory law, supersedes and repeals such amendatory law." Blake v. Brackett, 47 Me. 28, is also directly in point. In Kamerick v. Castleman, 21 Mo. App. 590, Phillips, P. J., said: "I understand the rule of construction, in this respect, to be that where a section of a statute is amended, and the amendment is in such terms that it takes the place of such section, the statute in which the original section stood, as to future acts, is to be regarded as if the amended section was incorporated therein. So much so is this the rule that if, by an act subsequent to the amendatory act, the section of the original statute be repealed, the amendment which stood in its stead is also repealed;" citing Greer v. State, 22 Tex. 588; McKibben v. Lester, 9 Ohio St. 627; Holbrook v. Nichol, 36 Ill. 162; and State v. Ranson, 73 Mo. 88. That the intention of the legislature was to amend the section as amended by the act of 1889 is apparent from the fact that the amendment of 1893 follows the language of the amendment of 1889 as to a provision not contained in the act of 1885, and changes it only by inserting a provision covering the construction of sewers over a right of way acquired over private property. I have cited a larger number of cases, and quoted more freely from them, than may be thought necessary, because the authorities are not uniform. Sutherland, in his work on Statutory Construction (section 132), takes the opposite view, and says: "An amendment of a section after it has been thus displaced [by amendment] is void." The cases he cites in support of this statement are, with one or two exceptions, from the Indiana Reports, and these cases are cited by appellant. The leading case in that state is Blakemore v. Dolan, 50 Ind. 194. The facts in that case were that in 1865 an act was passed requiring the common council or board of trustees of each incorporated town, at their first regular meeting in April of that year, and biennially thereafter, to elect three school trustees. In 1873 that act was amended, requiring the election, at the first regular meeting in April of that year, of three school trustees, who should hold their offices for one, two, and three years respectively, and thereafter one should be elected each year. In 1875 the act of 1873 was amended, requiring the common council or board of trustees, at their first regular meeting in June of that year, to elect three school trustees, who should hold their offices for one, two, and three years, respectively, and thereafter one should be elected each year. These amendments were regularly made, so far as the reference to the acts amended was concerned, in that respect being wholly different from the case at bar. It was there held that by the amendment "the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words; and it is upon this principle that it has been held that a section which had been once amended cannot be again the subject of amendment, but the section as amended must be amended." Goodno v. City of Oshkosh, 31 Wis. 127, cited by appellant, was correctly decided, but it involved another question. There a section of the Revised Statutes was "amended so as to read as follows," the amendment consisting of an addition constituting an exception to the general provisions of the section. It was held that the provisions of the original section became incorporated in the section as amended; that the repeal of the amended section went to the whole of it; and that, under the rule of construction adopted by statute in that state, a prior statute was not revived by the repeal of an act repealing such former statute. Upon this branch of the case, we conclude that the act of 1893, in question here, is a valid and constitutional enactment.

In view of the conclusion reached as to the validity of the statute, it becomes necessary to consider certain points made by appellant touching the regularity of the proceedings under the statute.

Appellant's next point is that, under section 5 of the Vrooman act, "before being entitled to a contract, the bidder to whom the award is made * * * must advance to the superintendent of streets for payment by him, the cost of publication of notices, resolutions, orders or other incidental expenses and matters required under the proceedings prescribed in this act." St. 1889, p. 162. The complaint shows that in this case "all persons entitled to payment of incidental expenses by the superintendent of streets, in writing, waived their right to have such expenses collected by the superintendent in advance from the contractor, as required by the section quoted." Every statute must have a reasonable construction, made in view of the purposes of the enactment. This provision was made for the benefit of those to whom such expenses were payable, and for the protection of the city, or the superintendent of streets. It is not a matter which can in any way affect appellant, or others whose property may be assessed for the construction of the sewer. It neither increases nor diminishes the amount of the assessment, whether these expenses are advanced by the contractor, or paid afterwards. Suppose the persons entitled to these incidental expenses had given the bidder receipts showing payment in full, and these receipts were exhibited to the superintendent of streets. Must he still require the bidder to pay to him the amount of these expenses already paid, and, if he fails or refuses to do so, decline to enter into the contract? Or would such direct payment by the bidder to these third persons, instead of the street superintendent, make the contract invalid if it should afterwards be entered into? If not, the written waiver above mentioned would not have the effect to invalidate the contract.

It is further urged by appellant that the contract signed by the superintendent of streets and the appellant does not fix any time for the commencement or completion of the work, unless a certain stipulation filed in court, as to certain papers annexed to the contract, shows a substantial compliance with this requirement. The stipulation referred to is intended to be considered as an amendment to the complaint, and shows that attached to the contract, at the time of its execution, was a printed copy of the specifications referred to in the body of the contract, in which it was stated that "the work must be done to the satisfaction of the superintendent of streets, highways, and squares, and must be completed within ninety days from the signing of the contract;" and at the end of said printed paper, below the signature of "John A. Russell, Clerk," the superintendent, at the time the contract was executed, and with the knowledge of Prather, the contractor, wrote the following: "The work to be commenced within fourteen days, and completed within ninety days, from the date of the contract," and signed the same with his official signature. The stipulation further states that this addition was made and signed with the knowledge of the contractor, and was understood by him to have been done for the purpose of fixing the time of commencing and completing the work. I think this was a compliance with the statute. Section 6 of the act "to provide for work upon streets," etc., "within municipalities," approved March 18, 1885 (St. 1885, p. 151), provides that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time, under the direction of the city council." Within the limits fixed by the statute, the superintendent of streets has the power expressly given him to fix the time for the commencement and completion of the work. It is not a matter left to be fixed by the agreement of the contractor and superintendent. The contractor makes his bid in view of the power given to the superintendent, and its limitations, and it is only necessary that it should be definitely fixed, with the knowledge of the contractor; and the time thus fixed then enters into, and becomes a part of, the contract. The time may be fixed either in the body of the contract, or, as here, indorsed upon it with the knowledge of the contractor, and authenticated by the official signature of the superintendent. There is nothing in Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228, or in Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310, inconsistent with this view. The statute and the indorsement make it part of the contract, without the signature of the contractor to the indorsement.

In view of the conclusions reached, it is not necessary to consider whether the city and county of San Francisco was improperly joined as a party defendant. The judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

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102 Cal. 381

PEOPLE v. DINSMORE. (No. 21,095.)

(Supreme Court of California. May 3, 1894.)

CRIMINAL LAW—TEMPORARY DISCHARGE OF JURY.

After the impaneling of the jury, and commencement of a trial, it was an abuse of discretion to discharge the jury for 63 days, on motion of the state, because one of its witnesses was unable to attend, where the nature of the offense charged was likely to create prejudice against the defendant in the community from which they were drawn.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

F. A. Dinsmore was convicted of rape, and appeals. Reversed.

Carroll Cook, Mahon & Laird, and S. N. Reed, for appellant. Atty. Gen. Hart and J. W. Ahern, for the People.

GAROUTTE, J. Appellant, Dinsmore, was convicted of the crime of rape, and appeals from the judgment and order denying his motion for a new trial. Many grounds are relied upon for a reversal of the judgment and the granting of a new trial, some of which we will proceed to notice.

We think the evidence sufficient to support the verdict. The course adopted in the impanelment of the jury was irregular, and not in line with the established practice (see People v. Russell, 46 Cal. 121); but it is not necessary to determine whether or not the irregularity occurring in the formation of the jury was prejudicial to the rights of appellant. We also think the information is sufficient to support the verdict and judgment. Many of the objections made thereto are technical in the extreme, and it is now too late to bring them to the attention of the court. The information appears to have been filed October 15, 1892, while it charges the offense to have been committed October 28, 1892. It is entirely apparent that a mistake has occurred in the stating of one of these two dates, and this mistake might well have been corrected by the trial court by some appropriate proceeding; but we think no such irregularity is here presented as to be fatal to the case. The information alleged, in terms, that the acts charged were committed prior to the day of its filing, and in the year 1892, thus bringing the offense without the bar of the statute of limitations. The particular date alleged in the information was not material to the sufficiency of the charge, and we see nothing in this point to justify a new trial of the action.

The remaining objection to which we shall direct our attention is more serious, and, we are satisfied, demands a new trial of the case. During the progress of the trial, and some days after the jury had been impaneled and evidence taken, a witness for the people, while upon the stand, became indisposed, and unable to proceed further in giving her evidence. At the suggestion of the court, physicians examined her condition, and reported that it would not be safe for her to again take the witness stand, for the purpose of continuing her testimony, within the next two months. Thereupon, against the objection of the defendant, the court made an order continuing the case for a period of 63 days; instructing the jurors to return into court at that time, and allowing them to return to their homes, and there remain until the expiration of the continuance. We cannot countenance the procedure here taken, and feel that the action of the court was such an abuse of the discretion reposed in it that another trial must be had. The prosecution was placed in a peculiar and embarrassing position by the sudden sickness of the witness, if her testimony was important. At the same time the conditions were occasioned by no fault or act of the defendant, and no right of his should be sacrificed, or even jeopardized, thereby. The offense of which the defendant was charged was a peculiarly aggravated one, and one which was well calculated to arouse the feelings and passions of the people of the surrounding country; and, while it will not ordinarily be presumed that jurors have been improperly influenced simply because an opportunity for the practice of improper influence has been presented, still this case is an exceptional case, and presents a most exceptional state of circumstances. The court is required to instruct the jury at every adjournment as to their duties, and especially as to their conduct during the time extending over an adjournment. The law is most jealous of these matters, in the interests of justice to all parties, and its care and anxiety to have a fair and impartial jury in every case is fully exemplified by the provisions of both constitution and statute. These 12 jurors, returning into the jury box after roaming at large throughout the county and state for a continuous period of 63 days, associating with their neighbors and friends and the world at large during all this time, and without the care and protection of the court for this long period, are not the jurors the law contemplates for the trial of a defendant charged with a serious offense. Conceding them to have been ideal jurors when the court declared the continuance, the chances largely preponderate that, under the circumstances here depicted, one or more of them did not return to the box at the expiration of the continuance in the same frame of mind as to the case as when he left it. It is highly improbable that all of them returned with minds uninfluenced by some circumstance occurring during their long vacation. While the question as to what constitutes a reasonable continuance for the purpose of securing the personal attendance of a sick or absent witness is one necessarily resting largely in the discretion of the court, and while we do not attempt, in this case, to establish any fixed rule—and, indeed, while it would be impossible to lay down any fixed rule—by which all cases presenting this question could be determined, still we are well satisfied that the course here adopted must not be allowed to pass into a precedent. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.

(102 Cal. 330)

PEOPLE v. FLOOD. (No. 21,057.)

(Supreme Court of California. May 1, 1894.)

CRIMINAL LAW—GRANT OF NEW TRIAL—REVIEW ON APPEAL.

1. On appeal from an order granting a new trial, general in its terms, it will not be assumed that it was granted on one particular ground when others were properly presented.

2. On appeal from an order granting a new trial, an opinion of the trial court, giving his reasons therefor, cannot be reviewed.

3. On appeal from an order granting a new trial, the action of the lower court will be affirmed, if there is any ground on which it can be sustained.

4. The grant of a new trial because the verdict was contrary to the evidence will not be disturbed on appeal, except for manifest abuse of discretion.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

One Flood was convicted of embezzlement, and, from an order granting him a new trial, the people appeal. Affirmed.

Atty. Gen. Hart (Galpin & Zeigler, of counsel), for the People. W. W. Foote, Wm. H. Chapman, Carroll Cook, and Knight & Haggerty, for respondent.

HARRISON, J. The defendant was convicted of the crime of embezzlement, and, before judgment was pronounced upon the verdict, moved for a new trial, upon several grounds, one of which was that the verdict was contrary to the evidence. This motion was argued before the court, and taken under advisement; and thereafter, on the 7th of July, 1893, the court made the following order: "In this cause, on this day, the defendant, his counsel being present in court, counsel for defendant having heretofore presented a motion for a new trial, and the same having been submitted to the court for consideration and decision; and now, the court having fully considered the same, being fully advised in the motion herein, it is ordered that the motion for a new trial be, and the same is hereby, granted." From this order an appeal was taken by the people, and thereafter a bill of exceptions was settled by the judge before whom the case was tried, which purports to contain the instructions of the court, and its rulings, during the trial, and all the testimony and evidence offered by either party, or admitted in evidence, upon the trial of the cause. In the bill of exceptions is also an opinion of the judge, given by him at the time of making the above order, in which he holds that he committed an error in a certain instruction given by him to the jury; and the argument on behalf of the people upon this appeal is chiefly directed to a discussion of the correctness of this instruction, and the matters to which it refers. We are not at liberty, however, to assume that the court granted a new trial merely because it was of the opinion that it had committed an error in this respect. The motion was made upon other grounds than this; and the order being general in its terms, and not specifying or limiting the grounds upon which it was made, in determining whether it is correct or erroneous we can only consider it in the form in which it was entered. The opinion of the judge in making the order is not a part of the order itself, but is merely his reason for making the order, and is not subject to judicial review. In Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, the court, in its order granting a new trial, specified certain grounds upon which it made the order, and denied the motion "on all other grounds embraced in said motion, save said ground aforesaid." We held that the court could not thus limit the party moving for a new trial to a review of the ground specified in the order, but that "upon an appeal from that order, this court will review the entire record upon which the order was based; and, if there be found any error in the record which would have justified the court in making the order, the order will be affirmed, upon the same principles that an order sustaining a demurrer to a defective complaint will be sustained, even though the ground upon which the trial court sustained it may be held untenable." In that case we also said: "This rule has a limitation in cases where one of the grounds upon which the new trial is sought is the insufficiency of the evidence to justify the verdict or decision. If, in such a case, the trial court in its order granting a new trial excludes this as a ground of its action, by direct language, and the record shows that there was a conflict of evidence, this court, upon the same principles that cause it to affirm an order granting or denying a new trial upon that ground, will accept the conclusion of the trial court, and not reexamine the evidence." From these propositions follows the corollary that if one of the grounds of the motion for a new trial is that it is contrary to evidence, and the order does not specify the ground upon which the new trial is granted, it must be held here that, if there is any ground upon which it can be sustained, it must be affirmed; and that, as the granting or denying a motion for a new trial upon the ground that the decision or verdict was contrary to evidence is largely within the discretion of the trial court, its action will not be reversed, unless its discretion in this respect has been abused, whether this be the only ground upon which the motion is made, or one of the several statutory grounds.

The Penal Code (section 1181, subd. 6) authorizes the court to grant a new trial when the verdict is contrary to law or evidence; and, whenever the trial court is of the opinion that the evidence upon which the conviction was had was insufficient to justify the verdict, it is its duty to grant a new trial, and its action in this respect will not be reversed in this court, unless it shall be shown that there was a manifest abuse of its discretion. People v. Baker, 39 Cal. 686; People v. Ashnauer, 47 Cal. 98; People v. Hotz, 73 Cal. 241, 14 Pac. 856; People v. Lum Yit, 83 Cal. 130, 23 Pac. 228. The appellant herein has not shown any violation of this rule, and an examination of the record does not enable us to say that the court was not justified in its action. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

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102 Cal. 370

KRUMB v. CAMPBELL. (No. 15,220.)

(Supreme Court of California. May 3, 1894.)

ACTION ON CONTRACT.

Defendant agreed with certain heirs to look after their interests up to and including final settlement, for a per cent. of the amount received by them, and pay his own expenses, such commission to be paid as the proceeds were distributed. He then agreed to pay plaintiff for assistance two-fifths of the net amount received by him. *Held*, that plaintiff was not entitled to compensation until defendant had completed his contract with the heirs, and his action prior thereto, to enforce payment, was premature.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Louis Krumb aginst James H. Campbell. From a judgment for plaintiff, defendant appeals. Reversed.

D. M. Delmas and Kittredge & Krafft, for appellant. Frs. E. Spencer, for respondent.

GAROUTTE, J. Appellant insists that this action is prematurely brought, and the conclusion reached by the court as to that contention is determinative of the litigation. The facts of the case may be briefly stated: On the 8th day of January, 1888, the appellant entered into an agreement with certain heirs of Charles Lux, deceased, whereby he engaged to give his services as an attorney to them throughout the administration of the estate of said deceased, and bear his own expenses in so doing, and, as compensation therefor, said heirs conveyed to him 3 per cent. of their interest in said estate. On the 14th day of January, 1888, the appellant and the respondent entered into an agreement whereby said respondent agreed to aid the appellant in carrying out his agreement with said heirs, and said appellant granted to him two-fifths of the amount realized by him under his agreement with the heirs, after defraying the actual disbursements of appellant in fulfilling his obligations under said agreement. The administration of the estate of Charles Lux, deceased, is still pending and unclosed, but, as the appellant has received certain sums of money aggregating about $18,000 under his agreement with said heirs, by virtue of partial distributions of the estate, respondent claims two-fifths thereof after deducting expenses incurred by appellant up to that time; and this action is brought to recover the said two-fifths, amounting to about $7,000.

For the purpose of determining whether or not respondent's (Krumb's) cause of action had accrued at the time he filed his complaint, it is necessary to consider the contracts entered into between these various parties, for it is upon the interpretation and construction of these contracts that plaintiff's right to a present cause of action is weighed and measured. If plaintiff's contract is an entirety, and he has bound himself thereby to give his services to defendant during the entire administration of the estate, it would seem that no recovery could be had upon the contract until he had rendered all the services stipulated to be performed. Defendant agreed with the Lux heirs, in consideration of 3-100 of their interest in the estate, that he would "perform any and all legal services necessary and proper to be performed in and about the said estate of Charles Lux, deceased, as the attorney of said parties of the first part, in representing them and their several interests therein, to and including the final settlement of said estate, and the final distribution thereof; and it is further agreed that said party of the second part shall faithfully perform his duty and all legal services for the benefit of said parties of the first part, * * * and that all his personal expenses and outlay in and about said services shall be borne by him individually, and at his own costs, without charge to the said parties of the first part." Under these provisions of the contract, it cannot be questioned but that the defendant bound himself to render his services to the Lux heirs as long as the estate remained in course of administration. The contract entered into between plaintiff and defendant was made a few days later. It refers in detail to the execution of the prior contract from which we have just quoted, and then proceeds: "Now, this indenture witnesseth that the said Louis Krumb hereby covenants with said J. H. Campbell that he will render all aid and assistance in his power, in such manner and ways as said party of the second part may direct, to facilitate the labors of the said party of the second part under the said agreement, and will do all acts and things lawful and proper to be done, which said party of the second part may require to further and aid the labors of said party of the second part in carrying out the terms of said agreement. In consideration of the foregoing covenants, and subject to the terms of said agreement, the party of the second part hereby grants and assigns to said party of the first part, his executors or administrators, two-fifths of the net amount of money and property realized by said party of the second part from the said estate of Charles Lux, deceased, under the terms of said agreement, after defraying the actual disbursements of said party of the second part in fulfilling his obligations under the said agreement, as the same shall hereafter be ascertained." The defendant, Campbell, having bound himself to render his services during the entire progress of the administration of the estate, we see no escape from the conclusion, in view of the plain provisions of this contract, that plaintiff also bound himself to render his services to defendant during the entire progress of the administration of the Lux estate, and that estate is now in progress of administration. Final distribution has not yet been had, and it does not appear from the record at what time in the future that event will occur. Reading the two contracts together, it must be held that the plaintiff's term of employment ends only when defendant's labors are no longer demanded by the Lux heirs under his contract with them.

Is plaintiff entitled to a partial payment as his term of service progresses? It must be borne in mind that the present action is not based upon a rescission of the contract. No default upon the part of defendant is alleged or proven. No act of his amounting to a prevention of performance is relied upon. No breach of any kind is claimed, but, upon the contrary, plaintiff stands upon the contract as the basis of his recovery. The compensation as fixed by its terms forms the measure of his prayer for judgment. Its present vitality is conceded and affirmed by the whole litigation. After a careful consideration of the various terms of these contracts, we are forced to the conclusion that the one to which plaintiff is a party must be considered as an entirety, and that plaintiff must carry out and perform all the covenants upon his part to be performed as a condition precedent to his right of recovery. It is apparent that defendant is entitled to his compensation as the administration progresses. His contract expressly so provides, but we look in vain for anything in the agreement indicating such a purpose as between these two parties litigant. It is not possible to see how the amount of plaintiff's compensation can be ascertained until the administration is closed. His compensation is a percentage of a net amount, and that net amount is impossible of ascertainment until the estate is finally settled and distribution had. This net amount is ascertained by deducting from defendant's compensation, in gross, the amount of his personal expenses incurred in the conduct of the business of his clients, the Lux heirs. The estate still being in the probate court, not fully administered, the amount of defendant's personal expenses is an unknown quantity, for only future events can determine what those expenses will be. We have no definite knowledge as to the true status of this estate. We know not what proportion of the estate has been administered upon, and passed from the jurisdiction of the probate court by its various decrees of distribution. Perchance the defendant has received practically his entire compensation under his contract, and at the same time his labors thereunder may have but fairly begun. His compensation may be fully paid, yet his disbursements upon his expense account may all be before him. His future expenses being a matter not susceptible of calculation, it cannot be said that plaintiff is entitled to recover two-fifths of the amount thus far received by defendant; nor even two-fifths of the present net amount received, for there can be no net amount, within the meaning of the contract, until all the labor is performed, and all defendant's expenses incurred. Not knowing what further compensation defendant may be entitled to, and not knowing the amount of expenses yet to be incurred, it is impossible to say that plaintiff, under his contract, is entitled to the amount sued for in his complaint. He might not be entitled to that amount upon the final settlement of the estate.

Again, plaintiff's services to defendant were to extend throughout the accomplishment of a certain undertaking, to wit, the administration of an estate. It does not appear to be contemplated by the contract that he was to receive his compensation in advance. The amount he here seeks to recover may form the bulk of his compensation, and yet the bulk of his labor may be before him. Upon a recovery here for services not yet performed, his future ardor for labor in the interests of his employer would probably be dulled, and possibly his further valuable services be lost entirely. Defendant could hardly be required to pay for services not yet performed, and then look to the courts for redress in case his employe should forsake his employement. We see no question of authority or precedent here involved. The whole matter appears to be entirely one of the true construction of the terms of this contract.

For the reasons stated, we think the contract, both as to the subject-matter and the consideration, is entire, and that the compensation that plaintiff is attempting to recover in this proceeding has not been earned, and will not be earned until he has fully performed all the labors required of him under his agreement. The action is prematurely brought, and the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.

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102 Cal. 384

PEOPLE v. GREENING. (No. 20,979.)

(Supreme Court of California. May 3, 1894.)

ARSON—INDICTMENT—EVIDENCE—ARGUMENT.

1. A building bought by N., who afterwards conveyed an undivided half of it to his partner, T., is sufficiently described as "a building belonging to the firm of N. & T., a partnership composed of N. and T."

2. When accused has made statements to the district attorney and sheriff, which the court reporter has taken down in shorthand, and written out, and has testified that his longhand transcript truly sets out accused's statements, it is not error for the district attorney in his argument to read from said transcript, though not introduced in evidence.

3. When a state's witness has testified that after defendant had been drinking in his house he went with him to burn the barn, and when defendant set fire to it witness fired a pistol, the concerted signal between him and the police, a cross-examination as to previous talks between witness and others with the police, to show that the officers knew that the fire would be set, and were near by to arrest accused, is immaterial, and its exclusion harmless, when defendant has admitted that he set the fire. Beatty, C. J., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

George Greening, convicted of arson in the second degree, appeals. Affirmed.

Barham & Bolton, for appellant. Atty. Gen. Hart, for the People.

HARRISON, J. The defendant was convicted of arson in the second degree, and has appealed from the judgment.

1. The property which he is charged with having burned is described in the information as "a building belonging to the firm of Noonan & Towey, a partnership composed of P. H. Noonan and Peter Towey." At the trial it was shown that Noonan & Towey were in partnership, engaged in business as butchers, and that the building was used by them in their business at the time it was burned; that the property had been bought by Noonan some years previously, and that he had afterwards conveyed an undivided half of it to Towey. This was sufficient to identify the property destroyed with that which was laid in the information. People v. Shainwold, 51 Cal. 468. It was immaterial, for the purposes of the trial, whether the building was held by Noonan & Towey as cotenants or as joint tenants. Real property may be owned by a partnership (Civ. Code, § 684), and the conveyance to the individual partners, in which they are styled as composing a firm, will be operative to vest in them the title according to the terms of the deed. McCauley v. Fulton, 44 Cal. 355.

2. While the defendant was in the county jail after his arrest, he made certain statements to the district attorney and sheriff, which were taken down in shorthand by a stenographer, and afterwards written out in longhand. The stenographer was called as a witness at the trial, and in his testimony gave these statements at length, refreshing his memory from his shorthand notes. He also had the longhand notes that he had written out, and stated that they were a true and correct statement of what the defendant had said. During the argument to the jury the district attorney proceeded to read to the jury from this statement written out in longhand, to which the defendant's counsel objected, upon the ground that the paper had never been introduced in evidence, whereupon the court said: "It appearing to the court that the paper which the district attorney holds in his hands is the paper the reporter of this court has testified to as being a copy of the statements made by the defendant as testified to by him, although the paper or copy is not in evidence, the objection is overruled." To this the defendant excepted. The record does not show what was read to the jury, or that the longhand statement was in any respect different from the testimony given by the stenographer, and, as he had testified that it was "a true and correct statement" of what the defendant had said, it does not appear that any error was committed.

3. The defendant visited the house of one Staley during the evening prior to the fire, and while there, after drinking a quantity of wine, proposed to Staley to burn the barn, to which Staley apparently assented, and accompanied him for that purpose along the railroad track to a place opposite the barn, when the defendant got over the fence, and set the building on fire. After this was done, Staley fired a pistol, which was a concerted signal between him and the officers, upon which they were to arrest the defendant. At the trial the defendant sought, in cross-examination of Staley and other witnesses for the prosecution, to show certain conversations between them and the officers prior to the burning of the building, to the effect that the officers had been informed that the fire was to occur, and that, in consequence of such information, they were near the place of the fire for the purpose of arresting the defendant. What took place between the officers and these witnesses could neither bind nor exculpate the defendant, and the fact that the defendant's intention to commit the offense was known to the officers beforehand would not palliate his crime. Even if it be conceded that the court committed a technical error in refusing to permit this cross-examination, we think that, in view of the undisputed evidence that the defendant admitted that he set fire to the building, this error did not affect any of his substantial rights. Pen. Code, § 1258.

The instructions to the jury were fully as favorable to the defendant as he could ask, and the exceptions thereto do not deserve further consideration. The judgment is affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

BEATTY, C. J. I dissent. The superior court erred, in my opinion, in preventing a full and free cross-examination of the witnesses for the people. Aside from certain admissions of the defendant, testified to by some of the witnesses, the evidence was quite as consistent with the theory that the fire was started by the principal witness for the prosecution, who, by his own admission, was "in the employ of the city to catch a fellow setting fire to a barn," as with the theory that the defendant started it. If the prosecution had deemed the evidence of defendant's admission sufficient in itself to insure his conviction, there was no occasion to put in other evidence. But the other evidence was put in, and, presumably, because it was deemed necessary to secure a verdict. This being so, the defendant had a right to cross-examine these witnesses as fully as if their evidence stood alone. He had a right to show upon cross-examination all the facts and circumstances of the preconcerted arrangement between the officers and the witness Staley, and to argue from such circumstances that there was a motive and an opportunity for Staley himself to commit the crime which was charged upon him; and the force of this observation is not diminished by the fact that Staley admitted that he had formerly been convicted of arson, and served a term in the state prison. When such a man is hired to detect some one setting fire to a barn, and when, as in this case, he invites another to his house, and there plies him with intoxicating liquors until his mind is seriously clouded, and then accompanies him to the building which is burned, and immediately after the fire is started fires a pistol, the prearranged signal to the officers to rush in and make the arrest,—when such, I say, is the testimony in chief, the utmost latitude of cross-examination should be allowed to the accused. If the testimony is true, such cross-examination can do no harm; if it is false, there is no other means of showing its falsity, and without it an innocent man may be made to suffer the penalty of another's crime. I think the defendant is entitled to a new trial.

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102 Cal. 377

HERTWICK v. NATIONAL CITY. (No. 19,221.)

(Supreme Court of California. May 3, 1894.)

LIMITATION OF ACTIONS—ACTIONS NOT ON WRITINGS.

Code Civ. Proc. § 339, requiring an action not founded on an instrument in writing, made in the state, to begin within two years, applies to an action for money paid to defendant city for a license for three months, and for damages for closing plaintiff's saloon and revoking his license after one month, though the license ordinance, the application, the trustee's action, the license, and the notice of its revocation, were written.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Charles F. Hertwick against National City for money had and received. Judgment for plaintiff. Defendant appeals. Reversed.

Haines & Ward, for appellant. H. W. Talcott and E. W. Hendrick, for respondent.

HARRISON, J. The defendant passed an ordinance September 21, 1887, requiring persons engaged in the business of selling intoxicating liquors at retail to procure a license therefor before engaging in the business, fixing the amount of the license tax at $75 per month, and required that licenses should issue for a term of not less than three months. In March, 1888, the plaintiff applied for licenses to engage in said business in two different places within the corporate limits of the defendant, which were granted; and he paid therefor to the defendant the sum of $450, and received licenses in the following form: "Mr. Charles F. Hertwick, having paid into the city treasury the sum of $225, is hereby authorized to keep, conduct, and carry on the retail liquor business in said city, for the term of three months from March 28, 1888. Dated this 27th day of March, 1888. G. H. Hancock, City Clerk." The plaintiff continued to carry on the business under said licenses until April 27, 1888, when the same were revoked by the board of trustees of the defendant; and the plaintiff thereupon ceased to transact said business, and on the 9th of May demanded a return of the money paid for the licenses. This payment was refused, and March 4, 1891, the plaintiff commenced this action; setting forth the above facts, and also that he had sustained certain damages, resulting from the revocation of said licenses, and asking judgment against the defendant in the sum of $4,450. The defendant demurred to the complaint upon the ground that the action was barred by the statute of limitations, and, its demurrer having been overruled, answered the complaint. The case was tried by the court, and judgment rendered in favor of the plaintiff for the sum of $285, the proportion of the license money paid by the plaintiff for the unexpired term of his licenses. From the judgment entered thereon, the defendant has appealed.

The demurrer to the complaint should have been sustained. The action is for the recovery of money paid to the defendant, and for damages resulting from the alleged wrongful revocation of the licenses. The liability of the defendant, if any existed, was not founded upon an instrument of writing, and the provisions of subdivision 1 of section 339, Code Civ. Proc., are applicable. The facts, as averred in the complaint, that the ordinance fixing the amount of the license tax was in writing; that the application of the plaintiff for the licenses was in writing; that the action of the board of trustees with reference to the same was reduced to writing, and entered upon the records of the defendant; and that the license itself, and the notice of its revocation, were in writing,—do not constitute a written obligation, or an instrument of writing upon which the liability charged in the complaint is founded. The license was only a permission to the plaintiff to transact the business specified therein, and was in no respect a contract on the part of the defendant, nor did it create any pecuniary obligation or liability on its part. The acknowledgment therein of the money paid by the plaintiff was only evidence of its payment, and of no higher grade than a mere receipt, and did not create any obligation on the part of the defendant to repay the same, or any part thereof. Whatever rights the plaintiff had to its repayment arose from the violation by the defendant of its obligation, if such obligation existed, to permit him to transact the business, and arose by the act of the defendant in revoking the licenses. This obligation was entirely distinct from the receipt of the money, and for the enforcement of these rights the plaintiff should have commenced his action within two years after his right to recover the money accrued. The judgment is reversed.

We concur: GAROUTTE, J.; PATERSON, J.

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4 Cal. Unrep. 558

FISKE v. CASEY. (No. 15,354.)

(Supreme Court of California. March 28, 1894.)

APPEAL—FINDING OUTSIDE OF THE ISSUES—SPECIFICATION OF ERROR.

1. Findings of fact on issues not made in the pleadings cannot be considered for the purpose of supporting the judgment.

2. On appeal, it is not necessary to specify that the evidence is insufficient to support a finding not embraced in the issues.

3. In an action to declare a deed absolute on its face a mortgage, and to foreclose same, a finding by the court that, prior to its maturity, plaintiff had claimed such mortgage to be an absolute conveyance, and refused performance of the obligation, and that such refusal stopped the running of interest after maturity, is error, when no such issue is presented.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Asa Fiske against E. J. Casey, administrator of Henry Shoulters, to foreclose a mortgage. From a judgment for $163.91, and for the foreclosure of the mortgage, and an order denying a new trial, plaintiff appeals. Reversed.

Daniel Titus, for appellant. Benjamin Healey and T. Z. Blakeman, for respondent.

HARRISON, J. September 14, 1881, Henry Shoulters made a promissory note to the appellant for the sum of $150, with interest payable at the rate of 3 per cent. per month in advance, and compounding monthly until paid. At the same time, he executed to the appellant, as security for its payment, a conveyance, absolute in form, of certain real property in San Francisco. Shoulters died at San Francisco in 1883, and in February, 1892, the respondent, Casey, was appointed administrator of his estate. March 23, 1892, the appellant presented his claim against the estate, upon the aforesaid note and conveyance, to the respondent, for allowance, and, it having been rejected by him, brought this action for the purpose of having said deed adjudged to be a mortgage upon the land described therein, and for the sale of said land to satisfy the amount of the said note. The defendant admits these allegations of the complaint, and sets up as a defense that in March, 1892, prior to the presentation of the claim to him, he had applied to the plaintiff to ascertain the amount due upon the note, for the purpose of paying the same, and having the property discharged from the lien of the mortgage, and that upon such application the plaintiff declared to him that the instrument of conveyance was not a mortgage, but was a deed absolute, and that he was the owner of the property, and that the plaintiff then refused to entertain any offer from the defendant to pay off and discharge the mortgage. The cause was tried by the court, and judgment rendered in favor of the plaintiff for the sum of $163.91, the amount of the promissory note, with interest up to the date of its maturity, and for the foreclosure and sale of the land described in the instrument. Plaintiff moved for a new trial, which was denied, and from that order, as well as from the judgment, he has appealed.

The court finds "that, prior to the maturity of the obligation created by the note and mortgage described in the complaint, the plaintiff claimed that said mortgage was a deed absolute, and that he was thereby the owner of the property therein described, and refused to accept performance of said obligation before any offer of performance was made, and did not, after such refusal, and before performance was due, give any notice of his willingness to accept performance." This finding is outside of any issue in the case, and cannot be considered for the purpose of supporting the judgment. The judgment itself depends upon this finding, as the theory upon which it was given is that the refusal therein found stopped the running of interest upon the note. It is unnecessary to determine whether this theory is correct, or whether the evidence in support of the averment of refusal in the answer would sustain such a finding, as the court has not made any finding upon this averment, and the finding which it has made is outside of any issues in the case. There is no averment in the complaint or answer that the plaintiff made any claim of ownership in the property, or refused to accept performance of the obligation in the note prior to its maturity, or prior to the date at which the defendant alleges that he sought to effect a release of the lands from the mortgage; and, even if it be assumed that the evidence before the court would sustain this averment in the answer, it would not authorize a finding that such claim or refusal had been made at any previous date. A claim by the plaintiff in March, 1892, that the deed was absolute, or a refusal by him at that time to accept payment upon the note, would not impair his right to recover the amount of the promissory note according to its terms up to that date.

Annexed to the note, and apparently upon the same piece of paper, was the following: "Please send, at my risk and request, by mail or otherwise, written or printed notice of when the annexed note falls due to me. Henry Shoulters." And the court finds that no notice was ever given by the plaintiff to Shoulters of the time when the note would fall due. It is urged by the respondent that the effect of these words is that the note did not mature until such notice was given, or at least did not mature until the presentation of the claim to the administrator. If this theory be correct, it would follow that the "maturity of the obligation" referred to in the above-quoted finding did not exist until such demand in 1892, and that the court erred in not allowing interest upon the note up to that date. We think, however, that this request annexed to the note did not have the effect to postpone the maturity of the note until the holder should elect to give such notice.

The objection by the respondent that the plaintiff has not sufficiently specified the particulars in which the evidence is insufficient to support the decision is unavailing. It is never necessary to specify that the evidence is insufficient to sustain a finding which is not embraced within the issues, as the finding itself is unauthorized, even though it be supported by evidence. We do not mean, however, to say that the specification in the present case is insufficient. It directed the attention of the defendant to the particular finding which it claimed was unsustained by the evidence. The judgment and order are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

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102 Cal. 345

PEOPLE v. COLLINS. (No. 21,075.)

(Supreme Court of California. May 2, 1894.)

LIBEL—INDICTMENT—SUFFICIENCY.

Where the publication set forth in an indictment for libel is not libelous per se, and the indictment contains neither colloquium nor innuendo, the indictment is demurrable.

Department 1. Appeal from superior court, Fresno county.

One Collins was indicted for libel, and from a judgment sustaining a demurrer thereto the people appeal. Affirmed.

Atty. Gen. Hart, Firman Church, and C. C. Merriam, for the People. L. L. Cory and N. C. Coldwell, for respondent.

PATERSON, J. The defendant was indicted for libel. The court sustained a demurrer to the indictment, and the people have appealed.

We do not deem it necessary to set forth the allegations of the indictment. It is sufficient to say that the words of the publication alleged are not actionable per se, and that the indictment contains neither innuendo nor colloquium. This is an objection which can be taken by general demurrer, that the facts stated do not constitute a public offense. Where the publication is not a libel on its face, but it is claimed that the language used has a covert meaning, it is necessary, not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed. Edwards v. Society, 99 Cal. 431, 34 Pac. 128. This rule has been rigidly enforced here and elsewhere. Maynard v. Insurance Co., 34 Cal. 48, 47 Cal. 207; People v. Isaacs, 1 N. Y. Cr. R. 149; Bloss v. Tobey, 2 Pick. 320. We cannot determine from the allegations of the indictment what charge defendant made against Church, if he made any charge at all. It certainly does not charge him with violating any of his duties as a citizen, and the term "public prosecutor" does not necessarily mean district attorney or other prosecuting official; and, if it were otherwise, there is nothing in the indictment to show that the district attorney was charged with the violation of any official duty. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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102 Cal. 347

Ex parte FOSS. (No. 21,113.)

(Supreme Court of California. May 2, 1894.)

INTERNATIONAL LAW—EXTRADITION TREATY—CONSTRUCTION.

1. The existence of an extradition treaty between the United States and the Hawaiian Islands does not prohibit the surrender by either of a person charged with a crime not enumerated in the treaty.

2. The setting aside on motion of an indictment against an extradited prisoner does not operate as an acquittal of the offense charged, nor bar his further prosecution for the same offense by indictment or information. McFarland, J., dissenting.

In bank.

Proceeding by one Foss on habeas corpus for discharge from imprisonment. Petitioner remanded.

C. E. McLaughlin, for petitioner. U. S. Webb, for respondent.

DE HAVEN, J. The petitioner, Foss, was indicted by the grand jury of the county of Plumas for the crime of embezzlement. At the date of the finding of this indictment the petitioner was in Honolulu, and there remained until February, 1894, when, upon the request of the American minister, and upon "a requisition to that effect" from the governor of the state of California, he was surrendered by the provisional government of the Hawaiian Islands to the agent appointed by the governor, to receive and convey him back to this state, there to be tried for the offense with which he was charged in the indictment referred to. The treaty between the United States and the government of the Hawaiian Islands in relation to the extradition of fugitives from the justice of either of such countries does not provide for the extradition of a person charged with the crime of embezzlement, and the warrant issued by the Hawaiian government for the arrest of the petitioner, and for his delivery to the agent appointed by the governor of this state to receive him into custody, does not refer to the treaty, but the proceedings preliminary to the issuance of such warrant were conducted in accordance with the rules prescribed by the treaty to effect the extradition of a person charged with either of the offenses for which extradition is there provided. The petitioner, upon his return to this state, was brought before the superior court of Plumas county, in which the said indictment against him was pending, and he then moved to set the indictment aside. The motion was granted, and he was discharged from custody, and within two hours thereafter a complaint was filed with a justice of the peace, charging him with the same embezzlement named in the indictment previously set aside, and he was again arrested, and, after examination, held to answer the charge before the superior court of Plumas county; and he is now in the custody of the sheriff of that county awaiting his trial.

The petitioner claims that his imprisonment under the circumstances here stated is illegal, and he seeks to be discharged therefrom under the writ of habeas corpus upon which he has been brought before this court. In support of this general contention he insists that his arrest in the foreign country, and enforced return to this state, and detention here for the purpose of being tried for the crime charged in the indictment, was and is in violation of his rights under the treaty between the United States and the government of the Hawaiian Islands. That treaty, in article 14, provides: "The contracting parties mutually agree to surrender, upon official requisition to the authorities of each, all persons who being charged with the crimes of murder, piracy, arson, robbery, forgery or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other, provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed." 9 Stat. p. 981. It is argued that the treaty, in thus enumerating the offenses for which fugitives who have sought an asylum in either country shall be delivered into the custody of the other upon demand of its government, in effect prohibits the surrender by either nation of a person charged with any other than one of the mentioned crimes; that the treaty is to be construed as containing an implied stipulation upon the part of the United States that a person committing any other crime against its laws than one of those named in the treaty, and who thereafter escapes to Hawaii, shall not be subject to arrest and return to the United States, there to be tried for such nonenumerated crime, even though the government of Hawaii should voluntarily surrender him for that purpose as a matter of comity. In our opinion, the language of this treaty will not bear such a construction. It is, of course, true that, when a treaty provides for the extradition of fugitives charged with particular crimes, the reciprocal duty of delivering up to the justice of the other persons charged with crime is confined to the particular cases for which the treaty has provided. Com. v. Hawes, 13 Bush, 708; U. S. v. Rauscher, 119 U. S. 411, 412, 7 Sup. Ct. 234. Thus in Com. v. Hawes, just cited, it is said: "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty." But, while this is so, the existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion in cases not coming within the terms of the treaty. It is only to the extent that the treaty imposes an obligation to surrender persons charged with particular offenses that there is any restriction placed upon the sovereign right of the nation in which the fugitive is found to either permit or refuse to permit his arrest and return to the country from which he has fled. In other words, in relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction. This conclusion is so obviously correct that no extended argument is necessary to sustain it, and the principle is thus stated in section 269 of volume 2 of Wharton's International Law Digest: "The rule, 'Expressio unius est exclusio alterius,' applies to extradition treaties, and under such treaties process can be sustained only for enumerated offenses. This, however, would not preclude in extraordinary cases, and an appeal, not on the basis of the treaty, but on the ground of comity, for surrender of a fugitive charged with a nonenumerated offense, when such offense is one which would justify such an extraordinary measure. * * * Thus, in 1796, the secretary of state [Mr. Pickering] 'expresses his concurrence with Mr. Liston [British minister at Washington] in the opinion that, while the reciprocal delivery of murderers and forgers is expressly stipulated in the twenty-seventh article of our treaty with Great Britain, the two governments are left at liberty to deliver other offenders, as propriety and mutual advantage shall direct. * * * The attorney general has just called, and thinks the opinion expressed to be correct.' Mr. Pickering to the president June 3, 1796. MSS. Dom. Let. In a letter of same date to the governor of Vermont, Mr. Pickering says: 'The reciprocal delivery of murderers and forgers is positively stipulated by the twenty-seventh article of the treaty. The conduct of the two governments with respect to other offenders is left, as before the treaty, to their mutual discretion; but this discretion will doubtless advise the delivery of culprits for offenses which affect the great interests of society.'" The crime with which the petitioner is charged, not being an extraditable offense under the treaty between the United States and the government of the Hawaiian Islands, it must be presumed that the surrender of the petitioner was made by the latter in the exercise of its own sovereign discretion, and as an act of comity. This violated no right secured to the petitioner by the treaty referred to, as that treaty does not in terms or by necessary implication deny to that government the right to surrender, or deprive the United States of the right upon such surrender to receive into its custody, fugitives charged with offenses not enumerated in the treaty. The cases of U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234; Com. v. Hawes, 13 Bush, 697; U. S. v. Watts, 8 Sawy. 370, 14 Fed. 130; Ex parte Hibbs, 26 Fed. 421,—cited and relied upon by petitioner, do not sustain his contention upon this point. Those cases simply declare that when a defendant has been surrendered in pursuance of a treaty for trial upon a specific charge named therein, he cannot be placed upon trial for any other than the particular offense named in the extradition proceeding. This rule is well settled, but it has no application whatever to the case presented by the petitioner here.

It is also contended in behalf of petitioner that he was only surrendered by the government of the Hawaiian Islands for trial upon the indictment referred to in the warrant issued by that government commanding his arrest and delivery into the custody of the agent authorized to convey him back to this state, and that, when this indictment was set aside, he had fully met its accusation, and was entitled to a reasonable time within which to return to the foreign asylum, and that he cannot be lawfully detained here to answer the complaint upon which he is now held for trial before the superior court. If it should be conceded that a fugitive from justice, surrendered by a foreign government on grounds of comity, has the same right to his discharge upon habeas corpus, when imprisoned upon a different charge than that for which he was delivered up, as if he had been extradited under the provisions of a treaty, and arrested and detained for trial upon another offense than that named in the extradition proceedings, in violation of the implied provisions of the treaty, still we do not think the petitioner here would be entitled to a discharge upon the facts appearing in this record. The order setting aside the indictment did not operate as an acquittal of the petitioner for the offense therein charged, and is not a bar to his further prosecution for the same offense by indictment or information; and, as he is now held by virtue of an order of commitment based upon a complaint charging him with the identical offense named in the indictment set aside, and to answer which he was surrendered by the Hawaiian government for trial by the state, the petitioner should be remanded. Petitioner remanded.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.

McFARLAND, J. I dissent. The petitioner, Foss, was indicted by the grand jury of Plumas county, in this state, for the crime of embezzlement. At the time of the indictment he was in the Hawaiian Islands. A requisition was made upon the government of the islands for his extradition here to answer the charge preferred by said indictment, and under extradition proceedings he was returned to said Plumas county. He moved to set aside the indictment, and his motion was granted, and he was discharged from custody. Within two hours afterwards a complaint for embezzlement was made before a justice of the peace, and he was arrested upon a warrant issued by said justice. He now applies to this court under the proceeding of habeas corpus to be discharged. There is a treaty between the government of the Hawaiian Islands and the government of the United States for the return from one to the other country of persons charged with certain enumerated crimes; but the crime of embezzlement is not one of the crimes so enumerated. Said treaty is to be found in 7 Am. & Eng. Enc. Law, p. 606.

The first point made by petitioner is that he cannot be returned to this country and tried here for any crime not enumerated in the treaty. There are certain very strong authorities to sustain this point, particularly Com. v. Hawes, 13 Bush, 697; U. S. v. Watts, 8 Sawy. 370, 14 Fed. 130; Holmes' Case, 14 Pet. 593; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234; Spear, Extradition, pp. 221, 205, et seq. The questions raised by this point need not, however, be here passed upon definitely, because we think that the petitioner should be discharged upon the second point made by his counsel, to wit, that, the indictment upon which the extradition was secured having been set aside, and the petitioner entirely discharged, he cannot afterwards be held upon a complaint before a justice of the peace, without having been given reasonable time to return to the country from whence he was brought. The treaty above mentioned provides that a person charged with crime shall be extradited only "upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime had been committed there. It further provides that the person demanded shall be brought before a court of the country in which he is, "to the end that the evidence of criminality may be heard and considered;" and if, upon such hearing, the magistrate is satisfied that the evidence sustains the charge, he may issue a warrant for the surrender of the fugitive. Now, in the case at bar it appears that the judge at the Hawaiian Islands was presented with a certified copy of the indictment that had been found against the petitioner, with the affidavit of the foreman of the grand jury, and that he acted entirely upon the sufficiency of the evidence as afforded by said indictment. And the indictment upon which the authorities of the Hawaiian Islands acted, and which it may reasonably be supposed was considered as sufficient evidence for action there, having been set aside and held invalid by the court in Plumas county, and the prisoner having been discharged under said indictment upon which the extradition papers were based, he could not be held upon a complaint before a magistrate and proceedings which were entirely unknown to the authorities of the Hawaiian Islands, and upon which their order for the arrest of the fugitive was not in any way based. As was said in Com. v. Hawes, supra: "By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand and as to the evidences of guilt is as plainly excluded as if that right had been denied by express language. It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than one upon which he is surrendered, much less against one for which his extradition could not be demanded." And I think the right under the treaty is one which the petitioner himself may assert. The petitioner, in my opinion, should be discharged from custody.

102 Cal. 294

BRENOT v. BRENOT. (No. 19,359.)

(Supreme Court of California. April 26, 1894.)

DIVORCE—RECRIMINATION — DISMISSAL—CUSTODY OF CHILD—NEW TRIAL.

1. In an action by a husband for divorce on the ground of his wife's adultery, where the wife files a cross complaint charging plaintiff with extreme cruelty, and both charges are sustained by the evidence, the court may properly dismiss the action.

2. Where a divorce is refused because both parties are in fault, it is not error to refuse to make any order as to the custody of a child.

3. On a motion for a new trial, a specification that "the evidence introduced in this action fails to show that the defendant, at the time stated, was guilty of adultery with" a person named, is not objectionable as failing to specify the particulars in which the evidence was insufficient.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action for divorce by E. L. Brenot against Jennie E. Brenot. Defendant filed a cross complaint. From a judgment dismissing the action, and an order denying a new trial, defendant appeals. Judgment affirmed, and order reversed.

Chas. S. McKelvey and H. W. Chynoweth, for appellant. Victor Montgomery and R. Y. Williams, for respondent.

GAROUTTE, J. This is an action for divorce, charging defendant with adultery. She denied the allegations of the complaint, and filed a cross complaint, charging extreme cruelty. Upon hearing the evidence the court filed its findings of fact, wherein it found the charges of both parties to be true, and denied all relief, dismissing the action. Defendant appeals from the judgment and order denying a motion for a new trial.

The allegations of the complaint charging the acts of adultery are sufficiently made as against a general demurrer. There is also no question but what a court of equity is authorized to enter a judgment dismissing an action of divorce, where both parties are seeking a decree, and the evidence discloses them to be equally guilty of the misconduct alleged.

It is claimed that the custody of the minor child was a material issue in the case, and should have been passed upon by the judgment of the court. The action was an action of divorce, and the question as to the proper custody of the child was an element of the case entirely incidental to the main relief sought, and dependent alone upon the divorce proceedings; and when a decree of divorce was denied either of the parties the court was not required to make any order as to the care and custody of the minor child. The question of costs in an equitable action is a matter resting in the discretion of the trial court. Abram v. Stuart, 96 Cal. 235, 31 Pac. 44

Defendant made a motion for a new trial, upon the ground, among others, that the evidence failed to support the finding as to the acts of adultery. Upon the hearing of the motion, counsel for plaintiff objected that the statement did not sufficiently specify the particulars wherein the evidence was insufficient. The court thereupon sustained the objection, disregarded the specification, and denied the motion for a new trial. We think the court committed an error in refusing to consider defendant's specification as to the insufficiency of the evidence. Plaintiff's action was based upon a charge of adultery. As to that allegation of the complaint the court made the following finding of fact: "That on or about August 1, 1892, and on or about September 1, 1892, the defendant did commit adultery by having carnal, sexual, and adulterous intercourse on each of the said dates with one Jeff Harlan." Defendant assailed this finding of fact as not supported in the evidence, by the following specification: "The evidence introduced in this action fails to show that the defendant, at the times stated, was guilty of adultery with one Jeff Harlan." The object of the statute requiring specifications of insufficient evidence is for the purpose of bringing directly before the mind of the court the particular point the aggrieved party desires to be reviewed, and also to give notice to the adverse party of the point of attack, and thereby enable him to produce any additional evidence found in the record which may tend to support the finding of fact assailed by the specification. In the present case we think the specification sufficiently full to meet the purposes of the law, and, in the face of the specification, after the opposing party had enjoyed the opportunity of placing in the record whatever evidence he desired bearing upon this point, the court should have passed upon the sufficiency of the evidence tending to show the said acts of adultery. The evidence upon this question upon the part of the plaintiff consists in the main of the testimony of one Jeff Harlan, who appears, according to his own statement, to be living upon the bounty of the plaintiff, and who is not only the principal witness for the plaintiff against the woman, but states under oath that he is the party with whom she committed the acts of adultery. While the court considered the evidence upon making its findings of fact, still we think it should again be carefully reviewed by the court upon the hearing of the motion for a new trial. It is of such a startling character, coming from the source it does, as to demand a most careful review whenever and wherever it is presented before a court of justice. For the foregoing reasons, the judgment is affirmed, and the order denying a new trial is reversed, with directions to the trial court to pass upon the sufficiency of the evidence suggested by the specification considered in this opinion, and to thereupon pass upon the motion for a new trial.

We concur: HARRISON, J.; PATERSON, J.

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102 Cal. 313

CROSS v. CALIFORNIA ST. CABLE RY. CO. (No. 15,190.)

(Supreme Court of California. April 27, 1894.)

NEGLIGENCE—PROXIMATE CAUSE—INJURY CAUSED BY STREET-RAILROAD COMPANY.

1. In an action for personal injuries, it appeared that plaintiff was driving a heavily-laden wagon down a steep street; that the lock chain put to hold the wagon back broke near the top of the hill, but plaintiff continued, zigzagging in and out between the sidewalk and defendant's street-car track; that defendant's car came down the hill, struck the wagon, and injured plaintiff. *Held*, that the absence of the lock chain was not, as a matter of law, the proximate cause of the injury, and a motion for nonsuit was properly denied.

2. Where there is evidence that plaintiff looked before going on the track, but saw no car, though he had a view of the track for 100 feet, his presence on the track at the time of the accident will not be *held* negligence per se.

3. Even if plaintiff saw the car approaching at a distance of over 100 feet, he will not be *held* negligent, as a matter of law, in driving on the track.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by John Cross against California Street Cable-Railway Company. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Garber, Boalt & Bishop, for appellant. Henry H. Davis and P. F. Dunne, for respondent.

GAROUTTE, J. This is an action for damages for personal injuries. The verdict of the jury was favorable to the plaintiff, and defendant appeals. The plaintiff, a teamster by occupation, and in full possession of his faculties, was engaged in hauling a heavy load of boards down a steep grade on California street, in San Francisco. He put on his lock chain in order to hold back his wagon, while he walked and drove the horse. When two or three rods down the hill, the lock chain broke. Defendant's car tracks are situated upon this street. Plaintiff did not stop, or attempt to fix his lock chain, but proceeded with the load down the hill, zigzagging in and out within the narrow space between the sidewalk and the car track. This mode of travel, under the circumstances, in order to bring plaintiff and his team in safety to the bottom of the hill, required great care and attention. Defendant's car approached from the top of the hill, struck the hind wheel of plaintiff's wagon, swung it around, and squeezed plaintiff between a portion of the dummy and his own wagon. Injuries were received by him, and this litigation resulted. It is insisted that the motion for a nonsuit should have been granted upon the ground that plaintiff was guilty of contributory negligence: "(1) In this, that he continued down the steep grade with a heavy load after his lock chain was broken, and the evidence shows that the breaking of the lock chain contributed directly to the alleged injury; (2) that, at the time of the accident, plaintiff had placed himself upon defendant's car tracks without first looking to see if a car was coming upon him."

The nonsuit was properly denied. Upon the first point relied on to support the motion, we are not prepared to say that the absence of the lock chain was the proximate cause of the injury, even conceding the plaintiff to have been guilty of negligence in traveling down the grade without such an appliance. Contributory negligence, sufficient in law to defeat a recovery, must be such negligence as directly contributes to the accident. Aside from this consideration, it cannot be said that it would be negligence in law to attempt to descend the hill without the lock chain. The plaintiff testified that the descent could be made safely without the chain, and the descent was safely continued by the team after the collision occurred. When the chain broke, near the top of the hill, it then essentially became a question of fact, for the jury to determine, as to what course the driver of the team should pursue. It was for the jury to say whether the driver, as an ordinarily prudent and careful man, was justified in attempting to make the descent under the circumstances that the attempt was made.

Neither do we think the party injured guilty of negligence, in law, in being upon the track at the moment of the accident. Viewing his evidence favorable to himself, which we are justified in doing upon the consideration of a question of this character, it appears that he could see the track for a distance of 100 feet, and saw no car. Owing to a steep grade and a wet track, the evidence disclosed that the car could not be stopped within a distance of 100 feet, after an alarm, and this fact most probably formed an important element contributing to the accident. The case was properly submitted to the jury.

It is insisted that the jury disregarded the following instructions of the court: "(1) If you find that the plaintiff, Cross, was negligent in continuing down the hill after his lock chain broke, and that such negligence contributed to the accident, you must find a verdict for the defendant, even if you also find from the evidence that the defendant was also negligent. (2) A man with good eyesight is bound to use it, in crossing a street-railroad track. If you find that the plaintiff failed to look up the hill, to see whether or not a car was coming, before driving upon or close to the car track, and that his failure so to do contributed to the accident, then he was guilty of contributory negligence; and your verdict must be for the defendant, even though the gripman was also negligent." All just complaint to the principle involved in the first instruction is disposed of upon the consideration of the order denying the motion of nonsuit. The jury evidently decided, in view of this instruction (if we interpret their conduct by their verdict), that the plaintiff, Cross, was either not guilty of negligence in attempting to descend the hill as he did, or that his negligence in that respect did not contribute to the accident; and, by upholding the action of the trial court upon the question of nonsuit, it is said, in effect, that the jury were justified, under this instruction, in finding the verdict rendered. There is no sound objection to the treatment by the jury of the remaining instruction. It cannot be said that it was disregarded by the jurors. As we have seen, immediately prior to the accident the plaintiff saw the track for a distance of 100 feet, and at that time it was unobstructed. Neither can it be said, as matter of law or fact, that if plaintiff had looked, and seen the approaching car at a distance of more than 100 feet, he would not have driven his team as he did drive it. Under those circumstances, he, as a reasonable man, may have thought that he would be able to leave the track before the car would be actually upon him. Hence, conceding his failure to look, under such circumstances, it cannot be said that such failure necessarily contributed to the accident. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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102 Cal. 272

ARMSTRONG v. LUCO. (No. 15,081.)

(Supreme Court of California. April 25, 1894.)

SURFACE WATER—DEFECTIVE DRAINAGE—QUESTION FOR JURY.

1. Though a landowner has no knowledge of defects in the pipes which drain the water from his roof, and the waste water from his building, yet, if he has means of knowledge, he is liable for injury done to his neighbor's land by reason of such defects.

2. In an action to recover for such injury, the amount of damages is a question for the jury.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Lucy A. Armstrong against Juan M. Luco. From a judgment for plaintiff, defendant appeals. Affirmed.

I. N. Thorne, for appellant. J. M. Nongues, for respondent.

GAROUTTE, J. Armstrong and Luco own adjoining lots and houses on Washington street, San Francisco. The street has a steep grade, and plaintiff's (Armstrong's) lot is the lower lot. Defendant's (Luco's) lot, adjacent to his house, is covered with planking. It is claimed by plaintiff that owing to the defective manner in which this planking was laid, and the defective drainage pipes used in carrying away the water from the roof of the building, and also used in carrying away the waste water coming from the building, the foundation of her building has been weakened and destroyed, and thereby she has been damaged in the sum of $3,000. Upon issue joined, trial was had; and, by the verdict of a jury, plaintiff was awarded $800 damages. This appeal is from the judgment and order denying a motion for a new trial. The following instructions of the court seem to fairly cover the law applicable to the facts of the case. The appellant makes no serious complaint as to the soundness of the legal principles stated. Neither do we see valid objection to be urged against them: "(1) If you should find that the damage was done, and that it was occasioned by the instrumentality of these alleged defective drains and pipes, then I ask you to pass on, and determine, from the evidence, whether the defendant had actual knowledge of the defective condition of his premises that resulted in the injury to the plaintiff, if any. If you find that he did not have actual knowledge, I will ask you then to find whether he had the fair means of knowledge,—that is, were the circumstances of the case such that a person situated as the defendant was could not, with reasonable care and observation, have escaped the knowledge of these defects; for if defendant had no knowledge, and no fair means of knowledge, he is not responsible. But the question of whether he had knowledge, or the means of knowledge, I leave to you, as a fact to be determined in the case. (2) The water upon each lot in a city, arising from rain, or from any cause originating on the lot, such as a spring, or cause of that kind, should be conducted by the owner thereof, if he wishes to have it removed, directly from it to a sewer, or other place appropriate for the receipt and discharge of the same, and not be turned or led on to an adjoining lot without the consent of the owner. No person has the right to relieve his own land from standing water, or prevent its accumulation thereon, by discharging it upon the land of his neighbor. When the owner of premises collects the water which naturally falls upon the same into a place, and conducts it from there by a pipe to his drain, he undertakes that his pipe shall be both sufficient, and shall continue so, as to the adjoining owner." Appellant's main insistence is that the evidence is insufficient to support the verdict. It is claimed that the evidence does not sufficiently indicate that water from defendant's lot did the injury to plaintiff's building, and it is also claimed that the amount of damages assessed by the jury was not proven by the evidence. Both of these elements of the case were matters of fact eminently proper for a jury to pass upon. The jury did pass upon them, and we are not disposed to disturb the verdict in these regards. It is evident that the water did injury to plaintiff's property, and we cannot say from the evidence that the damages are excessive.

It is further insisted that defendant had no knowledge of the existence of any defect in his drainage and sewer pipes that might result in injury to plaintiff's property. Conceding defendant had no actual knowledge of the defects, still the court properly instructed the jury that, if he had fair means of knowledge of such defects, then he was equally liable for the injury done. The question as to his fair means of knowledge was a matter of fact, which the jury determined against him, and we think justly so determined. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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102 Cal. 317

MERRILL v. MERRILL. (No. 19,319.)

(Supreme Court of California. April 27, 1894.)

VENDOR AND PURCHASER—RESCISSION—RECOVERY BACK OF PURCHASE MONEY.

Where a default by a vendor of land amounts to a rescission of the contract, giving the vendee a right to recover the amount paid of the price, the vendee need not allege or prove that he was ready and willing to carry out the contract.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Mattie Merrill against F. H. Merrill. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Henning, R. Dunnigan, and J. M. Voss, for appellant. John D. Pope, for respondent.

GAROUTTE, J. This is an action by the respondent, vendee, to recover back a sum of money paid to the appellant, vendor, as a partial payment upon the purchase price of a certain tract of realty under a contract of sale. Respondent made no tender of the balance due, and demanded no deed, but alleged in her complaint that defendant rescinded the contract, and she bases her right of recovery upon the alleged acts constituting the rescission. She recovered judgment in the trial court, and this appeal is taken from that order, and from the order denying a motion for a new trial.

This case has once been before the court (95 Cal. 334, 30 Pac. 542) upon an appeal involving the sufficiency of the complaint in stating a cause of action. In the decision of the court in that case it was decided that, while the complaint was not perfect as an example of correct pleading, still sufficient was stated therein to constitute a cause of action for the recovery of the money paid the defendant, and this view was taken by the court upon the ground that the conduct of defendant was such as to put him in default under the contract, and that such default gave plaintiff an immediate right of action to recover the money paid. It was, in effect, held that the acts alleged in the complaint constituted a rescission of the contract upon the part of the defendant. The complaint now stands exactly as it stood when before the court upon the prior appeal, and it necessarily follows that the law of the case is established to the effect that a cause of action is stated therein. Upon the trial the court made the following finding of fact: "On the 8th day of March, 1888, the defendant elected to rescind said contract, and did rescind the same, by reason of the failure of plaintiff and of the said Froelich, her agent, to make the third payment under said contract; and defendant on said day notified said Froelich in writing that he had rescinded said contract." This finding of the court is in line with that allegation of the complaint considered upon the previous appeal, and, if it has support in the evidence, would seem to establish a right of recovery. Without making a detailed review of the evidence found in the record bearing upon this question, it is enough to say that the two letters written by defendant to Hopkins and Froelich are sufficient in themselves to justify the aforesaid finding of fact. Whether or not there was a rescission of the contract was the contested and fundamental point in the case. It was a question of fact. It was the ultimate fact in the case, and its determination inevitably pointed the judgment.

It is claimed that certain allegations of the complaint are not found upon by the court. Conceding such to be the fact, the allegations referred to pertain to probative facts entirely, and findings upon those issues become immaterial in view of the finding that there was a recission of the contract. Windhaus v. Bootz, 92 Cal. 622, 28 Pac. 557. Appellant insists that, in order to entitle respondent to recover, the complaint should have stated that she was ready, able, and willing to carry out the terms of the contract, and that she should have introduced evidence at the trial to support such an allegation. The law of the case is to the contrary, and the past decisions of this court oppose this contention. See Shively v. Water Co., 99 Cal. 257, 33 Pac. 848, and cases there cited. We see nothing sufficiently contradictory between the allegations of the complaint and the findings, or between the findings themselves, to justify another trial of this action. For the foregoing reasons it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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102 Cal. 266

FELTON v. WEST et al. (No. 15,456.)

(Supreme Court of California. April 25, 1894.)

FORECLOSURE OF MORTGAGE—SECOND ACTION ON NOTE FOR DEFICIENCY.

Code Civ. Proc. § 726, provides that there can be but one action for the recovery of any debt secured by mortgage upon land, that the judgment may direct a sale of the property, and that, if the proceeds are insufficient, a judgment may be docketed for any balance. *Held* to apply only to actions to recover debts secured by mortgage on land situated in California; and where the holder of a note executed by a resident of California, and secured by mortgage on land in another state, forecloses the mortgage by publication, and bids in the property for only a part of the debt, he may afterwards bring a personal action in California against the maker of the note for the balance due thereon.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by C. N. Felton against E. A. West and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Reddy, Campbell & Metson, for appellants. H. G. Platt, for respondent.

GAROUTTE, J. The appellants on May 16, 1893, executed and delivered to the respondent their promissory note for the sum of $90,860.26. This note was dated, delivered, and made payable in San Francisco. It was secured by a mortgage upon lands situated in the state of Oregon. The appellants made two payments thereon, and then defaulted. Respondent thereupon began suit in the proper court in Oregon to foreclose the said mortgage. He was unable to, and did not, obtain personal service of the summons in such action upon appellants, as they were residents of California, and could not be found in the state of Oregon. Service was therefore had upon them by publication only. This mode of service appeared upon the face of the record in said suit, and a judgment in the usual form of foreclosure was made and entered therein, decreeing a sale of the mortgaged property to satisfy the indebtedness. Under this judgment the property was sold for about $32,000, and the amount was credited upon the note. There was no judgment for a deficiency. The respondent then began this action in the state of California upon the note for the balance due, to wit, the sum of about $44,000. This is an appeal from a judgment rendered in favor of plaintiff, Felton.

There is no dispute but that this is an action for the recovery of a debt secured by mortgage, nor is there any dispute about the fact of there having been a former action in the courts of Oregon to recover for this identical debt; and under section 726 of the Code of Civil Procedure appellants contend that the action cannot be maintained unless the plain and unambiguous language of that section of the Code is disregarded. Respondent insists, notwithstanding said section, that under certain circumstances there can be two or more actions brought to recover a debt secured by mortgage. It will thus appear that the sole and only question presented upon this appeal is: Under the circumstances above set forth, may a second action be maintained on the note which was secured by the mortgage? And this interrogatory necessitates a consideration of the aforesaid section of the Code of Civil Procedure upon which appellants rest the merits of their appeal. The section reads as follows: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may by its judgment direct a sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued." Formerly, the law allowed an action upon a promissory note, and also a suit in equity to foreclose the mortgage given to secure the note. The mischief in such a practice lay in the multiplicity of suits, and the harassing of the debtor by two actions, when the creditor could readily enforce all his rights in one. A remedy for this evil was provided by section 726 of the Code, whereby the creditor was allowed to foreclose his mortgage and have a personal judgment for any deficiency in the same action. This court has construed this law so as to suppress the mischief and advance the remedy by compelling the creditor to exhaust his security before proceeding personally against the debtor. But we think it evident, from an examination of the statute, that the section quoted has no application to the case at bar. To deprive this respondent of a right of action, under such a construction of the statute, would be to permit and justify a grave injustice. This we are not prepared to do, if the statute is reasonably susceptible of any other construction. The rule is well settled in this state, and most probably in all other states, that if a statute is ambiguous or doubtful or susceptible of different constructions or interpretations, then such liberality of construction is justified as, within a fair interpretation of its language, will effect its apparent object and promote justice. Appellants' construction of the statute would not promote justice, but injustice. Neither would the statute's apparent object be effected thereby. Such a construction would result in the gravest injustice, for respondent, a resident of California, would thus have no remedy in a California court against a defendant also a resident of California, upon a matured promissory note made and payable in this state. He could not bring an action here to foreclose the mortgage, for the security is situated in another state. He could not bring a personal action at law upon the note only, for our courts would not allow him to waive his security. Neither could the object and intent of the legislature in enacting this statute be effected in this case by such a construction, for one action, either in Oregon or California, could not be made sufficient to secure all of respondent's rights.

The circumstances of this case take it completely without the purview of the section. This section only refers to actions for the recovery of a debt secured by a mortgage upon property situated in the state of California. The context clearly evidences that fact. All the provisions of the section entirely negative the idea of any other construction. We cannot assume that the authors of this legislation attempted to establish a procedure for the foreclosure of mortgages upon realty situated in other states. The action referred to in this section is an action of foreclosure upon real or personal property which of necessity would have to be situated in the state of California, for an action of foreclosure could be brought in no other place. This action must be brought "in accordance with the provisions" of a certain chapter of the Code of Civil Procedure. The section contemplates and provides for the docketing of a deficiency judgment, and declares that such deficiency judgment becomes a lien upon the defendant's real estate. The succeeding sections of the chapter enter more fully into details as to the results and consequences flowing from the judgment rendered in such an action. It is hardly necessary to say that the action for the foreclosure of this mortgage, brought in the state of Oregon, was not the action referred to in this section of the Code of Civil Procedure, nor was that action brought under any of the provisions of our Code. This section refers to actions brought in the courts of California for the purpose of foreclosing mortgages upon property situated in the state of California.

It is claimed that the case of Ould v. Stoddart, 54 Cal. 614, is opposed to the foregoing views. If it be opposed to those views, it has been supplanted as an authority by the recent case of Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102,—a case which seems completely to dispose of appellants' contention as to the true construction of section 726 of the Code. But in order for this court to affirm the present judgment it is not necessary to overrule Ould v. Stoddart. In that case plaintiff brought his action in the state of Ohio to recover a personal judgment upon the note. Having recovered his judgment, he was unable to realize upon it, and thereupon brought an action in the state of California to foreclose his mortgage. It might, in good reason, be held by a court in this state, under the practice laid down in the Code, that, having a choice of actions,—one in Ohio, and one in California,—by making his choice of a personal action in Ohio he thereby waived his right of action to foreclose in this state. But this plaintiff occupied no such happy position. In bringing his action he was not free to choose between Oregon and California. He had no standing whatever in the courts of California. He was compelled to go to Oregon to bring his action. By bringing his action in the only place where he could possibly bring it, it cannot be said that such act resulted in a waiver of any rights upon his part. Upon the authority of Blumberg v. Birch we think the judgment rendered in this case should stand, and, in the absence of authority, sound reason and common justice demand an affirmance of the judgment. It is so ordered.

We concur: PATERSON, J.; HARRISON, J.

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102 Cal. 394

PEOPLE v. FEHRENBACH. (No. 21,019.)

(Supreme Court of California. May 3, 1894.)

Larceny — Testimony of Co-Conspirator — Obtaining Money by Fraud.

1. On a trial for larceny it appeared that defendant conducted an employment agency, and C., in response to his advertisement for a collector, was taken by him to the office of another (jointly indicted with him), by whom he was employed for three months, and required to deposit $100 as security for his good conduct. A few days thereafter defendant informed C. that his employer did not need his services any longer, and tried to get possession of the note given for the deposit, while at the same time he attempted to get another person to take C.'s place, and deposit $150. A part of these negotiations between such person and C. were made in defendant's presence. *Held* sufficient evidence of a conspiracy between defendant and the person employing C. to render the declarations of the latter admissible against defendant.

2. The testimony of another, who had responded to defendant's advertisement, that defendant tried to get him to take the position held by C. on the same terms, except that a deposit of $150 was required, and that his offer to give ample security instead of a cash deposit was refused, was admissible.

3. In such case it was not error to instruct that, where two are jointly concerned in a transaction, one is chargeable with statements of the other concerning it, made out of his presence, when the jury were further instructed that before they should consider statements against defendant, made by another out of his presence, they must find that defendant and such person were jointly interested in the transaction concerning which the statements were made.

4. The declarations of a co-conspirator are not inadmissible because he was not indicted.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

George Fehrenbach was convicted of grand larceny, and appeals. Affirmed.

Robert Ferral and Wilson & Burt, for appellant. Wm. S. Barnes, Dist. Atty., and Atty. Gen. Hart, for the People.

SEARLS, C. The defendant, George Fehrenbach, was informed against, with one R. E. McBurnie, for the crime of grand larceny, charged to have been committed on the 1st of December, 1892, at the city and county of San Francisco, by feloniously stealing the sum of $100 in lawful money of the United States, the personal property of one Earl L. Cook. Upon a trial, defendant was convicted and adjudged to punishment by confinement for eight years in the state prison. The appeal is from the judgment, and from an order denying a motion for a new trial. Defendant kept what was denominated as the "Pacific Coast Clerks' Employment Bureau," at 1118 Market street, San Francisco. McBurnie, who is informed against with him, either by himself or with others, was located at 1122 Market street, and engaged in what defendant specifies as "the real-estate and business chance." Whether McBurnie was alone in the real-estate business, and a man named Griffith was proprietor of the business chance branch conducted in the same office, is not clear, or indeed important. On the 1st day of December, 1892, Earl L. Cook had seen a notice of defendant, published in a public newspaper, that a collector was wanted at 1118 Market street, and called upon defendant to make inquiry, and was infromed by defendant that he had a couple of places which he thought Cook could fill; that one of them was that of collector in a real-estate office, but that security was required to the extent of $150, and witness was asked if he could give it. Finding that Cook could furnish but $100 in cash, defendant undertook to arrange it for him, pursuant to which he was taken by the defendant to McBurnie, at 1122 Market street, where, after some negotiating, Cook was employed as a collector at $60 per month for a term of three months, Cook depositing $100 in cash with McBurnie as security for good conduct, for which he received a note signed by McBurnie, payable at 90 days.

The important question in the case is this: Was there sufficient evidence of a conspiracy between defendant and McBurnie, or between defendant, McBurnie, and others, to fraudulently obtain possession of the money of the prosecuting witness, Earl L. Cook, to justify the admission in evidence of the declarations and acts of McBurnie, made and performed without the presence and hearing of defendant. The general rule is thus stated by Wharton at section 698 of his work on Criminal Evidence (9th Ed.): "In cases of crime perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the declaration of all, and therefore imputable to all. All are deemed to assent to or command what is said or done by any one in furtherance of the common object. A foundation, however, must first be laid aliunde, by proof sufficient, in the opinion of the court, to establish, prima facie, the fact of conspiracy between the parties, the question of such conspiracy being ultimately for the jury." It will sometimes, however, occur that the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, and first present to the jury the evidence on which the theory of a conspiracy is founded. There are other cases which might be mentioned in which this general rule may well be departed from. As the jury, in all cases of this kind, are the ultimate arbiters of the question of conspiracy or no conspiracy, the question of the order of proofs may be left with safety to the discretion of the trial court. Wharton, at section 698a, says: "As it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution may, on the trial, prove the declarations and acts of one, made and done in the absence of the others, before proving the conspiracy between the defendants, though such proof will be treated as nugatory unless the conspiracy be afterwards independently established."

The present case presents a fair example of the propriety of what may be termed the exceptional course in the order of proofs. The conduct of the parties was largely of a character such as may be properly resorted to as a matter of precaution and security in the employment of subordinates. The claim of the prosecution was that this plan was resorted to, not in good faith and for a legitimate purpose, but as a means to inveigle the prosecuting witness, and with the felonious intent of obtaining and converting his money. The testimony tending to show defendant a conspirator consisted not only in his procuring the prosecuting witness, taking him to his codefendant, and participating in the agreement with him, whereby he was induced to part with his money, but in his subsequent conduct at intervals, whenever and wherever it would seem to do most good, in endeavoring to get rid of such witness, and procuring possession of the note which the latter held. He it was who, at the end of three or four days after Cook was employed first, informed Cook that McBurnie did not need him and had no work for him, and endeavored to induce him to seek other employment, and at about the same time sought to engage the witness Ingalls to take the same place with McBurnie, and deposit $150, as he had already induced Sutherland to do. All this evidence came in in the orderly sequence of time and events, and, so far from being improper, the course adopted by the court was apparently the only one calculated to present the case fairly to the jury, as a consistent whole.

The instructions of the court to the jury upon the question of the necessity of the conspiracy being proven before the defendant could be bound by the declarations of others were all that the defendant asked, and all that the law requires. W. C. Ingalls was called as a witness for the prosecution, and testified, in substance, that, on the same day that Cook went to the office of defendant, he (the witness) also visited the same office, registered, and paid defendant therefor $1, and was told to come back in the afternoon, which he did, and was then told by defendant that he had a position as clerk in an office, doing outside work, collecting, etc., and that they required $150. Witness could not give that much, but told him he could give $60 or $70. Defendant then took witness to McBurnie at 1122 Market street, and introduced him. A man named Tyler was also in the room, and was consulted by McBurnie, after which witness was informed the amount he could deposit was not sufficient. Fehrenbach was present, and suggested that witness deposit $80, and then draw money on account of his wages to live upon. The witness was not willing to do this, and he and defendant left together. The witness informed defendant he was expecting some more money from the east, and would probably receive it in about a week, and was then told to come again when he received it. At the end of, say, a week, the witness went again to defendant's office, and, in answer to an inquiry, told the latter he was prepared. Defendant then introduced witness to either McBurnie or Griffith, who was in the room with defendant, and who defendant said was his clerk, and told the clerk to take witness "up to that office where they wanted a clerk." The witness is taken to the McBurnie office, introduced to Tyler, who asks him if the gentleman explained the business to him, whereupon they have a conversation on the subject of the employment, the witness proposing to deposit his money in a bank and give security, but Tyler will consent to nothing but a deposit of the money with him as security for the faithful performance by witness of his duties as a clerk. McBurnie or Griffith (the witness was not sure which it was) was present at this interview. Tyler was the party who witnessed the contract between Cook and McBurnie, and whether he was a partner with the latter, or a clerk, does not clearly appear. Defendant spoke of the occupants of McBurnie's office as a firm; said the firm was thoroughly responsible in every way. McBurnie, Griffith, and Tyler had an office together, and defendant took another witness in for a like purpose, and vouched for the reliability of the firm; said the "firm was all right," etc. To this testimony of said Ingalls objection was made, and overruled by the court, and thereafter counsel for defendant moved to strike out the testimony as to the conversation between the witness and Tyler upon the ground that it was not had in the presence of defendant, and with which the defendant had nothing to do. The objection was overruled, an exception noted, and the ruling is assigned as error. We think the testimony was admissible for the purpose for which it was offered. It must be borne in mind that it did not go to the direct guilt of defendant in feloniously taking the money of Cook, but was introduced merely for the purpose of showing guilty knowledge on the part of defendant in other and similar transactions, with a view of determining the motive in the transaction in issue. The negotiations commenced between defendant and the witness. Defendant stated the precise terms upon which the witness would be employed. That he took him to McBurnie, and they talked the matter over, Tyler being present, and the bargain was not consummated because witness did not possess the requisite $150. That when he called again at the office of defendant, and signified his readiness to comply with the terms proposed, defendant sent either McBurnie or Griffith with him to the McBurnie office, where they found Tyler, and carried on the negotiation upon the precise lines indicated by defendant. There is some evidence that McBurnie was present. There is also evidence in the record from which it may be inferred that Griffith, McBurnie, Tyler, and defendant filled the various relations of partner, principal, agent, clerk, and independent operators, at different times, and there was some testimony tending to show that Tyler was a conspirator with the others. This being so, the fact that he was not prosecuted with defendant and McBurnie is of no moment. The declarations of a co-conspirator who is not prosecuted are equally admissible with those of one under indictment and prosecution. Again, the declarations of Tyler were of no importance beyond the fact that he adhered to the terms indicated by McBurnie and defendant as the basis upon which the witness would be employed, viz. upon the deposit of $150 in cash. In any point of view which we take of the case, the error assigned does not call for a reversal of the judgment. Like considerations apply to the other objections made to testimony of other witnesses.

Appellant takes excerpts from the charge of the judge to the jury, and objects to them as violative of law. The following is a fair sample: "We all know that one man cannot be charged with what another man, disconnected from him, and out of his presence and hearing, does, nor with what he says; but, if the two are jointly concerned in the enterprise, then it is admissible, contrary to the usual rule, and I have admitted here divers and sundry conversations and acts done by McBurnie out of the immediate presence of Fehrenbach; but it is proper to understand that they were admitted because the charge on the part of the prosecution is that they were both concerned in this act." The argument of appellant is that this instruction was the equivalent that a bare suggestion by the prosecution of a defendant's guilt can take the place of proof of a charge, etc. The learned counsel seems to overlook the fact that this was preliminary to the instruction which was given by the court, as follows: "While I have admitted the testimony,—this testimony of what McBurnie said and did out of the immediate presence of the defendant, Fehrenbach,—while I have admitted it because of the claim of the prosecution that the two were jointly concerned, if you don't believe, and are not satisfied beyond a reasonable doubt, that they were both concerned and confederated in the alleged crime, you must not consider that testimony as against Fehrenbach. It is put before you only because it is a question also before you whether or not these men were jointly concerned. If you think they were, —if you are satisfied beyond a reasonable doubt that they were,—then the testimony of McBurnie's acts and declarations, without the immediate presence of Fehrenbach, is testimony to be considered. Unless you be so satisfied, it is to be put out of the case by you." The instruction thus taken as a whole contains a clear statement of the law properly applicable to the case, and is not subject to just criticism. The same may be said of the strictures indulged in as to other parts of the charge. They are too lengthy to quote in refutation of the objections. The instruction as to the weight to be given to the testimony of the defendant, who was a witness in his own behalf, was in line with like instructions which have been approved by this court in repeated instances. People v. O'Brien, 96 Cal. 173, 31 Pac. 45; People v. O'Neal, 67 Cal. 378, 7 Pac. 790; People v. Cronin, 34 Cal. 195; People v. Morrow, 60 Cal. 147; People v. Wheeler, 65 Cal. 77, 2 Pac. 892. The evidence was sufficient to support the verdict, and there was no abuse of discretion by the court below in refusing to postpone the trial. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 443

DUNLOP et al. v. KENNEDY et al. (No. 15,112.)

(Supreme Court of California. May 14, 1894.)

Mechanic's Lien—Filing Contract.

A contract for the erection of a building costing more than $1,000, "in conformity with plans, drawings, and specifications," is void where such plans and specifications are not filed with the contract in the recorder's office, and cannot limit the extent of mechanics' liens on such building.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Charles Dunlop and others against Alice Kennedy and others to enforce mechanics' liens. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Wm. H. H. Hart and Nowlin & Fassett, for appellants. Parker & Eells, for respondents.

PER CURIAM. This action was brought to enforce mechanics' liens. Plaintiffs recovered judgment, and defendants Alice Kennedy and John F. Kennedy now appeal from the judgment and from an order denying a new trial.

The contract was in writing, and in it Grey Stover contracted with Alice Kennedy, who is the wife of defendant John F. Kennedy, and was the reputed owner of the premises described, to construct a three-story dwelling house, and to furnish materials for the same. The contract price was $6,600. It was provided that partial payments were to be made in amounts equal to 75 per cent. of the value of the work done and materials furnished at the time of the payments, provided that, when each installment became due, a certificate should be obtained from the architect of the amount due; and it was made the duty of the architect at said times to deliver such certificate, or to state what defect had to be remedied to entitle the contractor to it. If the architect failed to deliver the certificate or give a reason for three days after demand, then the contractor should be entitled to the payment. The contractors abandoned the work when, as the trial court found, three-fourths of the work called for had been done. At that time the cost of the work performed and materials furnished was $6,941.86, a sum exceeding the full contract price. If this sum is only 75 per cent. of what would be required to complete the contract, as the court found, it would be estimated at contract rates as worth $4,950, which would be the value of the work and materials which had then been furnished, estimated as directed in section 1200, Code Civ. Proc. The court found that there had been paid on the contract only $3,000, which, deducted from the estimated value of the materials furnished and work performed, would leave $1,950 to be applied to the payment of liens. This would furnish ample means with which to pay the liens of plaintiffs in full, since other claimants filed no liens. But appellants claim that the evidence shows that there was more than $3,000 paid; that there was due defendant John F. Kennedy $1,000 for lumber furnished, and that it was agreed that the owner should have credit for that. The specification of the insufficiency of the evidence to sustain the finding that only $3,000 had been paid is, in effect, that the evidence shows that, considering the materials on hand, there was sufficient work done to warrant the payment of $4,000, when it was agreed that the owner was entitled to a credit for that sum. But this specification is not sufficient. It does not appear that there was a certificate of the architect to the effect that the contractors were entitled to the payment, nor does it appear that circumstances existed which would entitle the contractors to the payment without such certificate. But this view is not presented by appellants, nor is it necessary to rely upon it to sustain the judgment. The contract was not filed in the recorder's office, and the memorandum filed was fatally defective, in that it contained no sufficient statement of the general character of the work to be done. That part of the memorandum is as follows: "Third. The general character of the work to be done under said contract is as follows, to wit: The said Grey Stover, as contractor, agrees with the said Mrs. Alice Kennedy, as owner, to furnish the necessary labor and materials, including tools, implements, and appliances required in the execution of the carpenter, painting, plumbing, and cement works,—in fact, all work specified in the specifications furnished by the within-named architect. The cement work consists of all work in connection with the new building, such as sidewalk; walkway at westerly side of new building and in the lower rear yard; also, sidewalk in front of lot adjoining, running easterly forty-two (42) feet, and all walkways and yards in connection with said lot, said walkways to be curbed and put in as directed by the owner (said lot runs from Austin street through to Pine street) in a workmanlike manner, in conformity with the plans, drawings, and specifications for the same made by Jas. E. Wolfe, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto, and others concerned in said erection." This is manifestly as defective as was the memorandum in Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629, or in the more recent case of Greig v. Riordan (Cal.) 33 Pac. 913. In these two cases the policy of the law is elaborately discussed, and it is unnecessary to repeat the reasoning here. The contract being void, the lienors were entitled to recover the full value of the materials furnished, irrespective of the contract price. The other points raised are based upon the supposed contract, which being void, there is no foundation for the contention of defendants. The judgment and order are affirmed.

102 Cal. 389

NOYES v. WOOD et al. (No. 15,374.)

(Supreme Court of California. May 3, 1894.)

NEGLIGENCE OF FELLOW SERVANT—GRADE OF EMPLOYMENT—FOREMAN.

A master is not liable to an employe injured through the negligence of his foreman in erecting a defective scaffold for him to work upon, as such foreman is a fellow servant.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by William D. Noyes against Al. Wood and Charles Wood to recover damages for personal injuries. There was a verdict and judgment for plaintiff, and, from an order granting a new trial, plaintiff appeals. Order affirmed.

Edw. C. Robinson and Edward A. Holman, for appellant. C. T. Johns and J. C. Martin, for respondents.

TEMPLE, C. This is an action to recover damages for personal injuries received by plaintiff while in the employ of defendants. It is charged in the complaint that defendants employed plaintiff as a journeyman painter, to assist in painting a barn which defendants had contracted with the owner, Mr. Pierce, to paint; that it became the duty of defendants, as his employers, to furnish ladders to be used in the work, and that they furnished ladders which were too short to enable him to perform the work, and therefore defendants erected a scaffold, and placed a short ladder upon it; that, through the negligence of the defendants, the scaffold was defective, insufficient, and insecure, whereby plaintiff was injured. Verdict and judgment were entered for plaintiff, and thereupon defendants moved for a new trial, specifying many respects in which they claimed that the evidence was insufficient, as also several alleged errors occurring on the trial. A new trial was granted, and, from the order, plaintiff appeals.

In the order granting a new trial, the judge stated that the motion was granted "on the sole ground that the evidence does not show that said Wayne was a foreman or vice principal, but does show that said Wayne was a fellow servant with plaintiff, in the same general business; upon all other grounds of said motion for a new trial the court finds for plaintiff against defendants." Plaintiff testified that Wayne was foreman and in charge of the work for defendants, and, as such, put up the scaffold and ladder which fell with plaintiff. It is therefore claimed that the negligence of Wayne was the negligence of his principals (the defendants). Upon this theory the case was tried, and is argued here by appellant. Of course, under repeated decisions of this court, the grade of work of employes is an immaterial circumstance. Defendants would not have been liable to the plaintiff for the negligence of Wayne, even if he had had entire charge and control of the work, with full power to hire and discharge the men. Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Congrave v. Railroad Co., 88 Cal. 360, 26 Pac. 175; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Stevens v. Railroad Co. (Cal.) 35 Pac. 165. He was still but a fellow servant with plaintiff, and, as his competency is not questioned, defendants are not liable for his negligence. No doubt it was for this reason that the court granted a new trial. But, on this appeal, the court is not confined to a consideration of the point upon which a new trial was granted, but the order will be affirmed if upon the whole record it appears that a new trial should be had. Nally v. McDonald, 77 Cal. 284, 19 Pac. 418.

The second specification, as to the insufficiency of the evidence to sustain the finding that there was no evidence tending to show that the defendants were responsible for the act of Wayne in making the scaffold, is manifestly well founded, and this of itself necessitates a new trial. If, as appellant contends, the defendants furnished no ladders, that did not authorize plaintiff and his fellow servant to construct an insecure scaffold and hold defendants responsible for their own negligence. Upon this point Burns v. Sennett, supra, is instructive. That plaintiff and Wayne were fellow workmen is manifest from plaintiff's testimony. It was shown that, under the circumstances, the workmen generally construct their own scaffolds, and adjust their appliances to enable them to reach their work, and, in the nature of things, the skill requisite to do so is a necessary qualification to a journeyman painter. If the ladders had been long enough, scaffolds would not have been required. But there will generally be a choice of means open to workmen. It is not claimed that a scaffold could not have been made which would have been safe; if it was not, it was the fault of the plaintiff or his fellow workman. The order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(102 Cal. 432)

LAKE COUNTY v. ALLMAN. (No. 18,271.)

(Supreme Court of California. May 14, 1894.)

CONDEMNATION PROCEEDINGS—WHO MAY MAINTAIN.

Condemnation proceedings to open a private way over land may, under Pol. Code, § 2692, be maintained in the name of the county.

Department 2. Appeal from superior court, Lake county; R. W. Crump, Judge.

Proceedings by the county of Lake against John Allman. From a judgment for plaintiff, defendant appeals. Affirmed.

D. C. MacDougal and Mr. Sheridan, for appellant. J. M. Hamilton (Hudson & Sayre, of counsel), for respondent.

PER CURIAM. This is an appeal from the judgment by defendant upon the judgment roll, without any bill of exceptions, from a judgment against him in a condemnation proceeding brought to open a private road over certain land of defendant. The point that the proceeding cannot be maintained in the name of the county is, we think, not well taken. Under section 2690, Pol. Code, it may be brought by the county in the matter of opening a public road; and by section 2692 the same provisions apply to what are called "private or by-roads." The statement in the complaint of the land sought to be taken, together with the name filed, constitute a sufficient description of such land. The findings, we think, are sufficient. They show that "the public interests demand and require" that the road be established; and the damages are also found with sufficient particularity. They are not defective in any material matter. We see no reversible error. Judgment affirmed.

(102 Cal. 433)

WOLFF v. WOLFF. (Nos. 15,327 and 15,389.)[1]

(Supreme Court of California. May 14, 1894.)

DIVORCE—GROUNDS—EVIDENCE—CORROBORATION—CONDONATION—WHAT IS—BILL OF EXCEPTIONS—REDUNDANT MATTER.

1. In an action for divorce, where plaintiff's testimony as to certain acts of defendant is corroborated, and such acts constitute extreme cruelty, it is not necessary that her testimony be corroborated as to all other acts of cruelty testified to by her.

2. A mere voluntary promise, by a wife having a cause for divorce, to return to, and live with, her husband, is not a "condonation," within Civ. Code, §§ 115, 116, defining it as a conditional forgiveness, and making essential thereto reconciliation, and remission of the offense by the injured party, and restoration of all marital rights.

3. A complaint alleged that defendant had property worth $150,000, and a gross income of $10,000 a year. The answer alleged that nearly all of defendant's realty was mortgaged for over half its value, that his expenses had equaled his income, and that he was worth no greater sum than about $30,000, cash values. *Held*, that a finding that the complaint was true, though plaintiff admitted the allegations of the answer, was not inconsistent with plaintiff's admissions, as the answer contained no averment necessarily inconsistent with the allegations of the complaint.

4. The insertion of useless and redundant matter in the bill of exceptions by appellee is not ground for reversal.

In bank. Appeal from superior court of city and county of San Francisco; Charles W. Slack, Judge.

Action by Lillie Wolff against Henry Wolff. From a decree for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Fox & Kellogg (W. W. Foote, of counsel), for appellant. W. H. L. Barnes, for respondent.

PER CURIAM. When these appeals were in department, the following opinion was prepared by Commissioner VANCLIEF:

"Action for divorce on the ground of extreme cruelty, in which the judgment was in favor of the plaintiff, decreeing a divorce, and also that defendant pay to plaintiff, from his separate property, $150 per month for the permanent support of herself and infant daughter of the marriage, born December, 1891, whose custody was awarded to plaintiff, besides $600 for counsel fees in this action. There are two appeals,—one from the final decree, including the allowance of alimony, which is numbered 15,327; and the other from an order denying the defendant's motion for a new trial, numbered 15,389. The first is founded upon a bill of exceptions as to both law and facts, and was taken within sixty days after the rendition of the judgment. The second is upon a statement made and used on the motion for a new trial. The bill of exceptions, and the statement on motion for new trial, are substantially, and almost literally, identical. Counsel have argued the two appeals together, and they will be so considered.

"Appellant complains that, in several respects, the findings of fact are not justified by the evidence. But, with one exception, hereafter to be considered, I think the evidence sufficient. It is amply sufficient to justify the finding of extreme cruelty, and all other facts requisite to entitle plaintiff to the divorce. It is not questioned that plaintiff testified to all the acts of cruelty alleged in her complaint, but it is contended that her testimony was not sufficiently corroborated. This contention, however, seems to rest solely upon the alleged ground that the testimony of the other witnesses did not tend to prove all the acts of cruelty alleged in the complaint, and testified to by plaintiff. But the testimony of other witnesses positively tended to prove all the principal acts of cruelty charged, except that none of them saw the defendant beat or strike the plaintiff; yet, in my opinion, circumstantially corroborated plaintiff's testimony, even as to this. But the court found that the allegation that defendant beat and struck the plaintiff is not true. The findings of the facts of cruelty are as follows: 'That since said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and in particular as follows: That, almost ever since the commencement of the married life of said parties, the defendant has been in the habit of grossly abusing the plaintiff, and of applying to her, and to members of her family, and relatives, vile, profane, and obscene language, the particulars whereof are stated at length in the complaint on file in this action. And the court finds, as facts, that such language was used by the defendant as and when and in the manner alleged by the plaintiff; that almost immediately after said marriage the plaintiff became and was pregnant, and that during the term of her pregnancy she was highly nervous, and in a delicate state of health, and defendant used towards her, during said period, vile, abusive, and indecent language, and which language and treatment of defendant caused the plaintiff physical pain, and greatly aggravated the physical sufferings undergone by her during said period, and that the harsh and abusive treatment and language of defendant towards plaintiff caused her physical suffering, affected her health, and also inflicted upon her grievous mental suffering; and that plaintiff has not condoned said offenses,'—and, as a conclusion of law, found that defendant 'has been guilty of extreme cruelty towards the plaintiff.' The testimony of plaintiff, as to the facts thus found, having been sufficiently corroborated, and these being sufficient to constitute extreme cruelty, even according to the case of Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, and surely so according to the decision in Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, it was not material nor necessary that her testimony should have been corroborated as to all other distinct acts of cruelty alleged in her complaint.

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[1] For dissenting opinion, see 36 Pac. 1037.

"(2) It is contended that the finding 'that the plaintiff has not condoned the offenses' is not justified by the evidence. It was pleaded by defendant, as a defense to the action, that on April 12, 1892, after the commencement of the action, all the causes of action were condoned, etc.; but defendant offered no evidence of any condonation, except the testimony of Mr. Judis, to the effect that during the pending of this suit he had an interview with plaintiff, in which he thought she said 'she had made up with her husband, and then changed her mind; * * * that they parted friendly, and immediately she changed her mind, and thought she could not live with him.' The defendant, however, though he testified at considerable length as to all other matters, said nothing about the alleged condonation. It is agreed that the place of the alleged condonation was her mother's house, and the time the 12th day of April, 1892. That the defendant, there and then, earnestly solicited his wife to condone his offenses, and return to his home, was proved by the testimony of plaintiff's mother and sister, who testified that they, or one of them, was present with plaintiff and defendant, and heard all the conversation between them on April 12th, and did not hear plaintiff promise to forgive him, nor to return to his home, but did hear plaintiff refuse to return, or to live with him again, and that even on that occasion he was violent, abusive, and profane, calling his wife a 'damned liar.' The plaintiff testified to the same effect, except that she admitted that she had told him on that day, for the purpose of getting rid of him, and because she 'was in bodily fear of him, that she would return to him,' and that on the next day defendant returned, and asked to see her, when she refused to meet him again, and he was denied admittance into her mother's house. Conceding that she voluntarily promised to return to and live with him, such promise alone was not 'condonation,' as defined by Civil Code, §§ 115, 116,[1] since it neither remitted his offenses, nor restored him to marital rights.

"(3) The complaint contains the following: 'And plaintiff further says that prior to the marriage of plaintiff and defendant, and ever since their marriage, the defendant has been engaged in a large and lucrative business at 120 Sutter street, in the city and county of San Francisco; that she is informed and believes that his estate consists of real and personal property, and is of the value of from hundred and twenty to one hundred and fifty thousand dollars; and that his income from his business and property is not less than ten thousand dollars a year.' This was answered by the defendant, as follows: 'Defendant denies that he is engaged in a large and lucrative business at 120 Sutter street, San Francisco, or elsewhere, and avers that for two years last past the said business has been conducted without profit, and has been running behind in the matter of expense compared with profits; that for more than two years last past the defendant has not made any net profits in said business, and conducts, and has conducted, the same in hopes of a better future, and for the purpose of keeping together his customers and stock in trade, and the good will of the business. Defendant denies that he is worth from one hundred and twenty to one hundred and fifty thousand dollars, or that he is worth any larger or greater sum, over and above his just debts and liabilities, than about thirty thousand dollars, cash values, including all the property and business, and denies that his income is ten thousand dollars a year, or that his income from his business has been, during the past two years, any sum of net profit, or is any sum of net profit, and avers that the net income from his real estate does not exceed the interest which he is obliged to pay upon the mortgages thereof, and the taxes and repairs. Defendant avers, further, that nearly all his real estate which has any value is mortgaged in the aggregate fully one-half the value thereof, if not more.' During the trial, plaintiff's attorney made the following statement to the court: 'Plaintiff's attorney here stated to the court, in open court, and admitted as a fact in the case, that the allegations, statements, and denials in the defendant's answer on file herein, as to his property, assets, and income, are admitted and accepted as true and correct, and shall be accepted by the court as true and correct, in making its decisions and findings in this case.' Yet the court found, as facts, 'that all the allegations contained in the complaint herein are true, except that it is not true that the defendant beat and struck the plaintiff, as alleged in the complaint.' The effect of this finding is that the defendant owned real and personal property of the value of at least $120,000, and that his income from his business and property is not less than $10,000, as alleged in the complaint. The appellant contends that this finding is not justified by the evidence, and is inconsistent with the above statement and admissions made by plaintiff's attorney at the trial. I think, however, that the finding is justified by the pleadings, and is not inconsistent with the admissions made by plaintiff's attorney at the trial. The answer of the defendant contains no denial of the allegations that his real and personal property is of the value of $120,000, and that his income from his business and property is $10,000 a year, nor does it contain any affirmative averment necessarily inconsistent with either of those allegations of the complaint. The comparative value of his real property with that of his personal property is not stated, and cannot be deduced from the answer, and therefore may be only as one to ten. That nearly all of his real property was mortgaged for a sum equal to half its value neither lessened its value, nor deprived him of its ownership. That his expenses for the last two years, necessary and unnecessary, had been equal to his income, so that he had realized no profits or net income, is not inconsistent with a gross income of $10,000 a year, as alleged in the complaint. That he was worth no greater sum, 'over and above his just debts and liabilities, than about thirty thousand dollars, cash values,' is not inconsistent with his ownership of property of the value of $120,000, nor with an income of $10,000 a year. The answer is clearly evasive of the allegations of the complaint as to defendant's income and the value of his property, and seems to have been so intended. Nevertheless, the affirmative allegations of the answer, having been expressly admitted by plaintiff's attorney, were material probative facts, bearing upon the issue as to the proper amount to be allowed for the support of the defendant and her child; and, for the purpose of estimating and determining what was a 'suitable allowance' for such support, the court should have considered these admitted facts, as required by section 139 of the Civil Code, and it must be presumed that the court duly considered them for that purpose. They were not relevant to any other issue.

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[1] Section 115 defines "condonation" as the conditional forgiveness of a matrimonial offense constituting a cause of divorce. Under section 116, the following requirements are necessary to condonation: (1) A knowledge on the part of the condoner of the facts constituting the cause of divorce; (2) reconciliation, and remission of the offense by the injured party; (3) restoration of the offending party to all marital rights.

"(4) Plaintiff's attorney proposed to amend the bill of exception, as drafted by defendant's counsel, by inserting therein certain affidavits of the parties and others, which had been filed in the case on plaintiff's motion for alimony and attorney's fees pendente lite. Portions of some of these affidavits had been read on the trial, in connection with the examination and cross-examination of witnesses who had made them. Defendant's counsel objected to the insertion of such affidavits, or any parts thereof, not put in evidence on the trial. The court overruled the objection, and allowed said affidavits to be inserted in the bill of exception, to which the defendant excepted. Appellant contends that this ruling was error, for which the judgment should be reversed. Section 650 of the Code of Civil Procedure provides that, in settling a bill of exceptions, 'it is the duty of the judge or referee to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible.' And section 652 of the same Code provides: 'If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same,' under such regulations as that court may prescribe. It may be conceded that such affidavits as do not appear to have been read at the trial for any purpose, and such parts of them as were not so read nor necessary to explain the parts thereof which were read, were 'redundant and useless matter,' which should not have been inserted in the bill, yet the judgment should not be reversed for the error of inserting them; otherwise, at least one-half of the judgments tested, on appeal, by bills of exceptions and statements on motion for new trials, would be reversible on the same ground, since a majority of the statements and bills of exceptions contained in the records on appeal are found to contain more or less redundant and useless matter. All matter in a bill of exceptions which does not appear to be relevant to the questions raised by the bill, nor useful in the solution of such questions, is redundant and useless, and, as such, will be disregarded by the appellate court; and this is the only remedy for the error, except that the appellate court may tax the costs of redundant matter to the party that caused its insertion. Subject to these checks, the action of the trial judge in settling bills of exception and statements on motion for new trials is final and conclusive. Counsel for appellant further contend that the court erred in admitting and excluding evidence. Their numerous specifications of such alleged errors have been carefully examined, and are found to be either groundless or harmless, and of so little importance as not to require special consideration. I think the order and judgment appealed from should be affirmed."

Upon further consideration of the appeals in bank, we are satisfied with the foregoing opinion, and the conclusions there reached. It may be further said, with respect to the allowance of alimony, that, upon the whole case, it does not appear that the court abused its discretion in fixing the amount. Of course, it will always be within the power and discretion of the court to modify the allowance of alimony in the future, if just cause appear for such modification. The judgment and order denying a new trial are affirmed.

(102 Cal. 411)

PEOPLE v. YOUNG. (No. 21,063.)

(Supreme Court of California. May 3, 1894.)

CRIMINAL LAW — INTOXICATION OF DEFENDANT—INSTRUCTIONS—WITNESS — COMMENTS OF COUNSEL.

1. No act committed by one voluntarily intoxicated is less criminal because of such intoxication; but, when intent is a necessary element to constitute a particular species or degree of crime, the jury may consider the fact of defendant's intoxication to aid them in determining the intent with which he committed the act.

2. Evidence showing that deceased was defendant's mistress is competent.

3. A witness in a criminal case need not be absolutely certain in his testimony as to the identification of defendant, to render such testimony competent.

4. Comment by counsel for the state on the absence of a witness for defendant is no ground for reversing a conviction.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

William H. Young was convicted of manslaughter, and appeals. Affirmed.

On a trial for killing an inmate of a house of ill fame, a prostitute occupying a room adjoining that of deceased testified that she heard defendant and deceased quarreling; that there was a crash of broken glass; that deceased came out with her clothes on fire from a broken lamp; and that defendant rushed from the room, telling witness he would kill her, too, if she had him arrested. Another witness testified that he saw a man, who he thought was defendant, running away from the premises immediately after the alleged crime. The officer who arrested defendant testified that, when first arrested, defendant admitted being there, but said the burning happened by accident, and that the next morning he denied being there altogether. Deceased, who lived for two days after the injury, maintained that it was an accident caused by her knocking the table over. Counsel for the state, in alluding to a witness for defendant, said: "He is not here, and I will ask you, when you return to your jury room, to answer the absence of this pregnant fact; and I will tell you the echo will follow you, and answer, 'Where is Joe Chambers?' [witness]." The court instructed as follows on insanity: "No act committed by a person in a state of voluntary intoxication is less criminal by reason of his having been in such condition; but whenever the actual existence of any particular purpose, motion, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in order to aid them in determining the purpose, motive, or intent with which he committed the act."

Zue G. Peck and R. A. Ling, for appellant. W. H. H. Hart, Atty. Gen., for the People.

McFARLAND, J. The information charged the defendant with the crime of murder, consisting in the killing of one Irene O'Brien, alias Irene Mansfield, and he was convicted of manslaughter. He appeals from the judgment, and from an order denying his motion for a new trial. We see no reason for disturbing the judgment, or for granting a new trial.

The point that there was not sufficient evidence to sustain the verdict is not tenable. There was clearly evidence enough to warrant the conclusion reached by the jury.

We see no error committed by the court in its instructions to the jury. The instruction of the court upon the subject of intoxication correctly stated the law upon that subject; and, although there was not much evidence to the point of appellant's intoxication at the time of the alleged commission of the crime, still we think that he suffered no prejudice from said instruction. The instruction as to how the jury should view the testimony, and that they "should consider his relation to the case," etc., while criticised several times by this court, seems to be a favorite subject for instruction in lower courts, and has been too often held to be not erroneous to be now overturned.

There are no other instructions necessary to be noted.

A number of exceptions were taken to the rulings of the court admitting evidence which showed, to some extent, the relation, existing between appellant and the woman killed, of man and mistress. It is contended that this evidence was inadmissible because the effect of it was to bring the appellant into disrepute, and affect his good standing before the jury. The evidence, however, necessarily appeared in the disclosure of facts pertaining to the case; and we do not think that any error was committed in that regard, or that appellant was unjustly prejudiced thereby. Neither do we think that appellant was subjected to any unwarrantable cross-examination.

No error was committed in admitting the testimony of the witness Grant. A witness is not required to be absolutely certain in his testimony as to the identification of another person.

There was no error in admitting the evidence of the witness Bosqui. What the appellant said to him was not a confession; and there was nothing in the circumstances under which appellant made the statement to him which would exclude such statement from being introduced in evidence.

There was nothing in what the district attorney said to the jury that would warrant any interference with the verdict.

There are no other points in the case necessary to be specially noticed. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

(4 Cal. Unrep. 634)

CITY AND COUNTY OF SAN FRANCISCO v. BURR et al. (No. 15,326.)[1]

(Supreme Court of California. May 14, 1894.)

DEDICATION OF LAND FOR PUBLIC STREET — FILING PLAT — DEFENDANTS SUED BY FICTITIOUS NAMES.

1. Where a plat of land is recorded, and land appears thereon not numbered as a lot, nor corresponding in size or shape to one, but bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, such land is dedicated for a public street, though not named as such on the plat.

2. A judgment against persons sued by fictitious names, where the complaint is never amended, as required by Code Civ. Proc. § 474, by inserting their true names, will be reversed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against E. W. Burr and others to abate a nuisance consisting of maintaining a fence across a public highway. From a judgment for plaintiff, defendants appeal. Reversed as to defendants sued by fictitious names, and as to all others affirmed.

J. C. Bates, for appellants. H. T. Creswell, for respondent.

DE HAVEN, J. 1. The finding of the court that the land described in the complaint was dedicated as a public street is fully justified by the evidence set out in the bill of exceptions. It appears therefrom that the city of San Francisco was the original owner of said land, as successor of the former pueblo of Yerba Buena, and of the lots adjacent thereto, and that such adjacent lots were sold by it with reference to the map found in "Book B. D. R., Alcalde Grants of 100-Vara Lots in the Laguna Survey," upon which map, as well as upon the subsequent official maps of the city, known as the "Eddy Maps of 1850 and 1851," the land in controversy is sufficiently represented as a public way. It is true it is not named as a street on either of these maps, but, to use the language of the court in City of Indianapolis v. Kingsbury, 101 Ind. 209, "its shape, situation, and dimensions," as laid out on each, "show it to be a way of some kind." It is not numbered as a lot, nor does it correspond in form or size to the lots appearing on the maps; and the lines which mark its boundaries, as shown by each map, clearly indicate that they were intended to represent the lines of a street, and certainly, when the adjacent lots were sold by the city as bounded on the street thus represented on the map, the dedication by the city of such land for public use as a street was complete.

2. The defendants Domario, Devignenze, Hatman, Ferro, and Martha W. Wood were sued by fictitious names, and duly served in the action, but the complaint was never amended by inserting their true names, as required by section 474 of the Code of Civil Procedure, and all of them, with the exception of Martha W. Wood, made default. The judgment against these defendants cannot be sustained, as there is nothing in the complaint to show that the plaintiff is entitled to any judgment against them, or that they are the persons guilty of maintaining the nuisance complained of. A judgment against a person whose name is not mentioned in the complaint must, upon appeal therefrom, be reversed as to such person. McKinlay v. Tuttle, 42 Cal. 571; Campbell v. Adams, 50 Cal. 205; Baldwin v. Morgan, Id. 585; Farris v. Merritt, 63 Cal. 118.

The judgment against the defendants Domario, Devignenze, Hatman, Ferro, and Martha W. Wood is reversed, and as to all the other defendants the judgment is affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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[1] Rehearing granted.

102 Cal. 357

MILLS v. OREGON RY. & NAV. CO. (No. 15,033.)

(Supreme Court of California. May 3, 1894.)

New Trial—Verdict not Sustained by Evidence.

1. An order for new trial specified as grounds that plaintiff's evidence failed to prove the contract sued on, and that the court erred in admitting proof of admissions by defendant's agent. *Held*, that the supreme court could not review such discretionary order on the ground that the admissions, if competent, proved plaintiff's case.

2. The trial court's discretion in granting a new trial for lack of evidence to sustain the verdict cannot be reviewed.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by E. T. B. Mills against the Oregon Railway & Navigation Company for damages in delay in transporting wheat. Verdict for plaintiff, and new trial granted. Plaintiff appeals. Affirmed.

John H. Dickinson, Pillsbury & Blanding, and P. L. Benjamin, for appellant. A. R. Cotton, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages from the defendant for failure to transport certain wheat from eastern Oregon to San Francisco. The complaint is in two counts, the first alleging that in July, 1885, the defendant made a contract in writing with the plaintiff, whereby it undertook and promised him to transport, quickly and promptly, from any point on its line east of the Cascade mountains, to San Francisco, all such quantities of wheat as he might thereafter deliver to it, and to deliver the same quickly and promptly to him at San Francisco; that in pursuance of said contract the plaintiff delivered to the defendant 8,326 tons of wheat to be transported to San Francisco, and that the defendant willfully delayed the transportation of the wheat so that it did not arrive at San Francisco until more than three months after it could have arrived there; and that by reason thereof the plaintiff was damaged in the sum of $35,000. The second count of the complaint sets forth the same contract, and alleges that in reliance thereon the plaintiff tendered to the defendant, in Oregon, for transportation to San Francisco, 9,000 tons of wheat, which the defendant refused to accept or to transport, and that by reason of such refusal the plaintiff suffered damage in the further sum of $35,000. The cause was tried by a jury, which rendered a verdict in favor of the plaintiff for the sum of $40,000. The defendant moved for a new trial upon various grounds,—among others, errors in law occurring at the trial, and excepted to by the defendant, and that the evidence was insufficient to justify the verdict, and, in the bill of exceptions thereafter settled, specified various errors of law, and also certain particulars in which the evidence was insufficient to justify the verdict. The court granted the motion for a new trial, and made its order in the following terms: "In this action, the motion for a new trial having been heretofore submitted to the court for consideration and decision, and now the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, upon the following grounds: First, that the evidence introduced on behalf of plaintiff on the trial of this action fails to establish the contract sued upon by plaintiff; second, that the court erred in the said trial in admitting evidence of admissions made by defendant's agent Muir, when conversing with plaintiff's agent Cavanagh; and, third, that the evidence on behalf of plaintiff failed to sustain the second count." From this order the plaintiff has appealed.

The effect of limiting in the order the grounds upon which a new trial was granted was discussed by this court in Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, where the court limited its order to a single error of law, and made no mention of the sufficiency of the evidence to justify the verdict, and in People v. Flood (recently decided) 36 Pac. 663, where the motion for a new trial was made upon various grounds, and the order granting the new trial was general in its terms, in which we held that, as the court did not exclude this ground, we were justified in holding that this was one of the grounds upon which it made the order. In the present case, however, the court has expressly specified in its order the insufficiency of evidence as one of the grounds upon which it grants a new trial. If this had been the sole ground upon which the motion for a new trial had been asked, and the order had been made in general terms, or if the motion had been made upon all of the statutory grounds, and the order had specified insufficiency of evidence as the sole ground upon which it was made, under the well-established rule, we should be compelled to accept the conclusion of the trial court as definitive of this question. This rule is not changed by reason of the fact that the court specifies in its order, in addition to this ground, one or more of the other grounds upon which the motion was made, as a reason for making the order. The statute has authorized the trial court to grant a new trial if, in its opinion, the evidence before the jury was insufficient to justify its verdict. For this purpose, that court has a revisory power over the action of the jury, and, in the exercise of that power, is intrusted with a large discretion. The judge before whom the trial was had has heard all the evidence in the case, has seen the witnesses, has noted the conduct of the trial on behalf of the respective parties, and observed the attention and capacity of the several jurors during the trial; and if, in his opinion, the verdict of the jury is inconsistent with the evidence before it, it is his duty to set it aside, and grant a new trial. This discretion which he is called upon to exercise under the sanction of his judicial position is not subject to review in this court, and, whenever exercised, is to be regarded as final, unless it is made to appear that his action was arbitrary, rather than discretionary, or was made in a case where no opportunity was presented for the exercise of discretion. Domico v. Cassassa, 35 Pac. 1024.

Counsel for the appellant urges that the several grounds upon which the court granted the new trial in the present case are resolvable into one, and all depend upon the second one named in the order; that, if the evidence thought by the court to have been erroneously admitted was properly before the jury, the court would have deemed it sufficient to justify the verdict. We cannot, however, assent to this proposition. Not only would such a construction of the order be in violation of its own terms, but, if the court had intended this result, it would naturally have limited its order to the error in admitting the evidence, and expressed itself satisfied that the evidence, as it stood in the case, was sufficient to justify the verdict. The statement in the order that the evidence "introduced on behalf of plaintiff on the trial" fails to establish the contract sued upon by plaintiff necessarily imports all the evidence introduced by the plaintiff, as well that of the admissions referred to in the second ground named in the order as the other evidence introduced on his behalf, while the third ground given in the order refers to all the evidence on behalf of the plaintiff in support of the second count,—the contract, the breach, and the damage sustained therefrom.

It only remains to consider whether there was any opportunity for the court to exercise a discretion in reviewing the action of the jury; for, if there was any conflict of evidence, or if the facts upon which the verdict rested were undisputed, the court could not be called upon to exercise such discretion. Whether there was a contract between the plaintiff and the defendant was one of the main issues in the case; and the plaintiff sought to show the existence of this contract, not only by documentary evidence, but also by oral testimony, and by proof of the conduct of the respective parties in reference thereto, as well as by evidence of admissions made on behalf of the defendant. These were matters which, in a peculiar way, called for the exercise of judgment, and required a proper consideration of the weight and importance to be given to the several species of evidence brought out at the trial. It would not be proper for us to indicate any opinion in reference thereto, but it is sufficient to call attention to the fact that they were before the jury, and that they were proper to be considered by the court upon the motion for a new trial, and also that they are of such a character as to present a case suitable for the exercise of the judicial discretion of the court in its re-examination of the verdict, and of the sufficiency of the evidence for its support. The court does not, in its order, specify the particular evidence of the admissions of Muir which it deems to have been erroneously admitted; and as counsel for respondent maintains that none of these admissions could be received, while appellant's counsel contends that, even if a portion of the evidence was subject to objection, the defendant did not, at the trial, make its objection to this evidence in such form as to justify its exclusion, we do not deem it necessary to review the entire evidence, and the several rulings of the court thereon. Upon another trial the parties will be able to present their evidence in such form, and under such objections, as will enable the court, in its rulings, to preserve their respective rights. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

102 Cal. 405

VINCENT v. CITY OF PACIFIC GROVE.

(No. 15,252.)

(Supreme Court of California. May 3, 1894.)

NEWSPAPERS—OFFICIAL PUBLICATIONS—PROOF.

1. Where the statute provides for the publication of council resolutions, the fact that dates of their passage read "1880" and "1860," instead of "1890," is immaterial.

2. When a city officer makes affidavit that he posted a notice of a resolution on September 12th, and the same day caused a like notice to be published for one insertion in a certain weekly newspaper, such publication is not disproved by production of all the numbers of the paper of that year except that of September 17th,—the first issue after the notice was posted,—and showing that it is not in such numbers.

3. If a nonsuit is proper, to grant it prematurely is harmless error.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by W. N. Vincent against the city of Pacific Grove for money had and received. Nonsuit granted, and plaintiff appeals. Affirmed.

C. T. Bird, for appellant. W. A. Kearney, for respondent.

BELCHER, C. This is an action to recover the sum of $500, and the appeal is from a judgment of nonsuit and an order denying a motion for new trial. The facts alleged in the complaint, and not denied by the answer, are in substance as follows: The defendant was a municipal corporation of the sixth class, and on September 8, 1890, its board of trustees, acting under the authority of an act of the legislature commonly called the "Vrooman Act" (St. 1885, p. 147), as amended in 1889 (St. 1889, p. 157), passed a resolution declaring its intention to improve Laurel avenue in said city from East street to Alder street, and designating the Pacific Grove Review, a weekly newspaper published and circulated in said city, as the newspaper in which said resolution of intention should be published. On September 12, 1890, the superintendent of streets posted notices of the passage of said resolution of intention along the line of the work mentioned therein, as required by law, and on the same day delivered to the publisher of the said weekly newspaper a notice, similar in substance, for publication by one insertion therein. On November 14, 1890, the board of trustees passed a resolution whereby it ordered the work described in the resolution of intention to be done pursuant to plans and specifications adopted therefor, and on January 5, 1891, it passed a resolution directing the clerk of the city to cause a notice with specifications to be posted, inviting proposals or bids for doing the work, and also directing the clerk to publish in said weekly newspaper a notice that proposals or bids for said work would be received by him up to the first Monday of February, 1891. On January 10, 1891, the clerk posted, and caused to be published, notices with specifications, etc., as directed. On February 2, 1891, N. Vincent & Co. delivered to the said clerk their proposal to do the said work for the sum of $4,977.50, and accompanied the same with a bank check for the sum of $500, payable to the order of the president of said board; and on the same day the board awarded the contract to them, as the lowest bidder, for the price or sum named in their bid. Afterwards, N. Vincent & Co., upon the ground that they had discovered that the proceedings were invalid, refused to enter into any contract with the street superintendent to do the said work; and on March 5th they demanded of the said board of trustees, in writing, that it order the said bank check returned to them. The board refused to make such order, and on the same day passed a resolution declaring the check forfeited to the city, and ordering the chairman of the board to collect the same and pay the money into the city treasury, which was done. Thereafter N. Vincent & Co. assigned all their right, title, and interest in and to the said check and the said $500 to the plaintiff, who commenced this action, averring that the said sum was so placed and received into the treasury of defendant to his use, and that he had a right to recover the same, with interest. The complaint further alleged that no official grade for Laurel avenue had been established at the time of the passage of said resolution of intention, and also that neither the resolution of intention, passed September 8th, nor the notice of the passage of said resolution, posted by the street superintendent September 12th, nor the resolution ordering the work to be done, passed November 14th, was ever published as required by law, and hence that the proceedings were without authority of law, and void. The answer specifically denied each of these allegations, and averred that on September 8, 1890, the board of trustees, by an order duly made and entered, established an official grade for the said avenue, which ever since has been, and now is, the official grade thereof, and that the resolution of intention, the notice of the passage of said resolution, and the resolution ordering the work to be done were each posted and published in all respects as required by law. Appellant contends that the decision upon each of these contested issues should have been in his favor, and that the court, therefore, erred in granting the motion for nonsuit.

1. The resolution of intention declared that it was the intention of the board of trustees "to order Laurel avenue, from the east line of First street to the west line of Alder street, graded to the official grade thereof, as established by resolution of said board, adopted at a meeting thereof held September 8, 1890, and now on file at the office of the city clerk of said city of Pacific Grove." The notice posted by the street superintendent and the resolution ordering the work done also contained the same statements. No proof was offered by the plaintiff showing that a grade was not established at the time and in the manner indicated, and the statement that it was must therefore be accepted as true.

2. To show that the resolution of intention was never properly published, plaintiff introduced in evidence a copy thereof as printed in the newspaper. At the foot of the resolution as passed were these words: "Passed in board of trustees this 8th day of September, 1890, by the following vote," etc. As published, the year was printed "1880" instead of "1890," and this constitutes the only objection to the sufficiency of the publication. The error complained of was, in our opinion, wholly immaterial. The date of its passage was not a part of the resolution, and was not required to be published. The statute required only that the resolution be published.

3. The plaintiff introduced in evidence the street superintendent's notice of the passage of the resolution of intention, framed in all respects as required by law, and the affidavit of the superintendent stating that he posted the same on September 12, 1890, as required, and also that "on the same day he caused a notice similar in substance to be published for one insertion in the Pacific Grove Review, a weekly newspaper published and circulated in said city, designated by the board of city trustees of said city of Pacific Grove as the paper in which said notice should be published." To show that

this notice was never published, plaintiff then introduced in evidence copies of every issue of the Pacific Grove Review from January 12, 1890, to April 15, 1891, "excepting the issue of said paper for the date of September 17, 1890." The notice was not published in any of the papers introduced, and it is therefore claimed that it was never published at all. But the issue of September 17th was the first issue after the notice was posted, and the one in which it should have been published. Under this showing, the claim that the notice was never published cannot be sustained.

4. To show that the resolution ordering the work to be done was never properly published, plaintiff introduced in evidence a copy of it, at the foot of which were the words: "Passed this 14th day of November, 1890, by the following vote," etc.; and also a copy of it as published, in which the year of its passage was printed "1860" instead of "1890," as in the original. This was an error of the same character as that which occurred in the publication of the resolution of intention, and may be disposed of in the same way. It was harmless, and did not invalidate the publication.

5. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, and the motion was denied pro forma. The defendant declined to offer any evidence, and thereupon the cause was submitted upon briefs to be filed, the plaintiff being allowed 30 days to present his opening brief, the defendant 20 days to present its brief, and the plaintiff 10 days to reply. The plaintiff filed his opening brief and the defendant its brief, but, before the expiration of the time for presenting the reply brief, the court, without the plaintiff's consent, entered an order granting a nonsuit and dismissing the action. It is claimed that this action of the court was premature and erroneous, and therefore cause for reversal. But conceding that the court should have suspended its action until the time for presenting the reply brief had expired, still its failure to do so was a harmless error if, upon the case made, the plaintiff was not entitled to recover. That the plaintiff here was not entitled to recover upon the case made by him is clear. The statute required all proposals or bids to be accompanied by a certified check for not less than 10 per cent. of the aggregate of the proposal, etc.; and it provided that the contract should be awarded to the lowest responsible bidder, and "if said bidder fails, neglects, or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid, and the amount therein mentioned, shall be declared forfeited to said city, and shall be collected by it, and paid into its fund for repairs of streets." The provisions of the statute seem to have been substantially complied with by the defendant and its servants in all the proceedings here under review, and the plaintiff's check was therefore properly declared forfeited to the city. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 584

ESHLEMAN v. HENRIETTA VINEYARD CO. et al. (No. 3,180.) SAME v. MALTER et al. (No. 3,593.) HENRIETTA VINEYARD CO. v. ESHLEMAN et al. (No. 3,653.)

(No. 18,018.)

(Supreme Court of California. March 29, 1894.)

SPECIFIC PERFORMANCE—PAROL CONTRACT RELATING TO LAND—PART PERFORMANCE—WHAT CONSTITUTES—LACHES.

1. In an action brought in 1890 for specific performance of an oral contract to convey land, made in 1886, the court found that plaintiff was in possession, and took crops off the land, during 1886 and 1887, with defendant's knowledge, and that during such time, and ever since, plaintiff claimed title under the contract; but it was not alleged or found that plaintiff continued in possession after 1887. She never paid anything on the contract price, though she tendered the whole of it "prior to the commencement of this action." *Held*, that there was no such part performance as would take the contract out of the statute of frauds.

2. Where a vendee of land delays more than four years after she accepts a deed, before suing to compel a conveyance of land which she alleges was wrongfully reserved in the deed to the grantor, she is not entitled to relief, though she did not discover the error until within three years of the suit, in the absence of fraud or deception which prevented her from sooner discovering it.

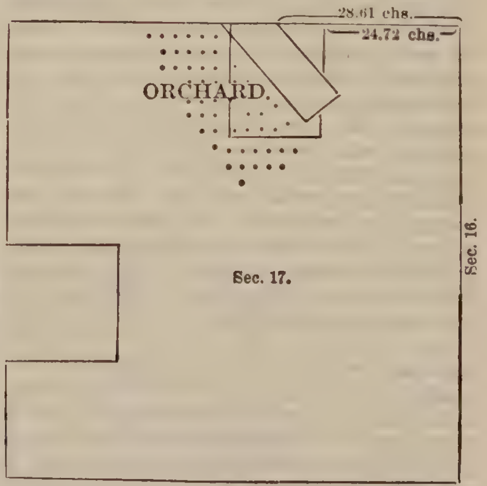
3. Where it is not found that plaintiff did not discover the error 35 months before the commencement of such action, and before she tendered payment and demanded a deed, she is not entitled to specific performance, even if her negligence in not discovering the error sooner than she did was excusable.

In bank. Commissioners' decision. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Three actions,—one by M. D. Eshleman against the Henrietta Vineyard Company and G. H. Malter, one by the same plaintiff against G. H. Malter and others, and one by the Henrietta Vineyard Company against I. S. Eshleman and others. From a judgment for defendants in each of the actions, plaintiff appeals. Affirmed.

Edward Lynch, for appellants. Tupper & Tupper, for respondents.

VANCLIEF, C. These three causes, together, are designated in this court by the number 18,018. In the lower court, they were numbered, respectively, 3,180, 3,593, and 3,653, as above. All the parties to the three causes, being represented here by the same attorneys, have stipulated that the decision of this court in the first in order, 3,180, shall control the judgment in the other two. That is, if the judgment of the lower court is affirmed in the first, it shall be affirmed in the other two; but, if reversed or modified in the first, it shall be reversed or modified likewise in the other two. Therefore, only the appeal in the first (Eshleman v. Henrietta Vineyard Company and Malter) need be considered. It is an action to enforce specific performance of a contract to sell to plaintiff certain tracts of land situated in the county of Fresno, originally executed in writing. The written contract was between the defendant Malter, of the first part (vendor), and I. S. Eshleman, of the second part (vendee). At the time the contract was executed (January 11, 1886), the title to the land which was the subject of the contract was in the defendant Henrietta Vineyard Company, a corporation, whose directors are alleged and found to have been under the control of Malter, by virtue of his ownership of all the stock, except a few shares held by the directors. I. S. Eshleman made the contract for the benefit of the plaintiff, and assigned it to plaintiff before the commencement of this action. The land to be conveyed consisted of certain described legal subdivisions of sections 16 and 17, containing about 720 acres, and included the northeast quarter of section 17, except a small parcel thereof, called the "Winery Tract," on which was a winery. This Winery tract was reserved from the sale by the following description in the contract: "A tract of from ten to, and not exceeding, twenty acres, on which the winery of the party of the first part now stands, bounded on the north by the north line of said section, to lie in a compact and square shape, with its northwest corner at the point on said north line, which is now the northeast corner of the orchard on the northwest quarter of the northeast quarter of said section, and with its northeast corner on said line, at a point thirty feet west of the head gates of the ditches which irrigate said lands, and with its south line not exceeding two hundred feet south of said winery." The contract price to be paid for the land was expressed to be "at the rate of $41.66⅔ per acre." It is alleged in the complaint, and found by the court, that on January 20, 1886, nine days after the date of the contract, Malter procured a conveyance from the Henrietta Vineyard Company to plaintiff of all the several tracts of land described in the contract; reserving, however, from the northeast quarter of section 17, 14.46 acres as the Winery tract, plainly described in the deed to plaintiff, in connection with the description of the north line of said northeast quarter of section 17, as follows: "And also that part of the northeast quarter of section seventeen (17) bounded and particularly described as follows, to wit: Beginning at the northeast corner thereof, running thence west on its north line twenty-four and 72 hundredths chains; *thence, at right angles, south, thirteen and 15 hundredths chains (13.15); thence west eleven (11) chains; thence, at right angles, north, thirteen and 15 hundredths chains (13.15), to said north line thereof;* thence west, along said north line, to the northwest corner of said section;" and thence runs south, west, and north, around the quarter section, to the place of beginning. The italicized part of the description shows the exclusion of the 14.46 acres, as the Winery tract, "in a compact square form." The plaintiff accepted the deed with this description without objection, and paid for the land conveyed, and no more, at the contract price per acre; and defendants contend that this was full performance of the contract on their part. On the next day after the conveyance to plaintiff, the Henrietta Vineyard Company conveyed the reserved Winery tract to the defendant Malter and E. B. Rogers. It is claimed by plaintiff that the tract reserved for the winery is not in conformity with the contract as understood by the parties, either as to quantity of land, or the form in which it is located; that it contains too much land, by eight acres; and that the lines bounding the east and west sides thereof, instead of running from the north line of the section directly south, at right angles therewith, should have run south, 40 degrees and 43 minutes east. Counsel for appellant has attached to his brief a little map, which, he says, correctly represents the difference between the tract reserved and the tract which should have been reserved, as follows:



This map will sufficiently represent the difference, as understood by counsel, without reference to the coloring.

It is alleged in the complaint, and the court found, that the Winery tract referred to in said agreement was at the date of said agreement, and still is, "a well-marked and defined body of land, of square shape, bounded on the north by the section line of section 17 * * * and a fence; on the west by a straight row of large trees * * * and a fence; on the east by a straight row of large trees;" and "that it was agreed and understood between the parties to said agreement and plaintiff, at its execution, that the Winery tract to be reserved by the terms of said agreement was the body of land last above described, and said tract was pointed out on the ground to said I. S. Eshleman and plaintiff, at the date of said agreement by said Malter and his agent, as the Winery tract referred to in said agreement." It should be noted, in passing, that this is not very definite as to what was pointed out. No boundary for the southeast end is mentioned. Nor is it said that any fences or rows of trees were pointed out as boundaries. It is further alleged and found that during the years 1886 and 1887 the plaintiff was in possession of the two parcels of land in question, and that she cultivated the same, with the knowledge of the defendants. These two parcels, of which a conveyance is sought to be enforced, are separated from each other by the parcel which plaintiff claims should have been reserved as shown on the above map, and together contain about eight acres. It is also found that prior to the commencement of this action (how long before is not found) the plaintiff tendered to each of said defendants, and to said E. B. Rogers, the contract price of said two parcels of land, and demanded from each a conveyance of their title thereto; that the defendants refused to convey, but that Rogers, on April 1, 1891, conveyed to plaintiff all his right, title, and interest in the whole tract of 14.46 acres reserved in the deed, his interest being an undivided half thereof, for which plaintiff paid him the contract price per acre. So that plaintiff seeks by this action to enforce a conveyance from defendants of only an undivided half of the two small, separate tracts, containing 8.06 acres, in which it is found that the corporation defendant has no interest whatever, having conveyed the whole tract of 14.46 acres reserved in the deed to Malter and Rogers on January 21, 1886. The court found, as a conclusion of law, that plaintiff was not entitled to a decree for specific performance of the agreement, and rendered judgment accordingly. The plaintiff appeals from the judgment, on the judgment roll, and contends only that, upon the findings of fact, the judgment should have been for plaintiff, decreeing specific performance of the contract,—not as written, however, but according to a contemporaneous understanding and agreement between the parties, which was not reduced to writing, and which is palpably inconsistent with the written contract, or any possible construction of it. Therefore, to the extent that the verbal differs from the written agreement, the action must be deemed an action for specific performance of a verbal agreement, and treated accordingly, and so it seems to be regarded by counsel for appellant; and, since the findings warrant no relief independent of the verbal agreement, the judgment should be affirmed, unless they are sufficient to support a decree for specific performance of a verbal agreement.

1. In the first place, a part performance of the agreement by the plaintiff was essential to the support of such a decree, but this fact is not found. It is found, however, that during the years 1886 and 1887 the plaintiff was in actual, exclusive, and peaceable possession of the two tracts of land in question, and that she cultivated and took crops off the same with the knowledge of the defendants, and that during said years plaintiff claimed, and has ever since claimed, title to each of said tracts of land under the agreement. But it is not found, even by implication, that the defendants consented to such possession, nor that they had notice that plaintiff claimed title at any time before she tendered payment to Malter and Rogers, and demanded of them a deed, which tender and demand are alleged and found to have been made "prior to the commencement of this action;" but how long prior to the commencement of the action is not alleged nor found. It is found, however, that defendants had knowledge that plaintiff cultivated and took crops off the land in question; but this mere knowledge of defendants does not imply their consent, although such knowledge, without objection, would imply consent, under some circumstances. The mere knowledge of defendants that plaintiff cultivated and took crops from the land during the years 1886 and 1887 is not, under the circumstances disclosed by the findings, inconsistent with the fact that the cultivation and taking of crops were without defendants' consent, and even against their express protest, and therefore does not imply their consent. Why is it neither alleged nor found that plaintiff continued in possession after 1887, and up to the commencement of the action,—April 8, 1890? The probable reason that there is no finding as to such possession during the years 1888 and 1889 is that there was no allegation of possession during these two years; and, as against the pleader, it is fair to presume that there was no such allegation because there was no such possession. There is no pretense that plaintiff improved the land, and it appears that she never paid a dollar on the contract price since she tendered the whole contract price "prior to the commencement of this action." All the money paid had been applied to payment for the land deeded to her on January 20, 1886, at the contract price of $41.66⅔ per acre. Nor is there any pretense that the land in question is of greater average value per acre than the land conveyed, nor that the cultivation and cropping of the land in 1886 and 1887 were unprofitable, nor that

defendants were benefited thereby. Since the plaintiff has suffered no injury, and the defendants have gained no advantage, from plaintiff's possession and cultivation of the land, it follows that such possession and cultivation did not constitute such part performance as will exempt the verbal agreement from the effect of the statute of frauds. The essential constituents of such part performance as will take a verbal contract for the sale of land out of the statute of frauds are concisely stated by Mr. Pomeroy, in his book on Contracts (section 104), as follows: "The foundation of the doctrine is fraud; not necessarily an antecedent fraud, consciously intended by the party in making the contract, but a fraud inhering in the consequence of thus setting up the statute. When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to the completion of the contract, and thus to secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for its failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract, by decreeing its specific execution." To the same effect is the case of Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828.

2. Plaintiff's delay of more than four years after having accepted the deed of January 20, 1886, as full performance of the agreement on the part of defendants, was so unreasonable, under the circumstances, as to justify the denial of the relief sought. It is true the court found that plaintiff did not discover the alleged error in the description of the land until within three years before the commencement of the action, but did not find when, within three years, plaintiff first discovered the error. But, in the absence of fraud or deception on the part of defendants, the failure of plaintiff to discover that the plain and definite description of the land in the deed which she accepted was not in accordance with the verbal agreement must have been the result of her own inexcusable negligence, from the consequence of which a court of equity will not ordinarily grant the kind of relief sought in this case. Pom. Cont. § 444. But, conceding that the negligence was excusable, it is not found that plaintiff did not discover the error 2 years and 11 months before the commencement of the action, and before she tendered payment and demanded a deed for the two parcels sued for; and, as the burden of excusing her delay devolved upon plaintiff, it may be presumed that she discovered the error barely within 3 years before she made any complaint whatever. In Fowler v. Sutherland, 68 Cal. 415, 9 Pac. 674, a delay of 2 years and 3 months was held to be unreasonable. In Green v. Covillaud, 10 Cal. 317, a delay of 22 months was held to be a defense to an action for specific performance. See, also, O'Donnell v. Jackson, 69 Cal. 622, 11 Pac. 251; Burnett v. Kullak, 76 Cal. 535, 18 Pac. 401; and Requa v. Snow, 76 Cal. 591, 18 Pac. 862. I think the findings of fact support the judgment, and, under the stipulation, that the judgment in each of the above-entitled causes, numbered, respectively, in the court below, 3,180, 3,593, and 3,653, should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment in each of the above-entitled causes, numbered, respectively, in the court below, 3,180, 3,593, and 3,653, be affirmed.

102 Cal. 362

BLUM et al. v. WESTON et al. (No. 15,376.)

(Supreme Court of California. May 3, 1894.)

EASEMENTS—WAYS OF NECESSITY.

1. Where land of cotenants is allotted in partition, there is an implied grant of a "way of necessity" over other land allotted to the county road, if that is the only way to reach the highway.

2. The fact that the person seeking to have his title quieted to such way was not a party to the partition proceedings is immaterial if he claims under one who was.

3. Where a way of necessity once existed it will be presumed to exist until some fact is shown establishing nonexistence.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by S. Blum and others against F. F. Weston and others. From a judgment for plaintiffs, defendants appeal. Reversed.

R. M. Fitzgerald, for appellants. Latimer & Brown, for respondents.

HAYNES, C. Respondents are the owners of a certain parcel of land in Contra Costa county, which is bounded on the west by a county road, and on the east by lands of appellant Weston, and this action is brought against Weston and his tenant, White, to recover damages for alleged trespasses committed by crossing respondents' land to the county road. The defendants (appellants here), in defense of the action, alleged a way of necessity across plaintiffs' land to reach the county road, and that in the use and enjoyment of said easement, which is appurtenant to their land, they traveled across plaintiffs' land over a roadway designated for such use by plaintiff Simon Blum. Defendant Weston also filed a cross complaint seeking to quiet his title to said easement. Demurrers were interposed to the answers and cross complaint, which were overruled, and no question is made here as to the sufficiency of these pleadings. The cause was tried by the court without a jury, and resulted in findings and judgment for plaintiffs, from which the defendants appeal upon the judgment roll. The findings of fact are very full, and specify with great particularity the whole course of the title of both parcels from the patent granted by the United States down to the parties to this action. Briefly stated, the facts found are as follows: In 1866 the United States patented the San Miguel rancho to 13 persons as tenants in common, both parcels here involved being part of said rancho. These patentees sold their interests to divers persons, and in 1868 about 50 persons owned the rancho as tenants in common; and in that year the ranch was partitioned among the owners by the district court, the hill land and valley land being separately divided. S. Blum, one of the plaintiffs, received an undivided two-thirds interest in lot 8 of "hill land," and the same interest in lot 8 of the "valley land," and M. S. Chase, defendants' remote grantor, received an undivided one-third in each of said lots. The title to Blum's interest in lot 8, hill land, by mesne conveyances, became vested in W. E. Davis; and, Chase having died, the lot last mentioned was, in 1876, partitioned by the court between Swain, his administrator, and Davis, part A, containing 425 acres, being awarded to Davis, and part B, containing 213 acres, to Swain, as administrator. Part B, so partioned to Chase's administrator, through several mesne conveyances became vested in one C. K. Breeze, and in 1889 was sold under execution to satisfy a judgment against Breeze; and the purchaser at execution sale sold and conveyed the same parcel to defendant Weston in July, 1890. In 1871, lot 8, valley land, was also partitioned by the court between Chase's administrator and the plaintiffs in this action, the lot being divided into two parts, designated as divisons 1 and 2, division 1 being allotted to plaintiffs, and being the same parcel described in the complaint in this action. Some other findings were made, which will be noticed hereafter.

So far as the situation of defendants' land is concerned, no question is made but he is entitled to a way of necessity. For a general discussion of this class of easements, and a statement of the law as to several of the elements thereof, see Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879. The substance of respondents' contention is that "a way of necessity" lies in grant, though it is not necessary that it be an express grant; that "the deed of a grantor creates the way when it is one of necessity as much as it does when it is created by an express grant;" but that here there was no grant, the original tract which embraced both parcels being owned by many persons as tenants in common; and that the several ownership of the different parcels was accomplished by proceedings under the statute for partition; and that no grant can be implied in such case. But this contention cannot be sustained, either upon principle or authority. I can perceive no difference in the effect of an allotment by order of the court in a proceeding for partition and an allotment by deed from all the other tenants in common. The effect in each case is to vest the title of all in a particular parcel in one, the decree operating as such conveyance. In Viall v. Carpenter, 14 Gray, 127, it was said: "The court do not doubt that by the division of the real estate of Thomas Carpenter, deceased, in the probate court, his heirs, to whom specific portions of that estate were assigned, acquired a right of way to those portions over other lands which had been their ancestors'; and whether they acquired this right solely as of necessity, without any provision therefor in the language of the division, or by the effect of the language used by the committee in making the record of the division, seems to us unimportant. * * * The reservation, in terms, of a way of necessity, would confer no further right than would be conferred by operation of law, without those words." In Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, a part of the land belonging to an estate fronting on the highway was set off to the widow, and the remainder was sold by order of court. It was held that the purchaser had a way of necessity over the widow's land. The court in that case went so far as to say that "a right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises." In Pernam v. Wead, 2 Mass. 203, it was held that where a judgment creditor levied on part of the debtor's land, leaving the latter no passage from the remaining portion to the highway, the debtor has necessarily a right of way over the land levied upon. See, also, Taylor v. Townsend, 8 Mass. 411; Smyles v. Hastings, 22 N. Y. 217.

It does not affect Weston's right that he was not a party to the partition. The easement, resulting by operation of law from the fact that the parcel of land he now owns was cut off from the country road by other subdivisions of the original tract, attached to that parcel as an appurtenance, and passed with each successive transfer of title, whether such transfer was by deed executed by the party or by sale under execution. That it is such appurtenance, and passes to each successive owner, was held in

Taylor v. Warnaky, 55 Cal. 350. The Civil Code makes no distinction as to the mode of transfer, but provides generally that "a transfer of real property passes all easements attached thereto." Civil Code, § 1104. Respondents also cite several cases to the effect that partition suits do not create new or additional titles in the respective parties; that they only sever the unity of possession. But those cases did not involve the question of an easement appurtenant to the land allotted to each, but related to the title by which the tenants in common held the land itself. It is further argued that no grant from Chase could convey any title as against Blum, his cotenant. If by this is meant that Chase could not grant a right of way, other than a way of necessity, across land in which Blum was a cotenant, the statement is correct; but Chase and Blum, as cotenants of lot 8, hill land, had a right of way of necessity over lot 8, valley land, which was also owned by them; and when lot 8, hill land, was again partitioned, the way was not lost, because Chase and Blum still owned the valley land as cotenants; or, if the valley land were first partitioned such partition could not destroy the easement which belonged to the hill land.

It is further argued that the judgment in these partition suits did not provide a right of way for the hill land, and that these judgments are final. But we have seen that it is not material whether in these judgments a way was reserved or not; that the law itself creates it. Viall v. Carpenter, supra. Respondents further contend that such way not having been used or claimed from about 1871 to the time when Martin (defendants' grantor) made the agreement with plaintiffs, in 1890, the court should not presume anything in defendants' favor, but should hold that any way they may have had has lapsed by their failure to use or claim it.

The seventh finding is as follows: "That plaintiffs' land is adjacent to and contiguous on the west side of defendant Weston's land, and the county road running from Ygnacio valley to Pine canyon bounds plaintiffs' land on the west, and no county road runs through, adjacent or contiguous to, defendant Weston's land; that defendants' grantors had no means of egress or ingress to and from said defendants' land to the county road except a road from plaintiffs' land traveled by defendants' grantors by a special agreement with plaintiffs." This finding contains facts showing, when taken in connection with the facts hereinbefore stated, all that is necessary to create a way of necessity. It is true that it is found that Weston's grantors used a road across plaintiffs' land by a special agreement; but what that agreement was, or when made, is not stated. The answer to defendants' cross complaint alleges that J. West Martin (Weston's grantor) used it for a short time in 1890, under an agreement with the plaintiffs. It is not found, nor is it claimed by counsel, that it created a way or easement of a different character from a way of necessity, which became appurtenant to the land now owned by Weston. If it did, it is apparent that plaintiffs could not maintain trespass for using it; while, if it did not, I fail to perceive how it could affect the existence of a way of necessity which, upon the partition, became appurtenant to the land. Besides, the facts found having shown that a way of necessity once existed, it must be presumed to continue until some fact found by the court shows that the right no longer exists. For all that appears from this finding, the "special agreement" may have been solely confined to the location of the way, or some like particular, consistent with and appropriate to the existence of the way of necessity. The way, having been created by the necessity for its use, cannot be extinguished so long as the necessity exists. The necessity, of course, ceases when another way has been acquired, or when, by the acquisition of other lands, the owner can reach the public road without traversing the land of others. That defendant could have a way by condemnation under the statute does not affect his right. Pernam v. Wead, supra; Collins v. Prentice, 15 Conn. 44. The findings that defendants have no right of way of necessity or otherwise, that they have not used the way except as trespassers, that plaintiffs have not designated any road, and that Weston does not deraign title from Blum, "except as hereinbefore stated," are conclusions of law from the facts found. It is immaterial whether plaintiffs or their grantors designated a road or way; as, if they did not, the owners of the dominant estate could designate it. Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

As all the facts necessary to support a judgment for the defendants have been found, the judgment should be reversed, with directions to the court below to enter judgment upon the findings for defendants with costs.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be reversed, with directions to the court below to enter judgment for defendants according to the prayer of the cross complaint.

102 Cal. 403

SPLIVALO v. BRYAN et al. (No. 15,505.)

(Supreme Court of California. May 3. 1894.)

POWERS OF COUNTY SUPERVISORS—STREET SPRINKLING.

Under Pol. Code, § 2645, subd. 1, as amended in 1893, providing that the board of supervisors shall employ necessary watering carts to do the sprinkling in their district, where such work is not let by contract, they may employ one to do sprinkling without advertising for bids, under Id. § 2643, subd. 11, providing that they may in their discretion advertise for bids for sprinkling, the contract for which must be let to the lowest bidder.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; G. H. Buck, Judge.

Application by C. R. Splivalo for a writ of mandamus to compel Jacob Bryan and others, supervisors of San Mateo county, to advertise for bids for sprinkling. From a judgment denying a peremptory writ, petitioner appeals. Affirmed.

Ben. Morgan, for appellant. Henry W. Walker, Dist. Atty., for respondents.

VANCLIEF, C. This was an application to the superior court of the county of San Mateo for a writ of mandate to the members of the board of supervisors of that county, commanding them "to advertise for bids for the sprinkling of the roads in the second road district" in that county. An alternative writ was issued on the affidavit of plaintiff. The defendant, by answer, showed cause why a peremptory writ should not be granted. The cause was submitted for judgment on the affidavit of the plaintiff and the answer of the defendants thereto, it being admitted that both were true. A peremptory writ was denied, and paintiff brings this appeal from the judgment.

The material facts disclosed by the affidavit of plaintiff are substantially as follows: That the board of supervisors, through one of its members, William B. Lawrence, "employed one John Rowell to sprinkle the roads in the said second road district, at $4.50 per day," without having advertised for bids to do said work. That petitioner and residents of said road district, being taxpayers of said county, demanded of said board, at a regular meeting of the same, that the contract for the sprinkling of said roads should be made by advertising for bids to do such work, and letting the contract to the lowest bidder, and not otherwise. And that the defendants, constituting said board, have refused to comply with said demand and persist in the employment of said Rowell as aforesaid. The petition also states what petitioner deems to be the law requiring the sprinkling contract to be let as demanded, namely: The eleventh subdivision of section 2643 of the Political Code, as amended in 1893. St. 1893, p. 114. The following is the particular part of the section on which appellant relies: "11. In their discretion, they (the supervisors) may advertise for bids to grade, turnpike, gravel, or sprinkle any road or roads in any road district, which contract shall be let to the lowest responsible bidder; provided the board may reject any or all bids, whenever it shall appear to them that the same are too high." Read in connection with other sections of the Political Code, in pari materia, as amended at the same session of the legislature, I think the meaning of the passage above quoted is that the advertising for bids is in the discretion of the supervisors; but when, in their discretion, they advertise for bids, the contract shall be let to the lowest responsible bidder, etc. Section 2641, Pol. Code, as amended in 1893, provides: "The board of supervisors of the several counties shall divide their respective counties into suitable road districts, and may change the boundaries thereof, and each supervisor shall be ex-officio road commissioner in his supervisor district." Section 2645, as amended at the same session, provides: "Road commissioners, under the direction and supervision and pursuant to the order of the board of supervisors, must: '(1) Take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts, where the same is not let by contract.'" I think the court below correctly construed the statute in question; and, since it is well settled that the exercise of discretionary power cannot be controlled by writ of mandate, the judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

TAPI v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(No. 15,523.)

(Supreme Court of California. May 4, 1894.)

In bank. Certiorari proceedings by one Tapi against the superior court of the city and county of San Francisco.

Timothy J. Lyons, for petitioner. Dunne & McPike, for respondent.

PER CURIAM. Upon looking into the papers in this case, we discover that no proper return to the writ of certiorari has ever been made, and that there is no record here which we can review. This being so, the order of submission of the cause heretofore made was premature, and must be set aside, and a direction issued to the clerk of the superior court to make a proper return. Code Civ. Proc. §§ 1070–1075. The order submitting the cause is set aside, and the clerk of the superior court is ordered to return the writ of certiorari, with a transcript of the record of the matter to be reviewed.

102 Cal. 458

NIXON v. SELBY SMELTING & LEAD CO.

(No. 15,204.)

(Supreme Court of California. May 16, 1894.)

MASTER AND SERVANT—NEGLIGENCE—DANGEROUS APPLIANCES—FELLOW SERVANT—CONTRIBUTORY NEGLIGENCE.

1. A smelting company is liable to an employe injured by the parting of a rubber hose containing hot acids through the negligence of its foreman in splicing two pieces of old hose to make it, though such foreman was the fellow servant of the employe in so far as he served in the places or with the machinery or appliances furnished by the company; since, it being the foreman's duty to select and prepare the appliances to be used by the employes for conducting such acids, he represented the company in this respect.

2. Where, in an action for such injury, no witness testifies that the insufficiency of the hose "was patent to an ordinary observer," and plaintiff testifies that it was not, it does not appear that he was guilty of contributory negligence.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; John P. Jones, Judge.

Action by Robert Nixon against the Selby Smelting & Lead Company, a corporation, for personal injuries caused by defendant's negligence while plaintiff was in its employ. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Page & Eells, for appellant. John P. O'Brien, for respondent.

VANCLIEF, C. Action to recover damages for a personal injury alleged to have been suffered by plaintiff while in the employ of defendant, in consequence of the neglect and failure of defendant to provide proper and safe instruments and appliances with which plaintiff was employed to work. The trial was by jury, and the verdict and judgment was in favor of the plaintiff for the sum of $3,816. The plaintiff was employed to work, and at the time he was injured was working, in a room called the "silver room," in which silver is separated from lead and gold by dissolving it in hot diluted sulphuric acid, and then precipitating it from the solution. In this process the solution passed through three adjoining tanks, in the last of which the silver is precipitated, and from which, after the precipitation, the hot diluted acid is pumped through a rubber hose into what is called the "waste tank." While the plaintiff was using this hose in the usual manner, it parted at a point between the tanks, and the hot acid was thereby discharged upon the plaintiff's shoulder and back, and scalded him severely. There were four sets of tanks in the silver room, the waste acid from all of which was pumped into the same waste tank; but only three of the sets were ordinarily used at the same time. On the day of the accident, however, all were used, and the waste acid from all four was to be pumped into the waste tank at the same time; but there were only three hose in the silver room through which to pump it. Under these circumstances, Mr. Helm, the foreman of the silver room, extemporized a fourth hose by connecting two pieces of old hose that had been lying in the silver room for a long time, after having been used for conducting steam into the tanks, for which purpose only short hose was necessary. The two pieces of old hose were connected by slipping one end of each over a piece of lead pipe about eight inches long, so that the two ends met near the middle of the piece of pipe, but were not tied or otherwise fastened to the pipe except by their elastic force, which depended partly upon their quality and partly upon the comparative size of the pipe and the orifice in the hose. About 10 or 15 minutes after plaintiff had commenced to use this hose, one of the connected pieces slipped from the lead pipe, with the result above stated. It appears that these pieces of old hose were much worn and eaten by the acid in which they had been formerly used, and it is admitted by appellant that, without having been tightly bound to the lead pipe by a wrapping of wire or twine, they were unfit for the use to which Mr. Helm put them. The evidence is quite sufficient to justify a finding by the jury that the plaintiff had no notice that this hose, as constructed and adjusted to the tanks by Mr. Helm, was defective, or that he exposed himself to any danger by using it. He was not present while Mr. Helm was connecting the two pieces, though Mr. Helm had told him that the hose to be used by him would be made by connecting the two pieces of old hose, and he knew when he commenced using it that it had been so made. He had not been regularly employed in the silver room, but only occasionally, during the year preceding the accident. He had never before used, nor seen used, a spliced hose, but had implicit confidence that the hose prepared and furnished by Mr. Helm was sufficient for the use intended, and could be safely used. Mr. Roff was general superintendent of the smelting works, and employed and discharged all the men. Under him Mr. Bee was superintendent of the silver room; but Mr. Helm was foreman of all the men employed upon the tanks in the process of dissolving and precipitating silver, and was given power, not only to direct the men employed in those processes, but to determine what implements and appliances should be used, especially for pumping the acids. As to this, Mr. Bee, on the part of the defendant, testified as follows: "All requisitions for materials and supplies in the silver room come to me. Mr. Helm makes all requisitions to me, including rubber hose. Mr. Helm is the foreman in charge of those tanks,—in the immediate supervision of them. All requisitions for rubber hose that he has made to me have been filled immediately. * * * Mr. Helm is the man who has that matter in charge. * * * When the tanks are to be drawn off, I don't generally superintend. That he does. That matter is always intrusted to him. The matter of drawing off the tanks is a matter he controls by his judgment."

1. It is not questioned that the injury to plaintiff was caused by the negligence of Helm, but appellant contends that Helm was a fellow servant of plaintiff, and therefore that the negligence of Helm was the negligence of a fellow servant merely, and not that of the defendant corporation. It must be admitted that, according to the firmly-settled rule of law in this state, Helm, notwithstanding the higher grade of service in which he was employed, was a fellow servant with plaintiff in so far as he served in the places or with the machinery or appliances prepared and furnished by the defendant; and, for the consequences to fellow servants of his negligence in the performance of such services in the places or with machinery or appliances thus prepared and furnished, the defendant is not responsible; but in so far as Helm was authorized and employed to prepare the places in which other servants were to work, or to furnish the machinery or appliances with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such places, machinery, and appliances had been prepared and furnished through the immediate agency of Mr. Roff, the general superintendent, or by Mr. Bee, the special superintendent, of the silver room. The reason of this is that it is the duty of employers to provide and furnish suitable and safe appliances (such as rubber hose in this case) with which their employes are required to work; and the law does not permit employers to transfer or shift their responsibility for the performance of this duty to any agent or servant. Of course, they may employ agents or servants to perform this duty, but, in case they do so, all negligence in the performance thereof is nevertheless deemed their negligence, for which they are responsible to a servant or employe thereby injured without contributory negligence on his part. In cases of this kind the agents of the employer who construct or furnish machinery or appliances to be used by employes are not, quoad hoc, fellow servants, although at the same time they may be fellow servants in the performance of other services. Perhaps the observance of this dual relation may reconcile some of the apparent inconsistencies of the cases in this state; but, however this may be, the principles and distinctions, as above stated, are expressly recognized in the later cases, and are consistent with all the cases in this state, except perhaps the cases of McKune v. Railroad Co., 66 Cal. 302, 5 Pac. 482, and Brown v. Sennett, 68 Cal. 225, 9 Pac. 74, which have been criticised and doubted, if not overruled. In Daves v. Southern Pac. Co., 98 Cal. 20, 32 Pac. 708, one Bresnehan was the foreman of a gang of men, including James Daves, employed in repairing a section of defendant's railroad; and, while thus engaged, Daves was killed, in consequence of the negligence of Bresnehan; and the question was whether such negligence was to be deemed the negligence of the defendant, or only that of a fellow servant. Speaking for the court in bank, Mr. Justice Fitzgerald said: "This must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it, to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible. If it was not, then they were fellow servants, and the fellow servant is alone re-

sponsible. The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provision for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for the injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service, impliedly assumed by the employe by his contract of employment." A similar question arose in department 2 of this court in the case of Burns v. Sennett, 99 Cal. 363, 33 Pac. 916, in which the alleged negligence was that of failing properly to construct and adjust a strap used as a part of the machinery in connection with which plaintiff was working at the time he was injured; and the question was whether the defendants were liable for such negligence. "And this," said Mr. Justice McFarland, "can be correctly answered only by determining whether or not the proper placing and maintaining of the strap was a positive duty which the appellants personally owed to respondent. Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Railroad Co. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 914. * * * And if, in the case at bar, the adjustment and maintenance of the said strap was not a duty which appellants owed personally to respondent, then all the gang of men employed by appellants in loading the ship were fellow servants, and respondent could not recover of appellants for injuries caused by the negligence of one or more of said fellow servants in constructing, parceling, etc., the strap. There is another general rule, however, under which alone, upon the facts so far appearing, respondent can maintain this action, if he can maintain it at all, and that general rule is that an employer must furnish machinery and appliances reasonably suitable and safe for the employe to do his work. In such a case the employer is, of course, not bound to insure the employe against any defect in such appliances, but he is bound to use reasonable care in their selection or construction; and, where that rule applies, the duty to furnish such machinery and appliances is one which the employer owes personally to the employed, and he cannot escape that duty by trusting it to an employe who negligently performs it." The learned justice further says that this general rule "does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done." In Elledge v. Railway Co. (Cal.) 34 Pac. 720, the defendant was held liable, under this rule, for the negligence of its foreman on a mine in putting plaintiff in an unsafe place in which to do his work. See, also, Sanborn v. Trading Co., 70 Cal. 261, 11 Pac. 710, and Bowen v. Railway Co., 95 Mo. 269, 8 S. W. 230.

2. As to appellant's contention that plaintiff was guilty of contributory negligence, little need be added to what has already been said. The only ground upon which it is claimed that plaintiff was negligent is that the insufficiency of the hose used by him "was patent to an ordinary observer." But no witness so testified; and plaintiff testified to the contrary, as above stated, and, if the jury believed his testimony, they were justified in finding that he was not guilty of contributory negligence. The most that appellant can justly claim is that the evidence on this issue was conflicting.

3. It is contended that the verdict is contrary to the instructions of the court, and therefore is against the law. This point is founded upon a construction of certain isolated instructions, given at request of defendant, which I do not think they will bear when read in connection with all other instructions given. It is not claimed here that any part of the instructions is erroneous, or inconsistent with any other part; and, after a careful examination and comparison of the eight printed pages of the instructions given, I am unable to perceive that, as a whole, they are inconsistent with the verdict. I think the order and judgment should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

In re WILLIAMS' ESTATE. (No. 18,289.)

(Supreme Court of California. March 29, 1894.)

Department 2. Appeal from superior court, city and county of Sacramento; W. C. Van Fleet, Judge.

In re estate of Williams, deceased, appellants appeal from an order refusing a new trial on a petition for a distribution of the estate. Dismissed.

Johnson, Johnson & Johnson, for appellants. McKune & George, for respondents.

PER CURIAM. The certificate of the clerk of the superior court of the city and county of Sacramento, which is not disputed, entitles the respondents to a dismissal of the appeals from the orders denying the motion of the appellants for a new trial of the issues arising upon the petitions of respondents for a partial distribution of the estate of the deceased. Appeals dismissed.

In re KING'S ESTATE. (No. 19,433.)

(Supreme Court of California. May 3, 1894.)

HOMESTEAD—WIDOW'S RIGHT—CONVEYANCE.

A deed of "all of my property, of whatsoever kind and wheresoever situated," does not convey a widow's right to homestead under the statute.

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

In re estate of George King, deceased. Petition of Maria King, widow, for homestead. Order for petitioner. Parley King, heir at law, appeals. Affirmed.

The widow had made a deed, which contained no description of any property whatever, but conveyed "all of my property, of whatsoever kind and wheresoever situated," reserving a life interest thereunder.

Geo. B. Cole, for appellant. Goodcell & Leonard, for respondent.

PER CURIAM. The main question involved in this appeal, and the only one necessary to be considered, is, in our opinion, met by the decision of this court in Re Moore's Estate, 57 Cal. 437; and upon the authority of that case the judgment and order appealed from must be affirmed. Judgment and order affirmed.

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102 Cal. 446

LYNCH v. BUTTE COUNTY. (No. 18,166.)

(Supreme Court of California. May 15, 1894.)

COUNTY ASSESSOR—PAY OF DEPUTIES.

The county government act of 1883, prescribing the salaries of all county officers, and declaring that the salaries and fees provided therein shall be in full compensation for all services rendered by the officers or their deputies, and that all deputies shall be paid out of such salaries, but that the assessor shall retain for his own use a certain per cent. on all taxes collected by him, repeals Pol. Code, §§ 3894, 3895, requiring the board of supervisors to allow the assessor enough deputies to complete the assessment within the prescribed time, and to fix their salaries, and providing that these shall be paid out of the county treasury.

In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by W. P. Lynch, ex-assessor, against the county of Butte, to recover money paid to deputies employed by him to assist in making up the assessment roll of Butte county. From a judgment for defendant, plaintiff appeals. Affirmed.

H. V. Reardan, for appellant. Lewis Freer, for respondent.

BEATTY, C. J. In this case the defendant demurred to the complaint for want of facts. The demurrer was sustained, and, plaintiff declining to amend, final judgment was entered in favor of the defendant, from which the plaintiff appeals.

The only question to be decided is whether the complaint states a cause of action. Its material allegations are that in the year 1892 the plaintiff was assessor of Butte county; that it was his duty, as assessor, to make and complete the assessment roll of said county between the first Monday of March and the first Monday of July; that for such purpose the assistance of deputies was necessary; that the board of supervisors failed to authorize their appointment; that plaintiff appointed four deputies, whose services were reasonably worth $5 per diem, and amounted for the time they were necessarily employed to $2,400, which sum he paid them; that he afterwards presented to the board of supervisors a demand, properly itemized and verified, for said sum, which was rejected. Upon these facts the appellant contends that he was entitled to judgment against the county for $2,400, and he bases his claim upon the provisions of sections 3894 and 3895 of the Political Code, which read as follows: "3894. The board of supervisors of each county in this state must allow the assessor thereof such a number of deputies, to be appointed by him in addition to the number now fixed, or where no deputies are now allowed, so many deputies as will, in the judgment of the board, enable the assessor to complete the assessment within the time prescribed by law. 3895. The board must fix the compensation of the deputies so allowed; and such compensation must be paid out of the general fund in the county treasury. The compensation must not exceed five dollars per day for each deputy for the time actually engaged; nor must any allowance be made but for work done between the first Monday in March and the first Monday in July of each year." If these sections were still in force, they do not apply to the case made by the complaint. Upon any reasonable construction of their terms they require an application to the board to fix the number of deputies to be appointed, and the rate of their compensation, which thereupon becomes a claim in their favor, payable out of the general fund of the county. If, upon such application, the supervisors fail or refuse to make the proper order, a specific remedy is provided in section 3704 of the same Code, as follows: "3704. If the board of supervisors of any county fails or refuses to either, (1) to allow the assessor to appoint a sufficient number of deputies to make the assessment; or, (2) to furnish the proper books or blanks for his use; or, (3) to furnish the assessor necessary office rooms; then the state board of equalization may, upon application of the assessor, make the allowance, or furnish the proper books, blanks or office room; and all the expense incurred in carrying into effect the provisions of this section must, by the secretary of the board, be certified to the controller, who must, in his next settlement with the county treasurer of any such county, require such treasurer to pay the amount out of any funds belonging to such county."

This statutory remedy for the failure to perform a statutory duty was, we think, intended to be exclusive, as it is clearly sufficient. The plaintiff, however, seems to have entirely disregarded it, as well as the reasonable construction of the sections upon which he bases his claim. But these sections of the Political Code were not in force in 1892. They were a part of the Code as originally adopted, and were superseded as to Butte county by special or local acts passed in 1874 and 1876 (St. 1873–74, p. 734; St. 1875–76, p. 753). By the passage of the county government act in 1883 they were repealed altogether. By that act the salaries of all county officers, including assessors, their deputies and their assistants, were fully regulated; and by section 164[1] thereof it was provided, in effect, if not in express terms, that they should have no other compensation. St. 1883, p. 361. These provisions, being inconsistent with the provisions of the Political Code relied on by the appellant, necessarily repealed them. That this was the actual intent of the legislature, especially with reference to Butte county, is amply demonstrated by the liberal provision made for the compensation of the assessor in counties of the ninth class, which included Butte county, and no other. And that the legislature itself has always construed the county government act as repealing sections 3894, 3895 of the Political Code is clearly evinced by the fact that in every revision of that act special provisions for the appointment of deputies applicable to certain classes of counties have been inserted,—a proceeding altogether unnecessary if those sections of the Political Code remained in force. The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.; DE HAVEN, J.

We concur in the judgment: GAROUTTE, J.; HARRISON, J.

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102 Cal. 449

LONG v. SUPERIOR COURT et al. (No. 15,642.)

(Supreme Court of California. May 15, 1894.)

BANKS AND BANKING—LIQUIDATION—PROCEDURE.

Act March 30, 1878, § 11, as amended by acts 1886–87, p. 90, authorizing the bank commissioners to obtain an injunction to restrain the doing of business by a bank which is insolvent or cannot safely do business, requires the business of such bank to be settled within four years after it is declared insolvent, unless a majority of the commissioners consent to its longer continuance in liquidation. The act also provides that banks in liquidation shall make semiannual reports of their condition to the bank commissioners, and that the commissioners shall examine their condition, and "shall have a general supervisory control" of them, and shall designate the number of officers and employes necessary to close up the business and fix their salaries. *Held*, that the act does not authorize the commissioners to supersede the officers of the bank in the control of the bank's property during its progress towards final liquidation.

In bank.

Application by S. F. Long for a writ of prohibition against the superior court of the city and county of San Francisco and the board of bank commissioners. Writ granted.

Frank M. Stone and Reel B. Terry (A. Barnard, Dunne & McPike, and Martin Stevens, of counsel), for petitioner. W. T. Baggett, for respondents.

GAROUTTE, J. This is an original application for a writ of prohibition against the superior court of the city and county of San Francisco, state of California, department No. 4, J. C. B. Hebbard, judge thereof, and the board of bank commissioners. The proceedings which have furnished the occasion for the application for the writ may be briefly stated as follows: An action was brought in the name of the people of the state of California upon complaint of the board of bank commissioners, and upon the information of the attorney general, against the Pacific Bank and its directors. The complaint alleged that the board of directors had willfully mismanaged the business of the corporation (giving instances of such mismanagement in detail); stated that it was unsafe for the parties interested in said corporation for it to continue to transact a banking business; that the corporation was insolvent; and prayed that the court enjoin and prohibit it from transacting any further business. The foregoing complaint was filed under the provisions of the bank act, found in the Statutes of 1877–78 (page 740), and the amendments thereto, found in the Statutes of 1886–87 (page 90); and there is no question but that ample authority is found in section 11 of that act to inaugurate the proceeding here outlined.

The defendant, by its board of directors, filed an answer, wherein the allegations of the complaint as to mismanagement of its business were denied, but it was expressly admitted in said answer that the corporation was insolvent, and it was unsafe for parties interested in the corporation that it should continue to transact business. The issues raised as to the mismanagement of the business of the corporation were not tried and adjudicated upon, but a decree termed an "interlocutory decree" was entered by the court upon the admitted facts, wherein it was adjudged and decreed: (1) "That the said corporation is insolvent, and that it is unsafe for the parties interested in said corporation for it to continue to trans act business; and it is ordered, adjudged, and decreed by the court that said corporation, said Pacific Bank, be, and is hereby, enjoined and prohibited from the transaction of any further business, and it is ordered, adjudged, and decreed that a writ of injunction issue in this action enjoining and prohibiting said corporation, said Pacific Bank, its officers and agents, from the transaction of any further business." (2) "And it is further ordered, adjudged, and decreed by the court that the affairs of said corporation shall be closed; that the business thereof shall be settled and liquidated under the control of the bank commissioners of this state, subject to the direction and jurisdiction of this court; and that for the purpose of such liquidation, the receiver heretofore appointed in this action, Harry I. Willey, is hereby ordered and directed to deliver over to said bank commissioners all the property and assets of every kind and nature of the said corporation, and all the books, records, and papers belonging to said bank. It is further ordered and adjudged that said bank commissioners shall from time to time make report to this court of their acts and doings in the liquidation of the business of said corporation, and that they shall make such report whenever directed by this court to do so; and it is ordered that the said bank commissioners, in settling and liquidating the affairs and business of said corporation, shall be subject to the supervision and control of this court, and that all the property and assets of said bank, and all its books and papers, shall continue and remain in the custody of this court while the business of said bank is being settled by said bank commissioners. It is further ordered that the said bank commissioners take such proceedings against such corporation as may be decided upon by its creditors." As to the first paragraph of this decree, it is clearly within the power of the court to make, and clearly was its duty to make, under the admitted facts. This is conceded by all parties to the present litigation, but the remaining portion of the decree is attacked, as being without the jurisdiction of the court, and beyond the limitations of its power. The court's jurisdiction in a proceeding of this character comes only from the statute under which it claims to act, and its powers are limited by the statute. It is said in Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206: "Although it is a court of general jurisdiction, yet, in the exercise of these powers, its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect upon those who have invoked its authority or submitted to its decision." And in the case of the State Invest. & Ins. Co. v. Superior Court, 35 Pac. 549, it is said of the jurisdiction of the superior court, in a case involving the principle here involved: "As its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction." We quote from Windsor v. McVeigh, 93 U. S. 274: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law." As containing an interesting resumé of this principle of jurisdiction, and the authorities supporting it, see Thomas v. Mortgage Co., 47 Fed. 556.

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[1] County Government Act, § 164, declares that the salaries and fees provided in such act for county officers shall be in full compensation for services rendered by such officers or their deputies, and that all deputies shall be paid out of such salaries, but that the assessor shall retain for his own use a specified per cent. on all taxes collected by him.

Section 11 of the bank act contains the law bearing upon the question here involved, and while the subject-matter of the section is one of the gravest importance, involving vast interests, complicated details, covering the liquidation of great banking institutions, and extending through a long term of years, yet the text of the statute is most meager, and what little there is of it most unsatisfactory and uncertain. Upon its face the statute is wholly inadequate to meet the exigencies that are bound to arise when courts are called upon, under its provisions, to deal with banking corporations. Its authors did not appear to understand or appreciate the importance of the question upon which they undertook to legislate, nor the difficulties surrounding its successful solution. For these reasons the court is left to grope its way in the dark upon the construction of a statute which, above every other statute, should be so written that all might understand. It is not necessary for the court to consider the meaning of that portion of the decree framed in the words of the statute, directing the bank commissioners to take such proceedings against the corporation as might be decided upon by its creditors, for no question of that character is involved in these proceedings. But the second paragraph of this decree in effect directs the bank commissioners to take charge of the assets of the corporation, and, under the control and supervision of the court, proceed to final and full liquidation of its affairs; and the justification of this portion of the court's decree in the law is the matter presented for our consideration upon the present application for this writ; for, in pursuance of this branch of the decree, the bank commissioners, in effect, as agents of the court, have taken charge and control of the property and business of the bank, and, to the exclusion of its directors, are proceeding to administer upon its effects, and conduct it through the course of liquidation. The present proceeding is one invoked to restrain the court and its agents (the bank commissioners) from carrying out the policy outlined and declared in its decree, upon the ground that the court is acting beyond the limits of any power conferred upon it. We think the writ should issue. It is demonstrated by the authorities quoted that the statute is the measure of the court's power, and unless the statute says the bank commissioners, in conjunction with and under the control of the court, may do the things they have done and are threatening to do, they are outside of the law, and their acts must cease. But the bank act is the only source from which the court's power to decree these things could flow, and that source of power is unable to respond when called upon to show good and legal cause for the court's action. Counsel for respondents have cited us to no law giving the court authority to administer upon and distribute the effects of this insolvent corporation, and we cannot find it in the statute. In giving a construction to section 11 of this act, it must be borne in mind that honest banks may become insolvent, as well as honest men, and that in the present case we have no question of fraud or dishonesty charged against the officers of this corporation. The two facts upon which the entire decree is based, and which must form its support, are that the corporation is insolvent, and that it is unsafe for parties interested in it for it to continue to transact business. Those facts are entirely consistent with a past honest administration of its business, and also consistent with a future honest liquidation of its affairs by its officers. Under such a state of facts, there is no reason why the officers of the bank should not proceed with the closing up of its affairs, and expeditiously return to the creditors their just dues. Such appears to be the evident purpose of the statute. The legislature appeared to recognize the fact that the officers of a bank, —men who are personally cognizant of the business throughout its ramifications,—having full knowledge of its minutest details, were the parties who could best and soonest carry it through a successful liquidation in the interest of its creditors. The injunction issued by the court enjoining the further transaction of business by the bank is in the language of the statute, and means what the statute means. The statute refers to the further transaction of a business for the conducting of which the corporation was organized. The prohibition is a restriction upon the doing of any further new business. No more money is to be received upon deposit; no more money is to be loaned. These are the objects and purposes of the statute, and nothing more. It is not contemplated that business may not be done by the officers of the bank which is absolutely necessary to the preservation of its assets, but, at the same time, it is contemplated that all its future acts and conduct must be directed towards the accomplishment of a single purpose, to wit, an economical and expeditious winding up of its affairs.

In this case there is no question of fraud or dishonesty upon the part of the officers of the bank, and no question of the rights of creditors petitioning the court for relief under the peculiar conditions existing. Measured by the facts found by the court, its jurisdiction did not extend beyond a prohibition of a further prosecution of the business of the bank, for that was the limit of its statutory authority. It had no power to oust the directors of the bank from the possession of its assets, or deprive them of the management of its affairs during its liquidation; for the statute vests in the court no such power. The decree authorized by the statute deprives the corporation of the right to further transact business, and, ex necessitate, there is nothing left for it to do but to pass into liquidation. The statute outlines in general terms how this liquidation shall be conducted, and its entire tenor is inconsistent with the idea of placing its affairs exclusively in the hands of the bank commissioners for the purposes of liquidation. To indicate that such was not the intention of the lawmaking power, and that a construction upon such lines is wholly unjustifiable, let us notice its provisions: (1) The section requires that the business of the bank be settled within four years from the time it is declared insolvent or thrown into liquidation, unless, at the expiration of such time, it shall obtain the consent in writing from a majority of the board of bank commissioners to continue in liquidation for a longer period. This provision contemplates that "it [the bank]" shall obtain the consent of the board of bank commissioners in order that it may continue in liquidation after the expiration of the term of four years. If the matter of liquidation was in the hands of the commissioners and the court, the foregoing provision would not be found in the act. (2) It is also provided that a bank in liquidation shall make semiannual reports of its condition to the bank commissioners, and shall state therein the amount of dividends paid, debts collected, and the amount realized on property sold. It is apparent that this report is to be made by the officers of the bank who have knowledge of these matters, to the bank commissioners. (3) It is also provided that the bank commissioners shall have the power, and it is made their duty, to examine the condition of every such corporation in liquidation in the same manner as in the case of solvent banks, "and shall have a general supervisory control of any such corporation." These provisions of the statute have no purpose, and are wholly meaningless, if the liquidation of this bank is to pass into the hands of the bank commissioners. (4) It is further declared that the bank commissioners shall have the power to designate the number of officers and employes necessary to close up the business and fix the salaries of the same, and shall do all in their power to make such liquidation as economical and expeditious as the interests of the depositors will admit. It will thus be observed that the commissioners are not even given the power to select the officers and employes, but simply to fix the number and designate their salaries. (5) The act expressly confers upon the bank commissioners the same powers over all banks in process of liquidation at the date of its passage as they have over banks situated as the one here involved; yet it has never been claimed by any one that the mere passage of the act ipso facto ousted the management then in possession of banks undergoing liquidation, and conferred complete and exclusive control over them upon the bank commissioners. It is evident such a thing was never contemplated by the legislature, and more than evident that such a contention could not stand in law for a moment. The foregoing citations from the statute are amply sufficient to indicate the general purpose of its provisions, and to further indicate beyond any doubt that the officers of the bank are not to be superseded by the commissioners in the control of its property during its progress towards final liquidation. As to the exact purpose intended to be accomplished by the following words found in the statute, we are not prepared to say: "And shall have a general supervisory control of every such corporation." In a limited sense, the bank commissioners have a general supervisory control of all solvent corporations, and we are not prepared to say that this clause of the act is more than a reiteration, in a general way, of those duties of the bank commissioners towards a bank in liquidation which are stated in terms by the act itself.

There is nothing in the conclusions we have reached in this case opposed to the principle of law declared in the recent decision promulgated in what is commonly known as the "Pacific Bank Case" (People v. Superior Ct. of San Francisco, 34 Pac. 492). It is there decided that the statutory insolvency proceedings had no application to banking corporations, but that the bank act, portions of which are involved in this litigation, superseded and supplanted the insolvent act of 1880. Such was the only question involved in that action, and we have no doubt whatever as to the soundness of the law there declared. There may be isolated clauses of the opinion written in that case, as may be found in the opinions of many courts written in complicated cases, that inferentially cover more ground than the facts involved actually demanded for their determination, but those things are matters separate and apart from the principles of law involved and declared in the case, and of no binding effect upon the court. Let the writ issue as prayed for.

We concur: HARRISON, J.; McFARLAND, J.; FITZGERALD, J.; BEATTY, C. J.

DE HAVEN, J., deeming himself disqualified, did not participate in the foregoing decision.

102 Cal. 426

SONOMA COUNTY v. CITY OF SANTA ROSA. (No. 15,257.)

(Supreme Court of California. May 14, 1894.)

CITIES—LIABILITIES—BOARD OF PRISONERS.

1. Where a city recorder had the jurisdiction of a justice of the peace of offenses against state laws and against city ordinances under the charter, which further provided that he might imprison persons adjudged guilty of the violation of city ordinances or state laws in the city prison or county jail, the city is liable for the board of persons committed to the county jail for violations of city ordinances, since the charter intends that prisoners shall be imprisoned in the city prison for violation of ordinances and in the county jail for violation of state laws.

2. In such case, under Pen. Code, § 1611, providing that the sheriff must receive all persons committed to jail by competent authority, it is immaterial that the recorder had no authority to commit prisoners convicted by him to the county jail, if he had jurisdiction to convict them.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the county of Sonoma against the city of Santa Rosa. From a judgment for defendant, plaintiff appeals. Reversed.

A. G. Burnett, Dist. Atty., Lippitt & Lippitt, and Emmett Sewell, Dist. Atty., for appellant. Wm. F. Cowan, for respondent.

HAYNES, C. This is an action brought by the county of Sonoma against the city of Santa Rosa to recover $371.70, alleged to have been paid by the county to the sheriff for boarding prisoners committed to the county jail by the city recorder for violations of the ordinances of the city. A general demurrer to the complaint was sustained, and this appeal is from a judgment entered thereon against the plaintiff.

The respondent, in support of its demurrer, contends that under the city charter it has the right to commit to the county jail all persons found guilty in the recorder's court of violations of the city ordinances, and that the county is compelled to support such prisoners at its own expense, and that the city is therefore not liable. The charter gives the recorder a dual jurisdiction: (1) The same jurisdiction over crimes and offenses committed against the state law, within the city limits, as is conferred on justices of the peace; and makes applicable to this jurisdiction of the recorder all the statutes of the state relating to the jurisdiction of justices of the peace in criminal cases, including "the processes issued by them, the trial of such cases, holding to bail, committing to prison," etc. (2) A jurisdiction over all breaches and violations of city ordinances, with power "to fine and imprison persons adjudged guilty of such violations or noncompliance with said ordinances, or violations of the laws of the state, in the manner provided by law or the ordinances of the city. Such imprisonment shall be in the city prison, or the county jail of Sonoma county." St. 1875-76, p. 257, § 15. Under this provision of the charter it is claimed the recorder may imprison violators of the city ordinances, either in the city prison or the county jail, at his option. But, if we have regard only to this charter provision, it is quite as clear that he has the same option in reference to violators of the criminal laws of the state; and therefore, if he chose, he could sentence any or all offenders against the state law to imprisonment in the city prison, and all offenders against the city ordinances to imprisonment in the county jail. But it is clear that he can have no such option in regard to persons found guilty of violating the criminal laws of the state. There is not only no intention to change the criminal law of the state apparent in the charter, but the frequent reference to such laws as the source of his powers in such cases places it beyond question that no such change was intended. All offenses against the criminal laws of the state are divided into two classes,—felonies and misdemeanors. Pen. Code, § 16. By section 19 of the same Code it is provided: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." One of these classes of offenders is therefore excluded from this supposed option, and a reasonable inference would therefore be that the other place of imprisonment mentioned in the charter (the city prison) was intended for the other class of offenders, especially as the charter does not make the violation of a city ordinance a misdemeanor. But there are other reasons for this construction. The city marshal can have no control over prisoners confined in the county jail, yet the charter of the city of Santa Rosa provides that he "shall have charge of the city prison and prisoners, and of any chain gang or prisoners at work under any judgment or fine imposed by the city recorder." The language is not that he shall have charge of the city prison and of the prisoners confined therein, but he is to have charge of the city prisoners, as well as of the city prison; and there is no provision in the charter giving the sheriff of the county any charge over or concerning them, unless it is found in the supposed authority to commit them to the county jail.

But a more conclusive reason for the construction we have given this provision of the charter is found in our frame of government, the policy of which is to localize, as far as can reasonably be done, not only the power, but the expense of government. The state is divided into counties, townships, and municipal corporations, with such limited legislative powers as are essential to each organization, and the expenses of such local governments, in all matters purely local, at least, are borne by such locality. The expense of the county government is borne by the whole county. But a city requires a government of its own. The laws necessary for the government of the people of the state at large lack something made necessary by the aggregation of large numbers of people. This lack is supplied by ordinances which are not required in the rural districts and small villages. The enforcement of these ordinances, and the preservation of order, require machinery not required elsewhere, the expense of which should, and under our well-defined policy, manifested clearly in our codes and statutes, as well as in the state constitution, is required to, be borne by the city; and therefore, if the language of the charter here in question is doubtful, or capable of different interpretations, it ought to be read in the light of our frame of government, and construed in harmony therewith, for we cannot presume that the legislature intended, after giving the city of Santa Rosa ample authority to provide means for defraying the expenses of her city government, that any part of it should be borne by the county at large. In accordance with this policy, the city is not only empowered by its charter to levy and collect taxes for the support of its city government, but the city recorder is required to pay into the city treasury all fines and penalties imposed and collected in criminal proceedings. Section 15, p. 258. We think the provision in question requires persons found guilty of violating city ordinances to be committed to the city prison, and those found guilty of the violation of the criminal laws of the state, where imprisonment is ordered, to be committed to the county jail. This construction gives full effect to the provision under consideration, and is the only construction that would bring it in harmony with the general policy of the state and give effect to the provision in the charter placing city prisoners under the care and control of the marshal.

Respondent (the city of Santa Rosa) contends, however, that if the charter authorized the commitment of city prisoners to the county jail, plaintiff cannot recover, since, under the law, the county is chargeable with the support of prisoners confined therein; and, if they were illegally committed to the county jail by the recorder, such illegal commitment could not raise an implied contract on the part of the city to support them; so that in either case the city is not liable. If the second premise above stated is correct, the conclusion is inevitable. Section 1611 of the Penal Code provides: "The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food * * * to be paid out of the county treasury." It is contended that if the charter does not authorize the commitment to the county jail of persons found guilty of the violation of city ordinances, such commitments are in excess of his jurisdiction and void, and are not made by competent authority; that the plain duty of the sheriff, under such circumstances, is to refuse to receive the prisoner. But counsel are wrong in this construction. The commitments were illegal, but were nevertheless made by "competent authority." By competency is meant the legal power or capacity to take cognizance of a cause; as, for example, the competency of a judge or court to examine and decide. In the case of People v. Liscomb, 3 Hun, 778, the words "competent tribunal," used in the habeas corpus act of the state of New York, were construed to mean "a tribunal having jurisdiction of the subject-matter and the person." That the city recorder had jurisdiction to try and punish these persons is not disputed, and that constitutes "competent authority." That he erred did not affect the character of the tribunal. All that the sheriff was bound to know was that the city recorder had jurisdiction. That the recorder could, in some cases at least, legally commit prisoners to the county jail, was beyond question; and the sheriff could have no authority to sit in judgment, and determine whether, in any given case, the recorder had exceeded his jurisdiction. If respondent's construction is correct, it would apply as well to commitments made by the superior court, and would equally justify the sheriff in refusing to receive the prisoner if the court erred in imposing the punishment. If that construction should prevail, the liability of the county for the support of a prisoner committed by the superior court would be made to depend, not upon the jurisdiction of that court over the offense and the person of the offender, but upon the question whether the court erred in the exercise of its jurisdiction as to the sentence pronounced. But it is hardly consistent for respondent to urge (as it does in the other branch of the case) that the commitment was improper, and, because the sheriff did not detect its error and refuse to receive these prisoners, that he should not be compensated for their support, for upon its theory neither the city nor county could be liable; the ctiy, because it did not promise to pay, and the county, because the commitment was not by "competent authority." But, as we construe the charter, the county has borne an expense which, under the law, should have been borne by the city. It is said, however, that the complaint does not allege that these prisoners were received "at the request of the city;" but the complaint alleges the facts which show they were so received. A commitment by the judicial officer of the city ought, though erroneous, to have at least the force of a request; and, the expense of enforcing its ordinances being imposed upon the city by law, a promise to pay therefor is implied. The judgment appealed from should be reversed, with directions to overrule the demurrer.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court directed to overrule the demurrer to the complaint.

102 Cal. 467

In re HUDSON. (No. 21,102.)

(Supreme Court of California. May 16, 1894.)

ATTORNEYS—REMOVAL—SUFFICIENCY OF ACCUSATION.

Under Code Civ. Proc. §§ 290, 291, providing that the accusation for removal of an attorney must be in writing, state the matters charged, and be verified by oath that the charges therein contained are true, an accusation merely on information, unsupported by informant's affidavit, is insufficient. De Haven, J., dissenting, on the ground that, though the verification of the accusation is insufficient, the objection cannot be raised by the court of its own motion.

In bank.

Application for the removal of Rodney J. Hudson from the office of attorney. Dismissed.

PER CURIAM. Application for removal from the office of attorney. A document entitled "Accusation" has been presented by H. A. McCraney, in which he alleges certain facts against the above-named Rodney J. Hudson on information and belief, and prays that said Hudson be removed from the office of attorney and counselor at law. The accusation is also supported by the oath of McCraney, in the following form: "State of California, City and County of San Francisco—ss.: H. A. McCraney, being first duly sworn, deposes and says that he is the affiant in the foregoing affidavit and accusation; that he has heard said affidavit and accusation, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein stated on information and belief. As to those matters, that he believes it to be true." Sections 290 and 291, Code Civ. Proc., provide that the accusation for the removal of an attorney or counselor must be in writing, and must state the matters charged, "and be verified by the oath of some person to the effect that the charges therein contained are true." It was held in Hotchkiss' Case, 58 Cal. 39, that by these provisions the legislature clearly intended that the accusation must be made by one who has at least some information on which he bases his charges, and that an accusation merely upon information that was not supported by the affidavit of the informant was insufficient. Upon the authority of that case, the application is dismissed.

DE HAVEN, J. I dissent from the judgment. While I fully concur in the view that the verification attached to the accusation is insufficient, still, in my opinion, the objection is one which ought not to be raised by the court on its own motion. The accusation having been presented, the matter should be heard on its merits, unless the accused should himself interpose the technical objection to the form of the verification; and, even if such objection were made by him, the proceeding should not be dismissed, but the complainant should be permitted to amend so as to make the accusation and verification conform to the law. The accused should have the opportunity to answer the accusation, and if, upon full investigation, such accusation should not be sustained by the evidence, he is entitled to a judgment acquitting him of the charges, which, though informally made, certainly reflect seriously upon his professional character.

In re SAYRE. (No. 21,103.)

(Supreme Court of California. May 16, 1894.)

In bank.

Application for the removal of Morton S. Sayre from the office of attorney. Dismissed.

PER CURIAM. Application for removal from the office of attorney. Upon the authority of Hudson's Case (this day decided) 36 Pac. 812, the application is dismissed.

DE HAVEN, J. I dissent from the judgment for the reasons stated in my dissenting opinion in Hudson's Case (this day decided) 36 Pac. 812.

101 Cal. 338

MARCEAU v. TRAVELLERS' INS. CO. OF HARTFORD. (No. 18,199.)

(Supreme Court of California. March 20, 1894.)

INSANITY—INSURANCE — INTENTIONAL KILLING OF INSURED.

On an issue as to the sanity of the person who killed insured, the testimony of an expert that a person might know an act to be wrong, and have no power to resist an impulse to commit such act, is not ground for reversal, though such "insane impulse" is not a defense to a charge of felony. Beatty, C. J., dissenting. 35 Pac. 856, affirmed.

In bank.

On rehearing. For original opinion, see 35 Pac. 856.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order of the court denying a rehearing. It is assumed in the opinion of Mr. Justice GAROUTTE, as it has been in the argument of counsel, that the same test is to be applied in determining whether the death of Fiske was caused by an injury intentionally inflicted, within the meaning of this policy, as is applied to the plea of insanity in a criminal case. Accepting this proposition as embodying a correct statement of the law, it follows that unless the slayer of Fiske was of such unsound mind at the time of the killing as not to know the nature and quality of the act, or, in other words, so insane as not to know that it was wrong and criminal, then the injury was purposely inflicted, notwithstanding the slayer may have been impelled to the act by an insane impulse which he had not the power to resist; for such is undoubtedly the law of this state, as established by numerous decisions in criminal cases. This being so, it could not fail to prejudice the defendant to allow evidence to go to the jury, over its objection, to the effect that there is a kind of insanity which our law does not recognize as an excuse for criminal acts. Such testimony was wholly uncalled for. It was for the court to inform the jury, as matter of law, what insanity is, and to confine their consideration to that species of insanity that the law recognizes. But the ruling admitting the evidence quoted in the opinion of the court over the defendant's objection was, in effect, a declaration to the jury that it was material for them to know, as bearing upon the issue to be found, that there is a kind of insanity other than that which determines responsibility for criminal acts. Such a ruling, unless subsequently cured by striking out the objectionable testimony, and instructing the jury, unequivocally, that they must wholly discard it from their consideration in making up their verdict, is, in my opinion, not only erroneous, but highly prejudicial. And I think it is laying down a most dangerous rule, and one which must lead to serious abuses, to say, as the court does say, with reference to this testimony, that there is "no possible objection to a practice of placing before them [the jury] general information bearing upon this most metaphysical and abstruse subject." The aim and effort of courts ought to be to make the law which jurors are to consider for the purpose of finding a verdict as plain and simple as possible; and, to my mind, there exist the gravest possible objections to the admission of witnesses to testify to that which is purely matter of law, and especially when, as in this case, such testimony is, for all possible purposes of the trial, in direct conflict with the law governing the decision of the jury. But the error of the superior court did not end with the admission of this testimony. So far from striking it out, and instructing the jury to disregard it, the court charged the jury, with respect to insanity, in the language quoted in the opinion of Justice GAROUTTE (fifth paragraph). In this instruction two (possibly three) distinct hypotheses are stated, upon either one of which the jury are told they may find that the injuries to Fiske were unintentional; and one of these hypotheses, clearly, is the insane impulse theory, pure and simple. The attempt, in the opinion of the court, to give to this part of the charge a meaning consistent with the doctrine of insanity, so clearly and so long established in the law of California, is, to my mind, a failure; and, even if the instruction were so obscure and unintelligible in its terms as to warrant us in assuming that the jury did not understand it in an objectionable sense because they could not understand it at all, the original error in the admission of the testimony as to insane impulse would remain uncured. Because of the errors here briefly indicated, I think that the judgment and order of the superior court are erroneous, and should have been reversed.

(102 Cal. 501)

PEOPLE v. STOKES. (No. 21,070.)

(Supreme Court of California. May 25, 1894.)

CRIMINAL LAW—APPEALABLE ORDERS.

Defendant cannot appeal from an order dismissing a prosecution pending against him.

In bank. Appeal from superior court, Tulare county; W. A. Gray, Judge.

An information against Ella Stokes was dismissed, and she appeals. Dismissed.

Horace L. Smith, for appellant. Atty. Gen. Hart and Maurice E. Powers, Dist. Atty., for the People.

PER CURIAM. This is an appeal from a judgment of the superior court of Tulare county, Cal., dismissing an information which was pending in said court against the defendant. On June 15, 1893, upon motion of the district attorney, the superior court ordered that the case "be, and is hereby, dismissed, on the grounds that the offense charged was committed in the territory comprising the new county of Kings." The defendant contends that this dismissal is erroneous, because it was not made for a statutory reason, nor in furtherance of justice. For the purpose of this case it is sufficient to say that a defendant is not entitled to an appeal from an order dismissing a prosecution which is pending against him. If courts deem it proper to dismiss prosecutions against defendants charged with crime, we know of no objections in law which a defendant is entitled to urge against such a course. This defendant was not injured by the order of the court dismissing the prosecution, which resulted in her discharge. For the foregoing reasons, the order is affirmed.

(102 Cal. 283)

SAWYER v. COLGAN, Comptroller. (No. 18,068.)

(Supreme Court of California. May 25, 1894.)

In bank.

Memorandum amending opinion. For opinion, see 36 Pac. 580.

PER CURIAM. The following paragraph in the opinion filed herein April 25, 1894 (36 Pac. 580), viz.: "Our conclusion is that the state of California never became liable to pay bond 420, or its coupons, or any of the coupons of bonds issued under the act of 1852," is amended so as to read as follows:

"Our conclusion is that the state of California never became liable to pay bond 420, or its coupons, or any of the coupons in suit of the bonds issued under the act of 1852."

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102 Cal. 476

CALLAHAN v. LOUGHRAN. (No. 15,429.)

(Supreme Court of California. May 22, 1894.)

Landlord and Tenant—Negligence in Making Repairs.

Plaintiff alleged that, a stairway of premises rented by him from defendant being in need of repair, defendant agreed to repair it, and employed a carpenter, who performed work on it and repaired it; that the same day, after defendant and his employe had, as plaintiff's wife believed, ceased repairs, and made the stairway fit for use, she, in the use of ordinary prudence, tried to use it, and by reason that, unknown to her, a step was negligently placed without being nailed, she was thrown down and injured. *Held* bad, as failing to aver that the repairs were completed, or that defendant induced her to believe they were.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. W. Lawler, Judge.

Action by John Callahan against John Loughran for damages for personal injuries to plaintiff's wife. Demurrer sustained, and judgment for defendant. Plaintiff appeals. Affirmed.

Frank Sullivan, for appellant. W. H. Barrows, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of defendant, rendered upon plaintiff's refusal to amend his complaint after an order sustaining defendant's demurrer thereto. The only question involved relates to the sufficiency of the complaint. According to its averments, plaintiff, John Callahan, and his wife, were tenants of the defendant, they having leased from him five rooms in the second story of a tenement at No. 115 Twentieth street, San Francisco. The rooms were connected with the back yard by a wooden stairway of 30 steps. Defendant, at the time of entering into the lease, agreed with plaintiff and his wife to make all necessary repairs, and at various times during the tenancy did make repairs of various kinds. During the tenancy, the stairs aforesaid became insecure by reason of weak supports and a broken step, whereupon plaintiff and his wife notified defendant, who failed to make repairs, in consequence of which plaintiff and wife notified defendant that they would vacate the premises, or apply one month's rent to repair the same, unless the stairway was repaired in a proper manner. On the 10th of September, 1890, defendant, to prevent his tenants from leaving or applying a month's rent for repairs, agreed to do the same, and on that day attempted to repair the stairway, and employed a carpenter, who performed work thereon and repaired the same. On the 10th day of September, 1890, after defendant and his employe had, as plaintiff's wife believed, ceased repairs and made the stairway fit for use, she (the said wife), after the use of ordinary prudence, undertook to use the same; and while descending the said stairs, by reason of the negligent placing of a step on said stairs without nailing it, of which plaintiff's wife was ignorant, the step gave way, whereby she was thrown down the stairs, and injured. The husband seeks to recover damages for the injury and expense sustained by him in the premises, to the extent of $5,300.

The demurrer raises two objections to the complaint: (1) That it does not state facts sufficient to constitute a cause of action; (2) That it is ambiguous and uncertain. Among the specifications under this latter head are: (a) That it fails to set forth the facts upon which plaintiff's wife founded the belief that defendant had repaired the stairway, and made it fit for the use of human beings; (b) that it does not show what, if any, care plaintiff's wife took to ascertain whether or not repairs had been made, etc.

At common law the landlord was not, in the absence of a covenant or stipulation binding him so to do, liable to do any repairs whatever. Woodf. Landl. & Ten. p. 595; Tayl. Landl. & Ten. §§ 327, 328. It follows that the measure of defendant's liability must be regulated by the standard of the statute. Section 1941 of the Civil Code provides that "the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section 1929." Section 1929 (referred to above) applies to such deterioration or injuries as are occasioned by the ordinary negligence of the hirer. Section 1942 of the Civil Code provides as follows: "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions." In Van Every v. Ogg, 59 Cal. 563, it was held that the tenant had no right to recover damages for dilapidation of the demised premises during the pendency of the tenancy, except such as is given by the statute; and as section 1942, supra, only gave the tenant the right to make repairs to the extent of one month's rent, or to vacate the premises upon the failure of the landlord after notice to make such repairs, that his remedy is confined to these measures, and he cannot recover beyond them for damages sustained by such dilapidation. In other words, the obligation of the landlord is said to be limited to the extent of the privilege conferred upon the tenant. Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304; Tatum v. Thompson, 86 Cal. 203, 24 Pac. 1009; Green v. Redding, 92 Cal. 548, 28 Pac. 599. From the result of the foregoing decisions, counsel for the respondent draws the conclusion that by the special agreement the landlord assumed no obligations other than those imposed upon him by section 1941 of the Civil Code, and that the damage for a breach of such obligation is limited by the provisions of section 1942, supra. We agree with the learned counsel only in part.

In Eblin v. Miller's Ex'r, 78 Ky. 371, it was held that a mere promise by the landlord to repair, based upon the tenant's agreement to relinquish a purpose of abandoning the premises, cannot be supported for want of a consideration. Concede, then, for the purposes of the argument, that the contract or promise to repair was void for want of consideration, or that, if valid, it imposed upon the landlord no obligation different from, or in addition to, that of section 1942, and that, upon its breach by failure of the landlord to make such repairs, the rights of the tenants would have been measured by that section, still, when the landlord undertook to make the repairs, whether pursuant to a contract, or an obligation imposed by statute, or as a volunteer, he was in duty bound to use ordinary care in the conduct of the work. At section 175 of Taylor on Landlord and Tenant, the author says: "Again, while the landlord is not, as such, bound to repair, yet if he assumes to do so, and neglects to perform his obligation, or, in performing it, if any injury is caused from want of skill in, or proper selection of, his workman, he is held therefor,"—citing Benson v. Suarez, 43 Barb. 408; Leslie v. Pounds, 4 Taunt. 649; Gill v. Middleton, 105 Mass. 477; Glickauf v. Maurer, 75 Ill. 289; Watkins v. Goodall, 138 Mass. 533.

The question still remains, does the complaint sufficiently charge negligence upon the defendant? I am of opinion this question must be answered in the negative, bearing in mind that the pleading is to be construed most strongly against the pleader, and that no intendments can be indulged in its aid. It may be summarized thus: On the 10th day of September, 1890, defendant agreed to repair, and on that day employed a carpenter to repair, and they examined the stairs, and performed work thereon, and repaired the same; that on the same day the wife of plaintiff, after she believed defendant and the carpenter had repaired the stairs, in accordance with the agreement, in the exercise of ordinary prudence attempted to use the stairs, and met with disaster because the step was placed on the stairs and not nailed. It will be observed that the plaintiff does not assert that the work was completed, but only that his wife believed they had ceased repairing it, etc. Plaintiff and his wife had notice that repairs were being made, and it is apparent from the complaint that, pending those repairs, the stairs were unsafe; that there was a stage in the progress of the work when, without any negligence on the part of defendant, just the conditions existed which met the wife of plaintiff when she attempted to descend the stairs. She believed the work was completed; but it is not averred that it was so in fact, or that defendant so represented or considered it. It was her duty while repairs were progressing, of which she had notice, to make sure that the repairs were either completed, or that the descent of the stairs was safe, or that the defendant, by some declaration or act, induced her to believe they were safe. Had the repairs been completed, we are authorized to believe it would have been averred in the complaint, and, not having been so averred, we must conclude the facts did not authorize the averment; and the failure to aver other facts showing negligence on the part of the defendant must be construed in the light of what are no doubt the very facts in the case, viz. that they did not exist, and therefore could not be averred in a complaint under oath. The demurrer was properly sustained, and the judgment appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

102 Cal. 469

McCABE v. CARPENTER, Tax Collector.
(No. 15,477.)

(Supreme Court of California. May 22, 1894.)

TAXATION—FOR HIGH-SCHOOL PURPOSES—DELEGATION OF POWER TO SUPERINTENDENT OF SCHOOLS.

Under Const. art. 11, § 12, providing that the legislature may not impose taxes on counties, cities, or other public or municipal corporations for county, city, or other municipal purposes, but may vest in the corporate authorities thereof power to assess taxes for such purposes, Act March 20, 1891, delegating to the county superintendent of schools power to levy such tax for high school purposes as he might deem desirable without control by the inhabitants or any local board, is illegal.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by J. P. McCabe against D. S. Carpenter, tax collector of Contra Costa county. Judgment for defendant. Plaintiff appeals. Reversed.

T. C. Coogan and W. W. Foote, for appellant. Henley & Macsherry, A. C. Hartly, and Mr. Costello, for respondent.

TEMPLE, C. This action was brought to recover from the defendant, as tax collector, the amount of certain taxes paid under protest. Certain school districts in Contra Costa county combined to establish a high school under an act of the legislature entitled "An act to provide for the establishment of high schools in the state of California," approved March 20, 1891 (St. 1891, p. 182). The plaintiff questions the validity of a tax levied under this law. It is contended that the law is unconstitutional, in that it authorizes the county superintendent of schools to furnish to the board of supervisors an estimate for the tax, and makes it the duty of the board to proceed to fix a rate which will realize the amount; thus leaving the amount of the tax wholly to the discretion of an executive officer, and leaving no discretion in the board. The law provides: "An annual tax shall be levied by the authorities whose duty it is to levy taxes in counties, cities, incorporated towns, the amount of said tax being estimated by the county superintendent of schools * * * and by him certified to the proper authorities, on or before the second Monday of September of each year. And it shall be the duty of such authorities to levy such rate as will produce the amount estimated to be necessary for such purpose." This estimate is furnished after the assessments have been equalized. No opportunity to be heard is afforded the taxpayer, and the discretion of the officer is controlled only by the phrase, "amount estimated to be necessary for such purpose." Appellant contends that this provision violates section 1, art. 3, of the state constitution, which divides the powers of the government into three departments, and declares that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions pertaining to either of the others." It is not denied that the county superintendent of schools is an executive officer. It seems to me, however, that, if it be granted that the section quoted vests in the county superintendent of schools legislative power the act is void, without reference to the character of the person in whom the power is vested.

Preliminarily to this question another presents itself. Could the legislature have levied the tax in question, or must it vest in the local authorities that power, under section 12, art. 11, of the constitution? School districts have been called public corporations and quasi municipal corporations. Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067. Public and municipal corporations are both mentioned in the section quoted from the constitution. But I think school districts have generally been considered a part of the county organization, and so they are regarded in the statute under consideration. In Hughes v. Ewing, supra, it seems to have been held that a school district comes within the provision of section 12, art. 11, and that the legislature cannot impose a tax upon the property or the inhabitants, but must vest the power in the local authorities. Whether a school district is itself a public corporation, or, with reference to the section under consideration, is to be deemed a part of the county organization, is immaterial to this argument. In either view the constitutional provision limits the power of the legislature in the matter of imposing taxes upon the inhabitants or the property within it. If the legislature cannot impose a tax upon the property or inhabitants of a school district, it would seem to follow that it cannot prescribe a procedure through which such tax would inevitably be levied without leaving some discretion in regard to it to the local authorities. The legislature imposes the tax when it requires an officer to make certain computations, the result of which must fix the amount to be levied. Such a process enjoined upon local authorities does not vest in such authorities the power to tax as required by section 12, art. 11. Therefore the argument of the respondent's counsel that such is the effect of the act, if correct, will not help him. But, since the power to levy a tax is purely legislative, it would seem to follow that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events, it could not vest such power in an executive officer of such corporation. Section 1817, Pol. Code, has no application to proceedings under this law. No process or procedure is laid down, following which the county superintendent shall reach the amount of his estimate. The word itself implies the use of discretion by the person required to make it in regard to a future contingency which is not capable of exact computation. The act itself gives no rule or data; not even, except by inference, that the purpose of the tax is to meet the expenses of the high school. Looking to the provisions in the general school law in regard to the discretion of county superintendents and trustees of school districts, we find they have a wide range of discretion in regard to expenditures. The trustees have, however, no voice in making this estimate; are not even required to furnish any data for it. How many teachers may be required, or how many months the school shall be held, or what other expenses would be incurred, are all conjectural, and all left to the judgment and discretion of the county superintendent. And nothing except the use of the word "estimate" implies that he is controlled even by such conjecture; and when the estimate reaches the board of supervisors of the county, which the act in a way recognizes as the proper authority to levy the tax, it has nothing to do but make a mathematical calculation, which consists in dividing the amount of the estimate by the amount of the taxable property in the district, and to enter the order. This is not the exercise of power. It is obedience to a command. Where one is required to do a given act in a mode prescribed, without reference to his judgment or discretion, except as to the mode of complying, the act is purely ministerial. The province of the county superintendent and the function of the board are well illustrated by the memoranda furnished the president of the board in this case. It consisted of an unsigned writing on a strip of paper, showing the amount of property in the district, amount required, allowance for delinquency, and rate. Of course, the board had nothing to do but to enter the order indicated by it, and this they must do if the law is valid. Certainly no legislative power is vested in the board in reference to this tax.

It is admitted that the power to levy is purely legislative. What discretion does the legislature exercise when it levies a property tax? The constitution provides that all property shall be taxed in proportion to value. The revenue laws provide modes of assessment, of ascertaining the ratable share of each taxpayer; the constitution itself fixing the rule of apportionment. The province of the legislature, then, is simply and solely to determine the amount. This, under the law in question, was done by the county superintendent. The board had no part or share in this, the only legislative function connected with it. Of course, it is claimed that the act of the board alone gave the levy its vitality as the levy. But, as the board had no discretion in the matter, it must follow either that the legislative power is delegated to the county superintendent, or the tax is imposed by the legislature. The order entered was really made by the county superintendent. The function of the board was clerical. The question as to whether in a given case there has been a delegation of the legislative power is sometimes a very difficult question to determine. Executive officers are often required to exercise a large discretion in the performance of purely administrative acts. The legislature cannot always anticipate contingencies which may arise. So it has been sometimes said, as in People v. Reynolds, 5 Gilman, 12 (quoted with approval in Society v. Austin, 46 Cal. 415), that there was a restricted sense in which legislative discretion may be delegated. "We see, then, that while the legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might do properly, yet cannot advantageously, do itself. * * * The object to be accomplished, or the thing permitted, may be specified, and the rest left to the agency of others with better opportunities of accomplishing the object or doing the thing understandingly." This difficulty in drawing a precise line between legislative and administrative functions is noticed by Judge Cooley in his work on Taxation (page 62). He says: "We conceive that the legislature must in every instance prescribe the rule under which taxation may be laid. It must originate the authority under which the tax gatherer demands the contribution, but it need not prescribe all the details of action, or even fix with precision the sum to be raised, or all the particulars of its expenditure. If the rule is prescribed which in its administration works out the result, that is sufficient, but to refer the rule to another would be in excess of legislative power." The author then gives some illustrations of the doctrine. One is where the judgments of a state board of claims are made final, and the legislature directs that the claims allowed shall be added to the general levy; another case is the awards of a commission to settle claims between counties which are to be added to the levy; another is power to add to the levy to create a contingent fund to be at the disposal of the executive, though not enumerated in detail by the legislature. The author, however, immediately adds that to leave to a court, board, or state officer the power to determinate the rate of a levy, is incompetent.

A similar question was considered by this court in two cases which were in all respects alike, and which were considered with very great care. Society v. Austin, 46 Cal. 415, and Houghton v. Austin, 47 Cal. 646. They involved the validity of a tax levy determined under an act of the legislature by a board composed of the governor and other executive officers. The legislature fixed the amount to be raised, and directed the board to transmit to county supervisors the rate of state tax, "which, after allowing for delinquency in the collection of taxes, must be sufficient to raise the specific amount of revenue directed to be raised by the legislature for state purposes." The only discretion given the board was to estimate the probable delinquency, and the board had considerable data upon which this could be done in past experience. Yet it was after an exhaustive discussion held, although the effect was temporarily to deprive the state of its revenues, that the act was void because of this attempt to delegate legislative discretion. Manifestly a much larger discretion is given by the act under consideration to the county superintendent than was given to the board created by that act. The case of Macklin v. Trustees, 88 Ky. 592, 11 S. W. 657, does not seem to me in point. The question there was whether, under the act of the legislature, the power to levy a tax could be delegated to the trustees of a school district, without referring the question to the inhabitants of the district. As a delegation of legislative power, it would, upon principle, have been just as objectionable when delegated to the inhabitants as to the trustees. The law was treated as conferring power upon a municipal government, and the discussion had reference to the extent to which such power could be delegated to such corporation. That this is an exceptional case is declared by Cooley in his work on Taxation (page 63). Here one objection is that the power was delegated, not to the local legislature, but to an executive officer; and the power vested in this officer, or attempted to be, was a perpetual power to levy any amount of tax that he might deem desirable, year after year, without control by the inhabitants or any local board, although he was not a district officer, and not necessarily an inhabitant of the district. If I am right in this position, it becomes unnecessary to determine the other points made. I recommend that the judgment and order be reversed, and the court directed to enter judgment for the plaintiff on the findings.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to enter judgment for the plaintiff on the findings.

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4 Cal. Unrep. 660

AFFLERBACH v. McGOVERN. (No. 15,276.)

(Supreme Court of California. May 26, 1894.)

REPLEVIN—JUDGMENT—WHEN DISTURBED.

In an action to recover the possession or value of personal property, the finding of the trial court will be affirmed when there is evidence to support it, though the evidence is conflicting.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by C. H. Afflerbach against John McGovern to recover the possession or value of certain personal property. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. J. W. Harding, for respondent.

PER CURIAM. This is an action to recover the possession or value of certain personal property. The court below gave judgment for the defendant, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

This is a second appeal. In the opinion rendered on the former appeal (79 Cal. 268, 21 Pac. 837), the principal facts of the case are stated, and they need not therefore be repeated here. The court found that "the plaintiff was not, on August 12, 1880, nor at the time of the commencement of this action, nor at any other time, the owner, nor in the possession, nor entitled to the possession, of the goods and chattels in the complaint mentioned, nor of either or any of them;" and the only contention on the part of the appellant is that this finding was not justified by the evidence. This contention cannot be sustained. It is true that there was some conflict in the evidence; but, when looked at as a whole, it appears to be clearly sufficient to justify and sustain the decision. The judgment and order appealed from must be affirmed, and it is so ordered.

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102 Cal. 502

McLAUGHLIN v. PERKINS et al. (No. 15,206.)

(Supreme Court of California. May 26, 1894.)

MECHANIC'S LIEN—NOTICE OF CLAIM.

The fact that a building contract provides for the issuance of a certificate by the architect before the installment due upon the completion of the building shall be paid does not postpone the commencement of the 30 days allowed subcontractors, within which to file their claims, to the time of the issuance of the certificate.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by R. A. McLaughlin against William Perkins and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Smith & O'Keeffe, for appellant. Boyd, Fifield & Hoburg, for respondents.

BELCHER, C. This is an action to foreclose a lien for materials used and work done by subcontractors in the construction of a building for the defendant Perkins. The court below gave judgment for the defendants, upon the ground that the claim of lien was not filed in time, and the plaintiff appeals from the judgment on the judgment roll. The only question in the case is, was the claim of lien filed within the time required by statute? The court found the facts to be, in substance, as follows: On August 13, 1889, one E. W. Hyde entered into a written contract with defendant Perkins, to erect for him a certain building according to plans and specifications prepared by R. H. White, architect, and to finish the same within 90 days from said date, for the sum of $4,900, payable in installments; the fifth installment, of $687.50, to be paid when the building should be completed and accepted, and the sixth installment, of $1,250, to be paid 35 days after its completion. This contract was duly recorded, and, under it, Hyde proceeded to erect the building. On September 16th he contracted with the assignors of the plaintiff to do the tinning and plumbing of the building, which they did, for the agreed price of $720, of which $475 was paid, leaving still due and owing therefor the sum of $245, for which, on March 1, 1890, they duly filed, and caused to be recorded, their claim of lien. The building "was completed and finished according to the plans and specifications on the 27th day of January, 1890, but it was accepted by the defendant William Perkins, on the 18th day of January, 1890, and was actually occupied and used by the tenants of defendant William Perkins on the 25th day of January, 1890, which tenants rented it on the 21st and 22d days of January, 1890. But plaintiff had no notice of the acceptance of said building by said defendant Perkins, or of its occupation by said defendant's tenants, until the 31st day of January, 1890, on which day the architect, R. H. White, issued a certificate in the following words and figures, to wit: 'San Francisco, January 31, 1890. To William Perkins: This is to certify that the sum of six hundred and eighty-seven and 50-100 dollars, amount of fifth payment on building located, etc., is due and payable to E. W. Hyde. [Signed] R. H. White, Architect.'" The contract between Hyde and Perkins contained the following provisions: "When each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates, under his hand, to the contractor, or, in lieu of such certificates, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or, in lieu thereof, the writing aforesaid, within three days after the times aforesaid, and after demand therefor, made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate shall, at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand. In case the architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificates." Appellant contends that these provisions of the contract made the certificate of the architect a prerequisite to the payment of any money to the contractor, and that until such certificate was issued the building could not be considered completed, nor accepted as completed, and hence, as the lien was filed within 30 days after the certificate above mentioned was issued, it must be held to have been filed in time. The provisions of the contract were not, in our opinion, as far reaching as claimed, but were intended simply for the protection of the owner, by making the approval of the architect a condition precedent to the contractor's right to demand payment of the money. This condition, however, the owner was at liberty to waive, if he chose to do so; and he might, without any certificate from the architect, have accepted the building and paid for it as he had agreed to do. The statute provides that every person, save the original contractor, who claims the benefit of the law in regard to liens, "must within thirty days after the completion of any building, improvement or structure" file for record with the county recorder his claim of lien, and that "the occupation or use of the building, improvement or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement or structure, shall be deemed conclusive evidence of completion. This language is clear and positive, and, as the right to a lien is purely statutory, is decisive of appellant's rights here. It follows that the judgment should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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102 Cal. 534

In re MITCHELL. (No. 15,351.)

(Supreme Court of California. May 29, 1894.)

EXEMPTIONS—IMPLEMENTS OF MECHANIC.

Under section 690, subd. 4, Code Civ. Proc., a person engaged in printing cannot claim as exempt any number of presses and amount of type he may have, but only such as are "necessary to carry on his trade."

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Petition by creditors of W. L. Mitchell to have him declared an insolvent debtor. Judgment for petitioners, and defendant appeals. Affirmed.

John Flournoy, for appellant. Geo. A. Rankin, for respondents.

BELCHER, C. This is a proceeding in involuntary insolvency. The petition of the creditors alleged that on the 18th day of June, 1892, W. L. Mitchell made a transfer to certain persons of his property, consisting of a printing plant, type, printing materials, etc., with intent to delay, defraud, and hinder his creditors, and that he was about to depart from this state with intent to defraud his creditors. The answer of Mitchell admitted that he sold the property to the persons named, but denied that he sold the same with intent to delay, defraud, or hinder his creditors, denied that he was about to depart from the state with intent to defraud his creditors, and alleged that the property sold was exempt from execution. The case was tried before a jury, and, in accordance with the issues raised by the pleadings, three special issues were submitted for decision. The jury found that Mitchell did make the transfer of his property with intent to delay, defraud, and hinder his creditors, that the property transferred was not exempt from execution, and that, at the time the petition was filed, he was not about to leave the state with intent to defraud his creditors. A decree was accordingly entered, adjudging Mitchell to be an insolvent debtor, and ordering him to file in court the schedule and inventory provided for in the insolvent act. He thereupon moved for a new trial, which was denied, and now prosecutes this appeal from the order denying his motion.

The only specifications found in the statement are to the effect that the verdict was not justified by the evidence, because it appeared therefrom that the property transferred was exempt from execution. Under these specifications, the questions as to whether the property was owned by Mitchell, and was transferred with intent to hinder and delay his creditors, cannot be considered, as all objections other than those specified are deemed to be waived. The sole question, then, is, was the property exempt from execution? The property consisted of four printing presses, a miscellaneous assortment of type, a paper-cutting machine, chases, rules, leads, and the general paraphernalia of a printing office. Three of the presses were operated by steam, and the machinery was run by shafts, belts, and pulleys. There was also an iron safe, which cost $100, and the total cost of the plant was $3,500. Mitchell was not himself a practical printer, typesetter, pressman, or machinist, but he was the manager of the printing establishment, and employed a foreman, and some times a dozen typesetters and machinists, the number depending upon the amount of work on hand. He testified that "every bit of the material, machinery, type, etc., which I sold * * * was absolutely necessary to the business which I was carrying on." On the other hand, N. C. Hawks testified that he had been a practical printer for 18 years, and that a printer could get along and make a living with one press and $500 or $600 worth of type. The statute declares that "the tools or implements of a mechanic or artisan necessary to carry on his trade" are exempt from execution. Code Civ. Proc. § 690, subd. 4. Conceding that Mitchell was a mechanic or artisan, within the meaning of this section, and that the printing presses operated by steam, paper-cutting machine, etc., may be regarded as the tools or implements of a printer, still the statute exempted only such tools or implements as were necessary to carry on his trade, and not all that he may have acquired and used in his business. Whether, therefore, the whole plant was exempt or not was a question of fact, which was by the court very properly submitted to the jury under instructions that stated the law bearing on the subject very clearly and fully. The jury found against the contention of appellant, and, in our opinion, the verdict cannot be disturbed for want of evidence to support it. The order appealed from should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

102 Cal. 506

CITY CARPET-BEATING, ETC., WORKS v. JONES. (No. 15,300.)

(Supreme Court of California. May 26, 1894.)

DEMURRER—SEPARATING CAUSES OF ACTION—CONTRACTS IN RESTRAINT OF TRADE.

1. Under Code Civ. Proc. § 430, subd. 5, a pleading is not demurrable because two causes of action are not separately stated.

2. Under section 1674, Civ. Code, a contract for the sale of the good will of a business, and agreeing not to do a similar business in several counties, is void as to all but the county in which the business is carried on.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by City Carpet-Beating, etc., Works against H. L. Jones to enjoin a breach of contract. Judgment for plaintiff, and defendant appeals. Modified.

S. R. O'Keeffe and J. C. Campbell, for appellant. Daniel Titus, for respondent.

HAYNES, C. On June 6, 1887, appellant was engaged in the business of cleaning and renovating carpets at a designated place on Eighth street, in the city of San Francisco, and on that day sold his buildings, machinery, and all appliances, and the good will of said business, to one Reamer. In the contract of sale the following covenant was inserted: "And in order to secure and protect said party of the second part in the full, free, and undisturbed use and enjoyment of the said good will, the party of the first part hereby promises and agrees that he will not, for and during the period of ten years from the date of this instrument, enter into, or be engaged or interested in, directly or indirectly, the business of taking up, removing, cleaning, renovating, laying, or relaying carpets, and of cleaning and renovating any other fabrics, in the said city and county of San Francisco, in the county of Alameda, or in the county of San Mateo." The property and good will so purchased was afterwards sold by Reamer to the plaintiff,—a corporation. The breach of this contract, complained of, is that appellant afterwards engaged in carrying on said business in said city of San Francisco, on the same street, opposite plaintiff's said place of business. Plaintiff, on the trial, waived damages, on account of the insolvency of the defendant, and obtained a decree enjoining the defendant from prosecuting or carrying on said business until the expiration of the time limited in the contract.

The demurrer to the complaint was properly overruled. The ground of demurrer was that two causes of action were united, and were not separately stated; one for breach of warranty that defendant would not injure plaintiff's business, and one for a breach of his contract not to carry on the business. I do not think that two causes of action are stated, or were intended to be stated; but, if it were otherwise, it is not ground of demurrer. The Code of Civil Procedure (section 430) specifies all the grounds of demurrer. The fifth is "that several causes of action are improperly united." This provision applies to causes of action which cannot be embraced in the same action, though separately stated, and not to causes of action which may properly be joined in the same action under section 427, but which are not "separately stated," as required by the last-named section. "The remedy is therefore not by a demurrer, but by a motion to make the pleading more definite and certain, by separating and distinctly stating the different causes of action." Pom. Code Rem. § 447. See, also, Id. § 446; Bernero v. Insurance Co., 65 Cal. 387, 4 Pac. 382; and Fraser v. Water Co., 73 Cal. 190, 14 Pac. 829.

Appellant's principal contention is that that portion of the contract between defendant and Reamer, hereinbefore quoted, is void because it includes, not only the city and county of San Francisco, but the counties of Alameda and San Mateo. The Civil Code contains the following provisions: "Sec. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided in the next two sections, is to that extent void. Sec. 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any one deriving title to the good will from him, carries on a like business therein." Section 1675 relates to partners. The property and business purchased from appellant were conducted in the city and county of San Francisco, and the good will was of the business there conducted. It is conceded that the contract is void so far as it purports to restrict appellant from engaging in said business in the counties of Alameda and San Mateo, and that, if the city and county of San Francisco had been the only locality specified in the contract, it would have been valid; so that the precise question at issue is whether the specification of these additional counties makes the restriction void as to the city and county of San Francisco, to which the judgment limits the injunction. At common law the territorial restriction imposed by this contract would doubtless have been considered valid, inasmuch as a portion of the value of the good will may have accrued from customers residing in these contiguous counties, though the business was conducted in one alone; and the purchaser, unless restricted by statute or by a controlling public policy, was entitled to the whole of the good will which he purchased and paid for. It was not, therefore, at common law, an illegal contract, nor are such contracts declared by the statute to be illegal. They are simply void so far or to the extent that they exceed the restrictions imposed by the statute. The Code introduces no new principle. It simply eliminates from the controversy arising upon such restriction the question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation; and in this the statute is wise and salutary, even though, in certain cases,—possibly in this one,—it gives the purchaser less than he bought, and less than he might enjoy without violating the interests of the public. The statute imposes no penalty upon the purchaser under such contract, nor could it require the seller to resume business. As was said by this court in Brown v. Kling, 35 Pac. 995: "A contract restraining one from following a lawful trade or calling at all is invalid, because it discourages trade and commerce, and prevents the party from earning a living; but the right to agree to refrain from his calling, within reasonable limits as to space, may have the contrary effect. It encourages trade, for it gives value to a custom or business built up, by making it vendible." In Wright v. Ryder, 36 Cal. 358, the court, quoting from Story on Contracts (section 551), speaking of partial or limited restraints, said: "Such an agreement not only does not obstruct trade, but is oftentimes requisite and necessary, as well for the advantage of the public as of the individual." We see, then, that, when confined within reasonable limits (and as to what is reasonable the statute is conclusive), the public, as well as the parties, are benefited, and are therefore interested in sustaining such contracts as are or may be brought within the statutory restrictions, where the contract admits of division. In this case three counties are named in the contract, and I see no difficulty in upholding it as to the county in which the business was conducted, and declaring it void as to the other two counties. The boundaries of each are definite, and fixed by law. Neither includes any part of the others. If the city and county of San Francisco had alone been named, the contract would have been good. How the naming of the counties of Alameda and San Mateo in addition, such addition being void, could affect that which otherwise is valid, the void part being capable of exact ascertainment and separation, I do not comprehend, and especially when such separation not only does no violence to the language of the statute, but does justice between the parties, and promotes the public interests, and conforms to the obvious intention of the statute. It is only to the "extent" that the contract departs from the provisions of the Code that it is declared void. The case of Brown v. Kling, supra, was a case where the contract was that the seller should not engage in the butcher business for three years, the contract omitting the qualification contained in the statute, viz.: "So long as the buyer or any person deriving title to the good will from him carries on the business;" a qualification also omitted here, but as to which no question is made. In that case, however, the question of restriction, or division of such contracts, as to space or territorial limits, was incidentally discussed; and the case of Baines v. Geary, 35 Ch. Div. 154, was quoted from, in part, as follows: "It is quite clear that a covenant in restraint of trade is good, if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee. The courts have, however, seen their way to treat such a covenant, as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space."

Appellant cites several cases which require to be briefly noticed. The one most nearly in point is More v. Bonnet, 40 Cal. 251. There the covenant was not to engage in the business sold "in the city and county of San Francisco, or state of California." The court said: "No precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject-matter of the contract. There were not two distinct areas, for the one included the other. The defendant's business was not carried on in the two distinct areas, as two separate occupations; but the complaint avers that the defendant was carrying on business in the state, and that he sold such business to the plaintiff." In that decision (an injunction was denied), it is clear that it was not decided that in no case could the covenant be held valid if it embraced unreasonable limits as to space, but left the question as to whether the territory was divisible to be determined upon the facts of each case, and strongly intimated that the decision was placed upon the ground that in that case "there were not two distinct areas, for the one included the other," and that the complaint alleged that the defendant was carrying on said business "in the state." It may be also remarked that that case was decided before the adoption of the Civil Code, and is therefore not to be taken as a construction of the Code provision on that subject. The case of Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, is not in point. There the agreement was to form a combination, the sole object of which was to increase the price of lumber, by limiting the supply, and giving it the control of the lumber market within the territory specified. It was held that the contract was illegal in its very essence; that "the bad enters into and permeates the whole contract, so that none of it can be said to be good," and that it was therefore incapable of division. In the case of Wright v. Ryder, 36 Cal. 342, the covenant was not to run a steamboat upon any of the routes of travel upon the waters of the state. The covenant was held void. In Callahan v. Donnolly, 45 Cal. 152, the covenant was that defendant should not engage in "any branch of the yeast-powder business." There was no restriction as to space. It included the world. The case of Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, was much like Lumber Co. v. Hayes, supra. The contract was declared to be illegal, and an accounting between the parties was refused upon that ground.

It is also contended that the covenant in this case includes the business of "cleaning and renovating any other fabrics" which is not included in the business, the good will of which was sold. In the absence of evidence that appellant was not engaged in renovating and cleaning other fabrics besides carpets, or that, if he was, that the good will thereof was not sold, it would be giving to the contract a very narrow construction to hold that the good will sold did not include such other fabrics. The contract cannot be held to be void on that ground.

The fifth finding, it is contended, is not supported by the evidence. It is not necessary to rehearse the evidence on this point. The only witness examined was the manager of the plaintiff corporation, who testified to the acts of the defendant, as well as to conversations with him, which, if true, were quite sufficient to sustain the finding in question, and this testimony was wholly uncontradicted by the defendant. That some portions of the testimony of the witness tended to show that defendant was simply an employe, may be admitted, if that were material, but we cannot disturb the finding for that reason.

The judgment should be modified to conform to the statute as to time, viz. that it should continue so long as the plaintiff or any one deriving title to the good will from it, carries on said business in said city and county, not exceeding 10 years from June 6, 1887, and, as modified, the judgment and also the order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reason given in the foregoing opinion, it is ordered that the judgment appealed from be modified so as to limit the continuance of the injunction for such time as the plaintiff, or any one deriving title to the good will of said business from or through the plaintiff, shall carry on said business in the city and county of San Francisco, not exceeding 10 years from the date of said contract, and, as modified, the said judgment, and also the order appealed from, be affirmed.

BLYTHE v. SAVAGE et al. (No. 15,611.)

(Supreme Court of California. May 24, 1894.)

On rehearing. Petition denied.

For prior reports, see 36 Pac. 522, 588.

PER CURIAM. The petition for rehearing is denied. Petitioners say that with respect to certain asserted "errors of law," and to what is called by them a "federal question" claimed to be "involved with Pina v. Peck," this court "has not said in its opinion that any of these points are not well founded." All the appeals in the Blythe Estate were considered in one opinion, in the concluding part of which we said: "There are no other points presented in the briefs and arguments which call for special attention." The transcripts presented a great multitude of asserted "errors of law," which, however, were little pressed in the arguments. We considered none of them tenable, and it would have been an endless task to notice them in detail. As to the "federal question," we cannot now see any. None of the points alluded to in the petition for rehearing were well founded.

102 Cal. 547

MURPHY v. MULGREW. (No. 15,214.)

(Supreme Court of California. May 31, 1894.)

FRAUDULENT CONVEYANCES — CHANGE OF POSSESSION—EVIDENCE—DAMAGES.

1. A sale of horses by a man to his wife is void as to his creditors, under Civ. Code, § 3440, providing that a transfer not followed by an actual change of possession is void, where he managed them after the sale just the same as before, though he did so as the purchaser's agent.

2. The fact that a married woman included horses purchased from the husband in an inventory of her separate property, filed under Civ. Code, § 165, does not render the sale of them to her by her husband valid as to one of his creditors at the time the inventory was made, where there was no change of possession, as required by Civ. Code, § 3440.

3. In an action where the validity of a conveyance of personal property, as to creditors, is in issue, declarations of the vendor as to the

character of his possession, while in actual possession of the property, after the sale, are competent.

4. In an action against an officer for the wrongful taking of property, the simple fact that the person from whom it was taken gave her attorneys her note for $200 for their services in the action does not support a finding that $200 was a fair compensation for the time and money expended by her in the pursuit of the property.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Ella A. Murphy against J. F. Mulgrew. From a judgment for plaintiff, defendant appeals. Reversed.

Barham & Bolton, for appellant. J. T. Campbell and A. B. Ware, for respondent.

GAROUTTE, J. Plaintiff claims to have purchased two certain race horses from her husband, Wyman Murphy, on January 11, 1890. On November 16, 1891, the defendant, as sheriff of the county of Sonoma, took possession of the horses under a writ of attachment in favor of the Santa Rosa Bank, and against the husband, Wyman Murphy. The sheriff refusing to return the possession to plaintiff upon demand, she brought this action to recover the property. The appeal is from the judgment, and order denying a motion for a new trial.

1. The main question here presented is, do the facts disclosed by the record support the transfer by the husband to the wife, in view of the provisions of section 3440 of the Civil Code? In other words, was there such an immediate delivery, and actual and continued change of possession, of the property, as is contemplated by that statute? There is no substantial conflict in the evidence upon this point, and plaintiff herself testified, in effect, as follows, regarding the transfer: "I resided with my husband upon the homestead at the time I purchased these horses from him. He gave me a bill of sale of them at that time, and they were in the barn, a short distance from the house. Upon receiving the bill of sale, I put it away, and said, in substance, to him: 'You take charge of this property for me, and manage it for me.' The horses remained at the homestead after the bill of sale, the same as before; and, when we moved away, we took them with us. My husband drove them all this time, and managed them, just the same as before the bill of sale was made." From the evidence of the plaintiff, it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale; but, on the contrary, in all its surroundings, it remained entirely in statu quo. Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent to take the possession and control of the horses for her, and, as such agent, his possession was her possession; but there is nothing to be urged in favor of such a contention. Both the letter and the spirit of the law contained in section 3440 would be defeated by the recognition of such a principle. The object of the statute is to require notice to the world of the transfer of personal property, in order that men may be able to deal with each other upon equal terms, and from a common level. The efficacy of the statute would be entirely destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of any notice to the world of such a change of conditions. Such a practice would be in direct conflict with the terms of the statute itself. We do not find a syllable of evidence in the record that would indicate to the outside world that a change of ownership had taken place as to these horses, and we can hardly imagine a case where the provisions of the statute could have been more entirely disregarded. Morgan v. Ball, 81 Cal. 93, 22 Pac. 331, is much stronger for the vendee, in its facts; and the language relied upon by respondent, taken from the case of Williams v. Lerch, 56 Cal. 334, has been well and justly criticised in the case of Etchepare v. Aguirre, 91 Cal. 293, 27 Pac. 668. The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial. McKee v. Gracelon, 60 Me. 165; Hoffner v. Clark, 5 Whart. 546.

2. The transfer of the property in litigation by bill of sale was made January 11, 1890; and upon December 30th, following, plaintiff filed an inventory of her separate property in the recorder's office, in accordance with the provisions of section 165 of the Civil Code. The Santa Rosa Bank became a creditor prior to the recording of the inventory, and the attachment proceedings upon the husband's indebtedness were begun November 16, 1891. It is now insisted by respondent that, conceding no immediate delivery and actual and continued change of possession took place at the date of the bill of sale, still the subsequent recording of the inventory in the recorder's office, of her separate property, including these horses, cured any defective compliance with the provisions of section 3440, and gave her good title against the world from that day. It is unnecessary to pass upon the scope and purpose of section 165 of the Code. Whatever may be its scope and purpose, we are well satisfied it is not entitled to a construction that would nullify the provisions of section 3440 as to fraudulent transfers of personal property.

3. The court committed error in not allowing declarations of the vendor, Murphy, as to the character of his possession after the

sale, and while he was in the actual possession of the property. Bump, Fraud. Conv. (3d Ed.) p. 588; Waite, Fraud. Conv. § 279; Cahoon v. Marshall, 25 Cal. 197; Blake v. Graves, 18 Iowa, 312.

4. The evidence is insufficient to justify the finding of the court that $200 is a fair compensation for the time and money expended by the plaintiff in the pursuit of the property. All the evidence bearing upon this question is the fact that plaintiff gave her note for $200 to her attorneys as a fee for their services in the case. This fact is wholly insufficient to support the judgment in that regard.

For the foregoing reasons it is ordered that the judgment and order be reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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4 Cal. Unrep. 561

CASTLE v. SMITH. (No. 18,156.)

(Supreme Court of California. March 28, 1894.)

NUISANCE—LIABILITY OF GRANTEE—NOTICE—PRESUMPTIONS—TRIAL—FINDINGS—APPEAL.

1. In an action against the grantee of land for the continuance of a nuisance erected by his grantor, notice to defendant that the erection was a nuisance is essential to plaintiff's cause of action, and it is not for defendant to show want of such notice.

2. Such notice is not dispensed with by Civ. Code, § 3483, making a grantee liable "in the same manner as the one who first created the nuisance," as the liability of the creator is based on the presumption that he has notice that it is a nuisance, which presumption does not arise against the grantee.

3. There is no presumption that a grantee knows that a dam erected by his grantor on the land was erected without the consent of others affected thereby.

4. In an action for damages caused by the erection of a nuisance, and to compel defendant to abate the same, plaintiff may waive the equitable relief, and thereby render a finding of facts by the court unnecessary.

5. Where the complaint contains two counts, one of which does not constitute a cause of action, and the error in rendering a judgment thereon can be cured by a modification of the judgment, the verdicts on each count having been returned separately, a new trial will not be ordered.

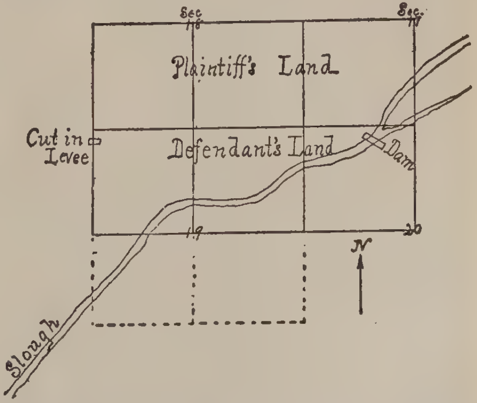
In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by C. C. Castle against Jennie Smith. From a judgment for plaintiff, defendant appeals. Judgment modified.

W. L. Dudley, James H. and John E. Budd, and J. C. Campbell, for appellant. Swinnerton & Rutherford, for respondent.

PER CURIAM. Action to recover damages for diverting water from defendant's land, and causing it to overflow paintiff's land, by reason of maintaining a dam on defendant's land across a slough, and also for opening a levee on defendant's land, and thereby causing an overflow of plaintiff's land. In addition to damages, plaintiff prays for a decree that defendant abate the alleged causes of the overflow, as nuisances, by removing her dam, and closing in her levee. Richard Smith, son of defendant, was made a defendant, but, as to him, a nonsuit was ordered at the close of plaintiff's evidence in chief. The case was tried by a jury, and the jury returned a general verdict for the plaintiff on each of the two counts of the complaint; assessing the damages on the first count (for maintaining the dam) at $4,500, and on the second count (for opening the levee) at $3,500. After the verdict, and before the judgment, the plaintiff withdrew his prayer for the abatement of the alleged nuisances, and waived all equitable relief; and thereupon judgment was rendered on the verdict for $8,000 and costs, taxed at $482.80. The defendant appeals from the judgment, and from the order denying her motion for a new trial.

It is admitted that since 1880 the plaintiff has owned the S. ½ of section 18, and S. W. ¼ of section 17, township 2 N., range 6 E., and that from 1880 until August 3, 1889, George F. Smith (defendant's husband and grantor) owned the N. ½ of section 19, and N. W. ¼ of section 20, of the same township, and adjoining plaintiff's land on the south side thereto, all situate in the county of San Joaquin. It appears that all the lands above described are swamp and overflowed lands, not generally susceptible of cultivation without reclamation; that they are, to some extent, overflowed by the tides, and are also subject to periodical overflows, to the depth of three to five feet, from the San Joaquin river and other sources, by extraordinary floods. It does not appear, however, that any part of these lands have been purchased from this state. A slough called "Twelve-Mile Slough," crosses the lands of plaintiff and defendant, diagonally, from northeast to southwest, as shown on the following diagram:



Twelve-Mile slough has no natural source of water supply, except surface drainage, during the rainy season, and has in it no water, except standing pools, during the dry season. That part of it which crosses the corner of plaintiff's land and the northwest quarter of section 20 has well-defined banks, which, at the dam, are 10 to 11 feet high; but below the middle of the northeast quarter of section 19 the slough is a mere swale, having no well-defined banks, and being only about a foot to a foot and a half lower than the general level of the land bordering upon it. The east line of plaintiff's and defendant's lands is marked "Line of Segregation" upon an unofficial map used on the trial, and is understood to be the line of segregation between the swamp lands and high lands. In 1882 the plaintiff and the defendant's grantor, George F. Smith, verbally agreed to reclaim their lands in the manner following: Each, at his own expense, was to build a levee from a point at the extreme western junction of their lands around his land to the segregation line; that is, the plaintiff was to build on the north and west of his land, and Smith on the south and west of his, and join their levees at said point on the west, where they were, jointly, to build a floodgate. This agreement was executed by the completion and junction of their levees in the fall of 1883. During 1884 they discovered that their levees, alone, were insufficient to protect their lands. Having been constructed mostly of peat turf, they were porous, so that large quantities of water seeped through and under them, which, together with the water from the slough and surface drainage, overflowed their lands. Thereupon, each erected pumping works,—the plaintiff on his north line, and Smith on his west line. By means of these pumps they were generally able to keep the water down; but, in consequence of a disagreement as to the proportion of pumping each should do, plaintiff, in 1886, built a levee about three feet in height on or near his southern line, for the purpose of preventing the water from passing from the land of one to that of the other, thus relieving himself from pumping any part of the water coming in through the slough. Thereupon, Smith proposed to plaintiff that they jointly excavate a canal on the line dividing their lands, and build a levee on each side thereof, and, by means of a dam across the slough, turn the water of the slough through such canal. To this proposal, plaintiff declined to assent. Smith then said he would excavate the canal on his own land, and construct a dam across the slough, turning the water of the slough into the canal, and build a levee on his side of the canal. Plaintiff objected to this, unless Smith would also build a sufficient levee on plaintiff's side of the canal. Smith declined this condition, and, against the protest of plaintiff, proceeded to excavate the canal, and to build the dam and levee on his own land, and completed them on the 25th day of December, 1886. The levee thus constructed by Smith on the south side of the canal was of equal height with his outside levees, and about 2½ feet higher than plaintiff's levee on the north side of the canal. During the next three years—that is, until December 25, 1889—the canal carried off the water from the slough without any overflow of, or injury to, plaintiff's land; and the evidence does not tend to show that plaintiff made any objection or complaint to Smith, or any other person, on account of the dam or canal, during that period of three years. On August 3, 1889, Smith executed a deed to his wife,—the defendant, Jennie Smith,—conveying to her all his land above described, and thereafter, on January 9, 1890, died.

1. The appellant contends that the judgment on the first count of the complaint is erroneous, for the reason that there was neither averment nor evidence that the defendant had any notice before the commencement of the action that the dam across the slough was a nuisance, nor that it ever had any injurious effect upon the plaintiff or his property, nor that she was requested to remove it. We think this point must be sustained. It is only alleged in the first count that defendant "kept and maintained the dam across the slough since August 3, 1889, and thereby turned the water of the slough on plaintiff's land, to his damage," etc. Neither the canal nor levee is complained of. It is not averred that defendant ever had notice that the dam was a nuisance, or had any injurious effect upon plaintiff or his property, nor that she was ever requested to remove it; and while the evidence on the part of the plaintiff clearly showed that the dam was erected in 1886 by George F. Smith, as above stated, it had no tendency to prove notice to defendant of the alleged nuisance, nor a demand upon her to abate it. And the defendant testified positively that she had no such notice, and that no such demand was made upon her, before the commencement of this action. In answer to this point, counsel for respondent claim that such notice and demand were not essential to plaintiff's cause of action, and that the want of them is mere matter of defense, which should have been pleaded as such by the defendant; but we think this position cannot be maintained. In Grigsby v. Water Co., 40 Cal. 407, it was said: "The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection." In Plumer v. Harper, 3 N. H. 88, it was said: "It is agreed in all the books that the grantee is not liable, until, upon request, he refused to remove the nuisance." This case is reported in 14 Am. Dec. 333, with notes by Mr. Freeman, in which he says: "The overwhelming weight of authority, therefore, is in favor of the position that no action will lie against him [the grantee] for merely continuing the erection which constitutes the nuisance in its original state, unless he has notice to abate it, and such notice is alleged. And this is so, not-

withstanding the fact that he may have made repairs upon the erection constituting the nuisance, so long as such repairs do not render it more noxious than it was when it came to his possession." See the numerous cases cited to these points. Also, Conhocton Stone Road v. Buffalo, etc., R. Co., 51 N. Y. 573, and Dodge v. Stacy, 39 Vt. 560. The case of Pierce v. Society, 72 Cal. 180, 13 Pac. 478, is not in point for respondent, since, in that case, it appears that the defendant had "full notice" of the nuisance which was caused by the manner in which a steam-bathing establishment, out of repair, was used. Section 3483 of the Civil Code provides: "Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner, is liable therefor in the same manner as the one who first created it." It is claimed that this section dispenses wih notice of the nuisance to the successive owner. But it is to be observed that the owner who creates the nuisance is presumed to have notice that it is a nuisance; therefore, is held liable without notice; whereas, no such presumption is indulged against his successor. Consequently, notice to the successor must be proved, else he would be held liable in a different manner from the owner who created the nuisance, as well as for a different cause. It is further claimed that the character of the dam was such that knowledge of its existence, which it is admitted defendant had, was notice to her that it injuriously affected plaintiff's land. Yet it clearly appears from the testimony of the plaintiff, as well as the testimony of other witnesses, that his land was not injured by the dam or canal until December 25, 1889, three years after their construction. And as to the injuries to plaintiff's land and crops alleged to have been suffered between December 25, 1889, and April, 1890, it is clear from the evidence that they were proximately caused by the extraordinary floods during that period, and would have been just as great if the dam and levee had not existed. All the lands similar to plaintiff's land in that vicinity, including defendant's land, were overflowed by the same floods. If there had been no dam, and no cross levee, all the water from the slough would have flowed upon the lands inclosed by the outside levees, and would have spread all over them, as it did in 1884, before they were built (the land of plaintiff being as low as that of defendant), and could not have escaped through the floodgates, for the reason that the water outside the levees was nearly up to the top of those levees. The outside pressure on those turf levees caused a great amount of seepage, which, together with the accumulation of surface drainage, would have overflowed all the land inclosed by the outside levees, without any contribution from the slough, and actually did overflow defendant's land, notwithstanding its protection from the slough. In regard to this the plaintiff testified as follows: "I first saw the waters of Twelve-Mile slough running in this canal, and over onto my land, in December (about Christmas), 1889. It did not come in the 1st of December, 1889. There was a great fall of snow and rain in the fall and winter of 1889 and 1890. The whole section of the country around there was all flooded. Smith's land was all covered over with water. A portion of it came from back water, seepage water, and a portion of it from the sloughs and head. The water that came down the slough covered my land. The back water came up to the top of the levee in two places, and washed over, and we put in sacks and stopped it. It was near my engine house, on the north side of the levee. The water did not run over the top anywhere else on my levee. It continued running over there for about an hour. Then it rained again, and the water came down. The head water and back water met. It would rise again. And it was that way from that time on, probably, for a month or more after that. From December, when the waters first commenced rising, away along through January, February, and March, the whole country thereabouts was submerged by water; my land, and Smith's land, and everbody else's thereabout. There was also water came down Twelve-Mile slough, got in on Smith's land and mine, and there was no place for it to get off." Under the admitted circumstances, the testimony of the plaintiff corroborates, rather than disputes, the positive testimony of defendant that she had no notice that the dam was a nuisance, or injurious to plaintiff, until the commencement of this action. All the low lands in the valley were inundated by a sudden, extraordinary flood, not caused by the dam or slough in question. Why should defendant have attributed the overflow of plaintiff's land to any other cause? Then, again, no reason appears why she should have known, or even suspected, that the dam was not built with the approbation and consent of plaintiff, and there is no presumption that she did. So much of the evidence on this point is presented for the purpose of showing that the case, on the first count, does not necessarily turn on the question of pleadings. Yet it is evident that the case was tried by plaintiff on the theory that notice to defendant of the nuisance was not essential to his cause of action; for, in his evidence in chief, there was nothing tending to prove that defendant had any knowledge whatever of the injury complained of in the first count, or of its cause, and here he relies principally upon the same theory.

2. The second count charges that in February, 1891, the defendant cut a wide and deep aperture through the western outside levee on her own land, at the west end of the canal, by reason whereof, in the following month, the back waters from the San Joaquin river and tributaries flowed through the lands of plaintiff, and destroyed his crops thereon, etc.

The evidence is sufficient to justify the verdict of the jury on this count, unless, as contended by the appellant, the defendant had a right to open the levee as she did. The arguments of counsel for appellant in support of this alleged right of the defendant to open the levee are principally, if not entirely, founded upon the assumption that the lands of the parties are legally "swamp and overflowed lands," authoritatively segregated, and certified to the state, and that the parties have acquired title from the state by purchase, and thereby have incurred such obligations to reclaim the land as are imposed by law on purchasers of swamp and overflowed land from the state. But there is nothing in the pleadings or in the evidence tending to show that these lands were ever lawfully segregated as swamp and overflowed lands, or that either party claims title or possession under the state. Therefore, neither the obligations assumed by purchasers of swamp and overflowed lands nor any deductions therefrom are relevant to this case.

3. The court did not err in refusing to find the facts after the plaintiff had waived all equitable relief. Section 731 of the Code of Civil Procedure provides that a nuisance is the subject of an action, in which "the nuisance may be enjoined or abated, as well as damages recovered." Under a similar provision of the practice act (section 249), it was said by Mr. Justice Sanderson, for the court: 'The nuisance is the cause of action. The abatement and damages therefor are merely the different kinds of relief to which the plaintiff may be entitled." Yolo Co. v. Sacramento City, 36 Cal. 196. We perceive no reason why the plaintiff was not at liberty to withdraw his prayer for abatement of the nuisance, and thereby waive the equitable relief prayed for, nor why, after such withdrawal and waiver, findings were necessary. The verdict of the jury, if justified by the evidence, supported the judgment for damages, at least. If no equitable relief had been prayed for, the action would have been purely legal, and such as the common law denominates an "action on the case." Therefore, after the withdrawal of the prayer for equitable relief, only an action at law remained. It does not appear why plaintiff's counsel waived equitable relief. They may have done so because, in their opinion, the complaint did not entitle plaintiff to such relief, or that such relief was not justified by the evidence. However this may be, it seems clear that the defendant could not have been injured by the refusal of the court to find facts additional to the verdict.

4. Appellant contends that the court erred, in numerous instances, in its instructions to the jury, and in rejecting evidence offered by defendant. But, so far as relates to the second count, we find no error prejudicial to the defendant. As the first count states no cause of action, and the error of rendering a judgment thereon may be corrected by a modification of the judgment, a new trial should not be ordered. The judgment is therefore modified by reducing it to the sum of $3,982.80, which includes the costs of trial, and as so modified the judgment is affirmed; costs of appeal to be taxed to the respondent. The order denying defendant's motion for a new trial is affirmed.

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102 Cal. 516

CLARKE v. MEAD. (No. 15,030.)

(Supreme Court of California. May 26, 1894.)

SALE FOR STREET ASSESSMENT—VALIDITY—EVIDENCE.

1. In an action to quiet title by one whose land had been sold to pay a special assessment thereon, the certificate of sale is admissible to show that it conformed to Pol. Code, § 3776, providing what such certificate should contain, and that the deed contained all the recitals in the certificate as required by Id. § 3786.

2. Notice of application for a tax deed under Pol. Code, § 3785, containing all the matters therein required, and served more than 30 days before the day of application named, is sufficient, though dated within that time.

3. The statute making a tax deed prima facie evidence of the proceedings requisite to its validity (Pol. Code, § 3786), is not inoperative because contained in the Political Code instead of the Code of Civil Procedure, which regulates the character and effect of evidence.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by one Clarke against one Mead to quiet title. From a judgment for defendant, and order denying a motion for a new trial, plaintiff appeals. Affirmed.

Alfred Clarke, for appellant. Geo. E. Bates, for respondent.

HARRISON, J. Action to quiet title. The plaintiff was the owner of a certain tract of land in San Francisco, situate within the district which was assessed for the widening of Mission street, continued from Twenty-Sixth street to the county line. The assessment being delinquent, the superintendent of streets sold the lot to the defendant November 29, 1889, and, no redemption having been made, that officer on the 29th of December, 1890, executed a conveyance of the land to the defendant. At the trial the plaintiff gave evidence tending to show title in himself at the date of the sale, and the defendant offered in evidence the certificate of sale, testimony tending to show that the notice of the application for a deed required by section 3785 of the Political Code had been given, and the deed to himself from the superintendent of streets. The court rendered judgment for the defendant, and the plaintiff moved for a new trial, which was denied, and from this order and the judgment he has appealed. The errors relied upon by the appellant are the rulings of the court in admitting evidence offered on behalf of the respondent. Section 16 of the statute under which the proceedings were had (St. 1889, p.

74) provides: "All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds. The deed of the street superintendent made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings hereunder, and of title in the grantee."

1. The court did not err in admitting in evidence the certificate of sale. The objection by the appellant that the certificate is insufficient to prove any of the previous steps in the proceedings is ineffectual, as the statute does not give, nor does the respondent claim, such effect from its introduction. It was relevant and competent evidence of the official act of the officer in making the sale, and was admissible for the purpose of showing that it conformed to the requirements of section 3776 of the Political Code, and contained the matters which by section 3786 of that Code were to be recited in the deed.

2. A witness on behalf of the defendant testified that on the 26th of November, 1890, the land was vacant and unoccupied, and that on that day, on behalf of the defendant, he posted in a conspicuous place upon the property a notice by the defendant that on the 27th of December he would apply for a deed of the property, and that on the next day he filed with the superintendent of streets an affidavit of such posting, together with a copy of the notice posted. This affidavit and the copy of the notice were also introduced in evidence. The notice contained the matters required by section 3785 of the Political Code to be given in order to authorize the execution of a deed. It is contended by the appellant that this evidence was insufficient to show that the proper notice was given, for the reason that upon the cross-examination of this witness he testified that he thought that a notice which was then shown to him, and which purported to bear the date December 25th, was the one he left posted upon the property. This notice is not, however, set forth in the record, and we cannot determine whether it is sufficient or not. The objection, however, that its date differs from the date of the one which the witness had testified was a copy of the one he posted would not impair the effect of the notice, as the statute does not require the notice to be dated, and it is not controverted that the notice which was posted contained all the matters required by section 3785, or that it was posted upon the property more than 30 days before the day stated therein, on which the purchaser herein applied for a deed.

3. The appellant objected to the introduction of the deed from the superintendent of streets, upon the ground that no foundation had been laid for introducing said deed by showing the validity or regularity of the proceedings preceding the deed. The deed itself is not contained in the record, but it is stated that it "is dated December 27, 1890, and is in due form of law, and covers the property in controversy, and contains all the matters recited in the certificate of sale." The ground urged in support of the objection is that it was incumbent upon the respondent to make proof of all the facts essential to the exercise by the officer of the power of sale conferred by the statute, and that the provisions of the statute making the deed prima facie evidence of certain facts essential to its validity is inoperative, for the reason that the character and effect of evidence is declared in the Code of Civil Procedure, and that any declaration upon these subjects in any other statute cannot be considered. The power of the legislature to make the deed prima facie evidence of certain preliminary steps in the proceeding is too well established to need discussion. Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508. The appellant was not precluded from showing the absence of any of the acts of which the deed is made primary evidence, but, as he made no effort to show that any of the preliminary steps in the proceedings had not been taken, the deed itself was sufficient evidence to authorize the court to find that they had all been regularly taken, and that the title of the appellant had been thereby transferred to the respondent. It was not held by the trial court that the deed was conclusive evidence of the notice required by section 3785, but the respondent made proof that such notice was given by the testimony of the person who posted the notice. The proposition that the provision making the deed prima facie evidence of certain preliminary facts cannot be considered, for the reason that it is not found in the Code of Civil Procedure, is untenable. The provisions of the four Codes are to be construed as though they were all parts of the same statute (Pol. Code, § 4480), and it is only when there is a conflict between different provisions that it is necessary to determine which shall prevail. There is, however, no conflict between the provisions of the Code of Civil Procedure relating to evidence, and the provision in the Political Code declaring the effect of the deed of the officer, or making it prima facie or presumptive evidence of some other fact. See McDonald v. Conniff, supra. The judgment and order are affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; FITZGERALD, J.

102 Cal. 537

In re DE LEON'S ESTATE. (No. 15,367.)

(Supreme Court of California. May 29, 1894.)

Settlement of Deceased's Estate—Petition by Remainder-Man — Jurisdiction of Superior Court—Decree—Collateral Attack.

1. A petition entitled "In the Matter of the Estate of L., Deceased," alleged that L. devised a life estate in his property to his daughter, remainder over to her children; that, after his death, the court decreed distribution in accordance with the will; that petitioner was subsequently born to the daughter, and that the daughter had died. The petition asked the court to determine to whom the property belonged, and make distribution. *Held* that, though brought in the superior court sitting in probate in the matter of an estate in which distribution had been decreed, the facts alleged entitled the petition to be treated as a complaint in equity, and gave the court jurisdiction to award the relief asked, though the proceeding was brought under Code Civ. Proc. § 1723, which gives the superior court power as a court of probate to decree merely that a life estate has terminated.

2. Petitioner, not being in esse when the prior decree of distribution was made, is not bound thereby, and may attack it collaterally.

Department 2. Appeal from superior court, San Francisco county; J. V. Coffey, Judge.

Petition of Virginia Durstein for distribution of the estate of Jose Francisco de Leon, deceased. From the decree, Emil Kehrlein and others appeal. Affirmed.

T. M. Osmont, for appellants. Lloyd & Wood (L. D. McKisick, of counsel), for respondent.

FITZGERALD, J. This proceeding was brought under section 1723 of the Code of Civil Procedure, which reads as follows: "If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate, which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the superior court of the county in which the property is situated his verified petition, setting forth such facts, and thereupon, and after such notice by publication or otherwise as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded." The petition substantially alleges that on the 9th day of April, 1872, Jose Francisco de Leon made, published, and declared his last will and testament, by the terms of which he devised the real property described in said petition to his daughter, Mrs. Virginia Leon De Cima, to hold and enjoy during her life, with the provision that she could not sell or mortgage the same, and that upon her death the said property should "pass to her children in equal portions;" that the said testator died in July, 1873, and his will was thereafter admitted to probate, and Mrs. De Cima, who was named as the executrix therein, thereupon qualified, and entered upon her duties as such; that in August, 1874, the court made a decree of distribution under the will, decreeing "that all of the property hereinafter described should go to and vest in the said Virginia Leon De Cima during her life, and upon her death the same should be divided between her four children, share and share alike, to wit, Gertrudis Leon De Cima, Frank Cima, John Cima, and Arthur Cima, who were all the children of said Virginia Leon De Cima at the time said decree was made; that after the decree of distribution was made the said Mrs. De Cima was divorced from her husband, Don Juan De Cima, and thereafter, in February, 1893, she intermarried with one Laurent Durstein; that the only issue of this marriage was the petitioner, who was born July 15, 1884,; that on the 25th day of May, 1891, the said Mrs. Virginia De Cima Durstein, mother of petitioner, and the holder of said life estate, died, leaving surviving her as her only children the said Gertrudis, John, and Arthur De Cima, and the said petitioner; that subsequent to the decree of distribution the said John conveyed his interest in the property to the appellants, Emil Kehrlein, Joseph Cuneo, Giacomo Costa, and Giuseppe Cadenasso, who are now the owners thereof. It is further alleged that by reason of the death of Mrs. De Cima Durstein, her life estate in and to said property has terminated, and the title thereto has vested one-fifth in the petitioner, Virginia Durstein; one-fifth in Kehrlein, Cuneo, Costa, and Cadenasso jointly; one-fifth in Juan De Cima, as father and sole heir of Frank De Cima, deceased; one-fifth in Arthur De Cima; and the remaining one-fifth in the said Gertrudis, who is now Mrs. Sanchez. The prayer of the petition is to the effect that, as the life estate of Mrs. Durstein has terminated by reason of her death, the court will make a decree to that effect, and adjudge and determine to whom, under the will of Jose Francisco de Leon, the said property belongs, and the interest of each party therein; and "for such further and other judgment and decree as the court may deem meet and able to grant." The petition was demurred to generally on the ground that it did not state facts sufficient to constitute a cause of action, and specially upon the further ground that the court had no jurisdiction of the proceeding. At the same time appellants filed their answer, denying, on information and belief, the marriage of Mrs. De Cima to Durstein, or that the petitioner was the issue of such marriage. They further deny that a one-fifth interest, or any interest, in said property has vested in petitioner, but aver that the title thereto passed and was vested in the parties to whom it was distributed by the decree of the probate court referred to in the petition; and that the petitioner had never had any right, title, or interest therein. And for a further and separate answer and defense they aver "that the said decree of distribution was a final decree of distribution of the estate of the said Jose Francisco de Leon, deceased; that on the same day an order was made and entered in said court in said estate settling the final account of the executrix of the last will of deceased; that on the 27th day of August, 1874, a decree of final discharge of the executrix of said estate was made, entered, and filed in said cause; that the administration of said estate was then closed, and finally wound up; and that this court has no further jurisdiction of said estate." Upon a trial of the issues thus raised by the pleadings, it was adjudged by the court "that the life estate vested in and held by said Virginia Leon De Cima Durstein in all and singular the lands and premises hereinabove named and described, and the rents and revenues thereof since her death as aforesaid, has absolutely terminated, and the title to said lands and premises, with the revenues thereof, has vested absolutely one-fifth thereof in Gertrudis Leon De Cima Sanchez; one-fifth in Juan Cima as father and sole heir of his son Frank Cima, deceased; one-fifth in Arthur Cima; one-fifth in Virginia Durstein; one-fifth jointly in Emil Kehrlein, Joseph Cuneo, Giacomo Costa, and Giuseppe Cadenasso, as successors in the interest of John Cima,"—from which judgment the said Kehrlein, Cuneo, Costa, and Cadenasso alone appeal with a bill of exceptions.

It is claimed by appellants that the court had no jurisdiction of this proceeding—First, because it was brought in the superior court sitting in probate, in the matter of an estate in which the final decree of distribution had been entered and the estate wound up more than 17 years before the filing of the petition; and, secondly, because, if the proceeding was brought under section 1723 of the Code of Civil Procedure, as it purports to be, then it should have been instituted in the superior court under its general, and not its probate, jurisdiction, in which case the power of the court to grant relief is limited by the provisions of the section to decreeing that the life estate of Mrs. De Cima Durstein had terminated. While the contention of appellants is technically correct as to both propositions, still the facts stated in the petition, notwithstanding its title, are such as to entitle it to be treated as a complaint in equity, and, as the allegations thereof are sufficient in all respects to justify the relief granted, the court having jurisdiction of the subject-matter and of the parties, it follows that the claim of appellants with respect to these questions cannot, under the liberal construction required by the provisions of section 4 of the Code of Civil Procedure, be sustained. In re Thompson's Estate (Cal.) 35 Pac. 991.

It is lastly claimed by appellants that the decree of distribution made by the probate court in August, 1874, is final and conclusive; and in support of this claim they rely on section 1666 of the Code of Civil Procedure. This section can have no possible application to the case before us, for the reason that the decree referred to was and is absolutely void as to the petitioner, as she was not in esse at the time that it was rendered. This being so, it follows upon well-settled authority that such a decree may be made the subject of collateral attack in a proceeding or action of this character. Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; Pearson v. Pearson, 46 Cal. 610. Let the judgment be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

4 Cal. Unrep. 636

PAINTER et al. v. PAINTER et al. (No. 15,310.)

(Supreme Court of California. May 25, 1894.)

PARTNERSHIP ACCOUNTING — SURVIVING PARTNER —EVIDENCE.

1. Upon the death of one partner the business was carried on for a number of years by the survivor. In a suit for an accounting and the appointment of a receiver, it appeared that the books contained many errors and erasures. Many of these errors compensated each other. The same method of bookkeeping was pursued, and the same irregularities were found, both before and after the deceased partner's death. Many of the more serious irregularities were explained. The books had been kept continuously by the same bookkeeper, who testified that he had never made a fraudulent entry. *Held* not to sustain a finding of fraud.

2. Where a surviving partner has conducted the business for six years to the advantage of all parties concerned, a decree declaring all the assets to belong to the old firm, and refusing to allow such partner any compensation for his services, or even credit for amounts paid a manager of the business, is erroneous.

3. In a suit against a surviving partner for an accounting, a credit to him on account of real estate appeared in the ledger, written over an erasure, under date of February 28, 1882. An expert witness surmised that the entry was made in 1883, after the death of plaintiff's decedent, and fraudulently antedated, as he saw nothing on the face of the books to justify the entry. Defendant's account book, kept as one of the books of the firm, contained entries justifying the credit, and the item appeared properly entered in the journal between entries unquestionably made in 1882. Defendant testified, corroborated by vouchers and his account book, that he took land in his name for the firm; that the payments were made by the firm, though charged to him, and the credit was made by the consent of his partner to balance his account. *Held* insufficient to sustain a finding that the entry was fraudulent and void.

4. One partner advanced money to the firm, and permitted his copartner to withdraw it for his individual use. The latter died without having returned the money. Thereafter, an action was brought by his personal representatives against the surviving partner for an accounting. *Held*, that the claim need not be presented for allowance against the estate of the deceased

partner, but would be adjusted by charging plaintiffs therewith on the partnership accounting.

5. The control of firm assets and business should not be wrested from the surviving partner, by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of danger of ultimate loss to the estate of the deceased partner.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Caroline A. Painter and E. B. Dallam, executors of the will of Jerome B. Painter, deceased, against Theodore P. Painter and J. Milton Painter, for an accounting. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed.

Pringle, Hayne & Boyd, for appellants. Fox, Kellogg & King (P. T. Riley, of counsel), for respondents.

VANCLIEF, C. This is an action by the executors of the will of Jerome B. Painter, deceased, to compel an accounting and settlement of the affairs of the partnership firm of Painter & Co., of which the deceased was a member, and Theodore P. Painter was the surviving partner.

The business of the partnership was that of manufacturing and selling printing presses, type, and other materials, and the publication of an annual directory, and other incidental business. The partnership was originally formed in 1859, when it was composed of the three brothers,—Jerome B., J. Milton, and Theodore P. Painter, of whom Jerome B., the deceased, was the eldest, and Theodore P. the youngest. J. Milton ceased to be a member of the firm October 1, 1865, from which date until the death of Jerome, February 6, 1883, the eldest and youngest brothers continued to be equal partners. During the partnership the firm acquired considerable real estate, a portion of which stood in the joint names of the partners, and a portion in the separate name of each partner. By the will of Jerome B., all his share in the partnership stock and good will of the business, except the real estate, was devised to his brothers, J. Milton and Theodore P., upon the condition of their assuming the partnership liabilities. Shortly after the death of Jerome, Theodore, the surviving partner, formed a new copartnership for the same purposes with J. Milton, without changing the firm name; and on December 3, 1884, they filed a certificate of their partnership, under the firm name of Painter & Co., as having existed since February 12, 1883. Before entering upon the business of the new firm, they took an account and inventory of the stock on hand, which was reported to the appraisers of the estate of Jerome B. Painter. All stock on hand was then marked so as to distinguish it from any additional stock they might acquire, and all sales of that stock were thereafter distinguished on the sales books from the sales of other stock. The books of original entry, cash book, and journal used by the old firm were used by the new firm, and were kept by the same bookkeeper, George W. Darbey, who had kept the books of the old firm for more than six years prior to the death of Jerome B. Painter. By order of J. Milton, posting of the old firm books was discontinued until it was discovered that they had not been fully posted prior to the death of Jerome, when directions were given to complete the posting of them. No posting of the accounts of the new firm, nor of sales of the stock of the old firm, was done for a period of about four years; but proper data for future posting were kept in the books of original entry, cash book, and journal. Only one cash account was kept, but the sales book clearly distinguished the sales of the old stock from the sales of new. J. Milton was the manager of the business, but made no charge against the old firm for his services, or for services of the new firm for selling the old stock, nor for collecting the debts due the old firm. The continuance of the business by the new firm facilitated, to some extent, the winding up of the old business. New machinery was purchased by the new firm for the manufacturing department; and the manufacture and sale of new stock, and the continuance of a general sale department, helped the gradual disposition of the old stock at less expense and sacrifice than probably would have been incurred by putting it upon the market at once, and separately from a general business and assortment of goods in that line. In 1878 the old firm entered into an agreement with Francis & Valentine, H. E. Langley, and others for the purpose of the copyrights and privileges of "Langley's San Francisco Directory," and certain other directories, and of the good will of the business of publishing the same, and agreed to publish the same annually for a period of 10 years, and to pay to Francis & Valentine 20 per cent. of the value of all copies sold,—equivalent to a royalty of one dollar per volume,—and providing that "in case of the death of either of the partners composing the firm, as it then existed, the surviving partner and the estate of such deceased partner shall have the right of abandoning the publication of the aforementioned works," and of being discharged from future liability, upon reassignment of the copyright and good will of the business. Up to the death of Jerome B., February 6, 1883, the publication of the directories had been made at a continual loss to the firm, and the publication for the year 1883 caused a loss of $1,200. The surviving partner, Theodore P., who was also one of the executors of the will of Jerome B., proposed to abandon the business of publishing the directories, as unprofitable, and spoke of the matter to Mr. Dallam, a coexecutor, who interposed no objection; but J. Milton Painter was of opinion that the future publication of the San Francisco directory might be made profitable, if they could secure more favorable terms from Francis & Valentine; and it was concluded to make another attempt, on the condition that the new firm should act on their own responsibility, and at their own expense. As a result of the efforts of J. Milton Painter, the contract with Francis & Valentine was modified so as to reduce their royalty on the San Francisco directory to 50 cents per volume. J. Milton then introduced a change of management, by which the publication of that directory became profitable. In November, 1886, the contract was further modified so as to constitute a partnership between the new firm of Painter & Co. and the firm of Francis & Valentine, for the publication of the San Francisco directory on the basis of sharing equally the profits and losses, but the publication was to be under the supervision of Painter & Co. After the year 1883 the plant of type, stands, and cases used by the old firm of Painter & Co. was used by the new firm in the publication of the directory, without formal transfer to the new firm; but all money required to be advanced for the publication for each year thereafter was advanced by the new firm, and a yearly rental of $300 was allowed as compensation for the use of the plant. The accounts of the directory concern were kept upon the books of the old firm by the same bookkeeper, without change in the manner of keeping them. The only means of discriminating between the old and new accounts consisted of the dates of the entries, and the essential nature of the business of publishing a new directory for each succeeding year. All accounts in regard to the directory, pertaining to the business of the old and new firms, were entered continuously upon the same books, in the same firm name, of Painter & Co.

In the year 1884, litigation arose between the surviving partner of the old firm and the estate of Jerome B. Painter, deceased; growing out of an attempt of the surviving partner to enforce a debit to the account of Jerome B. as a claim against his estate, though his net interest in the firm assets had been appraised at $4,152.94. This attempt of the surviving partner was defeated by a decision of this court in January, 1886. 68 Cal. 395, 9 Pac. 450. In May, 1888, the surviving partner, having resigned his position as executor, brought suit to settle the old partnership, and to sell the real and personal assets of that firm; and, in October of that year, J. Milton Painter brought suit to obtain a construction of the will of Jerome B. Painter, and to marshal the assets of the firm and of the estate of the deceased partner. In May, 1889, the present suit was brought, the complaint in which charges, in substance, that upon the death of Jerome B. Painter, the surviving partner, Theodore P. Painter, took possession of all the property and business of the firm, and admitted the defendant J. Milton to an interest in the business; that defendants have ever since conducted the business as if it had been their own; that Theodore P. was both surviving partner of the old firm and one of the executors of the will of the deceased partner; that he has neglected and refused to settle the affairs of the partnership; that, by order of the probate court, he has filed a report and account in that court, wherein he falsely claimed that at the time of the death of Jerome B. he was indebted to the firm in the sum of $44,000 and upwards, which indebtedness, on September 10, 1888, had increased to $73,000, whereas, on the contrary, the partnership was indebted to him, at the time of his death, in the sum of $50,000 at least; that the said report and account filed were insufficient and unintelligible, as well as false and fraudulent; that the probate court appointed an expert to examine the books, and state an account of the condition of the affairs of the partnership, who has been engaged in that work for several months, but is unable to state the account, for the reason that defendants have not, for many years past, kept any true or intelligible account of the business of the partnership; that, since the death of Jerome B., Theodore P. has altered and falsified the accounts of both himself and Jerome B., and made many new, false, and fraudulent entries in the books, with intent to cheat and defraud the estate of Jerome B.; that he has collected large sums of money on account of the firm, amounting to at least $20,000, which he has not accounted for, but has appropriated to his own use; that he has so managed the business as to lose, in a large degree, the good will of the business; that the books have not been posted since April, 1885; that false and fraudulent balances have been carried forward in the cash book, showing the balance of cash on hand to be far below what it really was; that there would be due to the firm about May 16, 1889, the sum of $16,000, on account of the printing of the San Francisco directory, which money is and will be the property of the firm, and would be lost to the firm if paid to the defendants; that the estate of Jerome B. Painter cannot be closed without a settlement of the partnership; and that unless all the books, papers, vouchers, properties, and assets of the firm are taken from the hands of the defendants, into the custody and control of the court, there is imminent danger that the interest of the estate of Jerome B. Painter in the property of the firm will be entirely lost. The prayer of the complaint is for the appointment of a receiver, and for an accounting and settlement of the partnership. The answer denies each allegation of fraud, and all danger of loss to the estate of Jerome B. Painter. It claims that the money received, and to be received, from the publication of the directory, is no part of the assets of the firm of which Jerome B. Painter was a member. It avers that the keeping of the books was intrusted wholly to George W. Darbey, the same bookkeeper who was originally employed by Jerome B. Painter, and they were kept in the same style and manner after as before his death; that no false or fraudulent entries were made in the books at any time, and no irregularity appears on the books, since the death of Jerome B. Painter, which has not a precedent and example in the books as previously kept by Darbey; that the omission of posting in the ledger was through a misunderstanding on his part of instructions given him. It sets forth the efforts made by the surviving partner to liquidate the business of the firm of which Jerome B. Painter, deceased, was a member, and the pendency of the action brought by the surviving partner, May 4, 1888, to settle the partnership. The court appointed a receiver, who took possession of the whole of the type-foundry business, merchandise, and personal property on hand, of every description, and the whole of the directory business, and moneys arising therefrom, to the exclusion of both of the defendants. The findings were in favor of the plaintiffs upon every issue, including all of the averments of fraud; and, as the result of an accounting of the whole business from 1880, the court adjudged that Theodore P. Painter was indebted to the firm of Painter & Co. in the sum of $28,675.64, one-half of which was declared a lien, in favor of the estate of Jerome B. Painter, upon Theodore P. Painter's half of the assets of the firm, and further adjudged that the defendant J. Milton Painter had no interest in any of the assets of the firm, including the property in the hands of the receiver, all of which was adjudged to be firm assets. The defendants moved for a new trial, alleging the insufficiency of the evidence to sustain the findings of the court; and this appeal is from the judgment, and from an order denying their motion for a new trial.

1. The evidence is insufficient to sustain the findings in regard to the alleged fraud of the defendants. Those findings are based upon the surmises of Mr. Folger, an expert witness, that various irregularities and erasures found in the books, and certain entries, of which the explanation was not obvious upon inspection, were indicative of fraud. These surmises were natural, as appears from the testimony of Mr. Van Bokkelen, another expert witness, who states "that while, on the preliminary examination of the books of Painter & Co., the irregularities found by him made a very unfavorable impression, yet on a more careful examination of such irregularities and errors, and the discovery of the explanation of the more serious of them, and the examination of the methods of bookkeeping for several years prior to the death of said Jerome, in which the same irregularities and errors occur, he is now satisfied that those errors and irregularities, with attending circumstances, exclude the idea of fraud." If the record did not afford the means of testing the relative value of the opinions of Mr. Folger and Mr. Van Bokkelen, the case might be considered as one of conflicting evidence; but from the facts, figures, and circumstances found in the record, all supporting Mr. Van Bokkelen's theory, I think Mr. Folger's unsupported opinion does not create a substantial conflict, and is too slight and uncertain to justify a finding of fraud. Code Civ. Proc. § 1835; Estate of Carpenter, 94 Cal. 411-419, 29 Pac. 1101; People v. Stewart, 80 Cal. 131, 22 Pac. 124. The evidence discloses a careless habit of bookkeeping by Darbey, and it is somewhat surprising that his services were retained, not only during the last six years of the life of Jerome B. Painter, and by the new firm of Painter & Co. until the appointment of the receiver, in 1889, but also by the receiver himself, from the date of his appointment to the time of the trial, in 1892, notwithstanding the fact that the affidavit on which the receiver was appointed disclosed the principal irregularities appearing in the books kept by Darbey. The evidence shows, and it is not disputed, that Darbey kept the books in the same careless and bungling manner from the beginning to the end of his services to the two firms of Painter & Co., but does not sufficiently show that either he, or any of his employers, were at any time guilty of fraud, or that any fraudulent entries were made in the books, or that any entries were fraudulently omitted, though the books contain many mistakes and erasures, and the vouchers show that entries were carelessly omitted. It appears that during the lifetime of Jerome B. Painter, he was the managing member of the firm. He had kept the books for a time, and always had more immediate supervision of the books and accounts than had Theodore, who was a printer, and had never studied bookkeeping, either practically or theoretically, and seldom examined the books, further than to see that certain entries were made in which he had an interest. After the death of Jerome B. Painter, no entry appears to have been made in any book by Theodore P. Painter or J. Milton Painter; but all entries were made in the handwriting of Darbey, who testifies that he never made a fraudulent entry in the books. Yet the evidence establishes that during the lifetime of Jerome B. Painter, as well as subsequent to his death, there were many irregularities, consisting of mistaken entries made on the wrong side of the accounts, with many erasures and corrections of mistakes in the cash account, and careless omission of entries and postings. The books abound with so many of these errors throughout the service of Darbey as bookkeeper, many of which compensate each other, that it cannot be supposed that they

were fraudulently designed. None of them, when viewed in the light of all the circumstances in proof, is inconsistent with innocent design, and it follows that none of them should be considered as fraudulently designed. Fraud should never be presumed, nor grounded upon mere suspicion, nor inferred from circumstances which are susceptible of an explanation consistent with innocent intention. Estate of Carpenter, 94 Cal. 411–412, 29 Pac. 1101; Estate of Kidder, 66 Cal. 490, 6 Pac. 326; U. S. v. Arredondo, 6 Pet. 716; Tucker v. Moreland, 10 Pet. 78; Paxton v. Boyce, 1 Tex. 317–325; Steele v. Kinkle, 3 Ala. 358.

2. The court erred in finding and adjudging that the whole of the assets taken from the possession of the defendants by the receiver were the assets of the old firm of Painter & Co., and at the same time refusing to allow any compensation to either of the defendants for their labor, skill, and energy in the conduct of the business for six years, and charging Theodore P. Painter with all the funds drawn by J. Milton Painter for his support during that period, while acting as manager of the new firm. He drew funds for his support at the rate of about $116 per month, aggregating during the six years the sum of $8,372.54, all of which Theodore P. Painter is made to pay out of his own pocket, without deduction or allowance of any compensation for the services of J. Milton Painter. J. Milton Painter was treated by the court, in all respects, as a mere intruder in the business of the old firm of Painter & Co., and as if he were a mere private employe of Theodore P. Painter, payment for whose services could not be charged to the old firm by the surviving partner. Such a ruling is manifestly unjust, and contravenes the principles of equity. It is true that a surviving partner is not entitled to compensation for the mere winding up of the business of the firm. "But the rule applies merely to the simple and immediate winding up, by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of a partnership, and implied in the contract; but for time, skill, and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails, as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, good will, or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and, perhaps, its necessity or desirability. The most usual application of this limitation of this principle is in the case of a surviving partner continuing the firm business, or completing the enterprise of the partners." 2 Bates, Partn. § 773. This court has said: "When the partnership has been carried on for some time after a dissolution by death, and such continuance has proved beneficial to the parties, it is but just and proper that the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business; for during that time the business has not received the care and labor of the deceased partner, as an equivalent for such services. While all the parties are living, each is under obligation to devote his time and services to the partnership business, and there is therefore good reason for holding that neither should receive a compensation for such services. But when, in consequence of the death of one partner, this equality no longer exists, it is but equitable that the surviving partner should be compensated for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business, and the overplus of such profits, after deducting such compensation, to be divided between the partners. Story, Partn. § 343, and notes; Coll. Partn. § 328; Gow. Partn. 354. We do not wish to be understood, however, as holding that the surviving partner is entitled to compensation merely for services rendered in winding up the affairs of the firm (Beatty v. Wray, 19 Pa. St. 516), but to confine it to a case like the present, where the partnership business has been continued for a considerable period in order that the affairs of the partnership may be advantageously wound up." Griggs v. Clark, 23 Cal. 427, 430. Where a surviving partner, who has continued the business to advantage, is ordered to account, he should be allowed all expenses incurred in continuing the business. O'Reilly v. Brady, 28 Ala. 530; Calvert v. Miller, 94 N. C. 600. And in the present case, upon the theory that the whole business conducted by the defendants should be regarded as if continued by the surviving partner for the benefit of the old firm, a reasonable compensation for the services of J. Milton Painter, as manager of the continued business, should be allowed as an expense incurred in continuing the business, in addition to a reasonable compensation for the services of the surviving partner. Where a partner forms a subpartnership with a third person, who becomes manager of the firm business, such manager, not being a partner of the other partner, is entitled to compensation, as against him. Newland v. Tate, 3 Ired. Eq. 226. But it is by no means clear that the court was justified in ordering an accounting of the whole of the business conducted by the new firm of Painter & Co., and in taking into its custody all of the assets claimed by that firm. It is true that, as a general rule, an accounting of profits will be ordered against a surviving partner who conducts the business after dissolution, with the use of the firm assets. "But if, from the nature of

the concern, and the state of the accounts, the assets cannot be realized, except by continuing business, and the surviving partners continue as a new firm, debiting themselves with old assets, they are not accountable for profits." 2 Bates, Partn. § 794. "Just allowances to the continuing partners are always made, and if the main contribution to subsequent success is the skill, time, and diligence of each partner, it is difficult or impossible to say how much of the profits is to be allowed for or deducted for the services of incoming new partners; and, if an accountability for profits would be unjust, the court may allow interest only." Id. § 797. The rule for an accounting of profits "being founded on the misuse of another's property, held for other purposes only, and on its exposure to risks, the share of profits to be accounted for is measured by the amount attributable to that source. Hence, if the subsequent profits are partly or wholly due to the skill of the remaining partners, a special inquiry is necessary to ascertain the amount. No general rule can be made." Id. § 797. There should be no accounting for subsequent profits where the deceased partner owes the firm more than the amount of his interest in the business of the firm, and the subsequent profits arise from the prudence, skill, and industry of the remaining partners. Id. § 798, and cases cited.

The case at bar seems to be a proper one for a special inquiry. According to the theory of the evidence contended for by the appellants, viz. that Jerome B. Painter bought all of the school lands purchased by him on his own private account, as his property, and that they are not assets of the partnership, and that Theodore P. Painter is entitled to all the credits of which he has been deprived by the findings and decree of the court, Jerome B. Painter might prove to be indebted to the firm, at the time of his death, beyond the actual value of his interest in the personal assets of the firm at that date, the actual value of which does not now certainly appear. If that theory were sustained, as the result of a new trial, his estate would not be entitled to share at all in the profits of the business conducted by the new firm. But, in determining the assets of the firm at the date of his death, the value of the good will of the business must be taken into the account; and it should be ascertained by special inquiry what was the precise value of the interest of Jerome B. Painter in the personal assets of the firm, including the good will, at the date of his death, and to what extent his interest in the assets was employed by the new firm in the conduct of their business. To the proportionate extent to which his interest in the good will and personal assets of the old firm was actually used by the firm in the prosecution of its business, his estate ought, in equity, to participate in the profits realized by the new firm. On the other hand, to the full extent of the interest of Theodore P. Painter in the assets of the old firm, as a partner therein, and of all money advanced by the members of the new firm, either individually or upon their joint credit, and to the extent of their purchase of new machinery and new merchandise with their own funds, and to the extent of the value of their personal services, skill, and energy employed in the business of the new firm, it is equitable and just that the new firm should receive its proportionate share of the profits realized from the new business. In estimating the value of the good will of the old firm, it should be considered that, while the old firm had the right to continue the publication of the directory, it was not under contract obligation to do so after the death of Jerome B. Painter, and that the original contract, as made by the old firm, had proved unprofitable, and that the profits subsequently realized were owing to modification of the contract secured by J. Milton Painter, and largely owing to his management of the business. It should also be considered, as matter of law, that no directory to be published after the death of Jerome B. Painter could have been copyrighted in advance of its publication, so that such copyrights could not be the property of the old firm. The question to be determined in this connection is merely as to what was the actual value of the good will of the directory business, considered as a part of the good will of the whole of the firm business, when the new business was inaugurated by the new partners under the old firm name.

3. The evidence is insufficient to justify the finding that the entry of a credit to Theodore P. Painter on the books of the old firm, of the sum of $15,203.19, on account of real estate and interest, was fraudulent and void, and that that amount was properly chargeable against him. The entry is written in the ledger over an erasure at the top of a column under date of February 28, 1882, and the expert witness, Mr. Folger, surmised that the entry was made February 28, 1883, after the death of Jerome B. Painter, and was fraudulently antedated; and, as he saw nothing on the face of the books to justify the entry, he thought that that amount should be charged back to Theodore P. Painter. But he admits that he did not examine the private account book of Theodore P. Painter, which was kept in the handwriting of Darbey, as one of the books of the firm, which, as the expert witness Van Bokkelen clearly shows, contained entries of sundry amounts paid by him on account of real estate and interest, which correspond with and justify the entry of $15,203.19 made to his credit in 1882. The narrative of Theodore P. Painter, which is corroborated by his account book and the vouchers produced in evidence, is to the effect that B. C. Vandall was indebted to the firm of Painter & Co. in a large sum of money, and having no assets other than heavily incumbered real property at South San Francisco,

which might have a prospective value, but then had no value beyond the amount of the incumbrances thereon, proposed to transfer it to the firm, subject to the incumbrances. Jerome Painter endeavored to have the title taken in the name of a third person, as he did not wish to have Vandall ask the firm for more money in case the land should rise in value, but, failing to secure such third person, requested Theodore P. Painter to take the deed of the land in his name. The property thus standing in the name of Theodore, the payments from the firm money made by him to pay off the incumbrances were entered by the bookkeeper upon Theodore's cash account; and the entry of $15,203.19 to his credit upon the journal and ledger in 1882 was of an amount then calculated by the bookkeeper to correspond with the principal and interest with which Theodore had been charged, and was entered upon the books at Theodore's request, in accordance with a tag showing the amount calculated by the bookkeeper, which he obtained from Jerome B. Painter. The entry upon the journal is without erasure, under a page bearing date March 31, 1882, but following an entry carried over from the previous page under date of February 28, 1882; it being the custom of the bookkeeper to make his journal entries as of the last day of each month. Immediately following the journal entry of this credit is a debit to the Boston & Fairhaven Iron Company, which the press copy of letters shows must have been entered in March, 1882, and was correctly posted as an entry of March 31, 1882. The credit to T. P. Painter was posted in the ledger under date of February 28, 1882. The amount of interest entered in the journal as part of the credit was calculated by Darbey only to February 1, 1882. The erasure over which the posting was made in the ledger is fully accounted for by a previous mistaken entry of a debit balance of December 31, 1880, which was commenced to be carried to the wrong side of the page, and erased by the bookkeeper, as was his custom in cases of such mistakes, which were comparatively frequent. One of the expert witnesses testified that he had discovered that the word "balance" had been originally written under the entry of this credit in the ledger, and erased; and in the photographic copy of the ledger page, appearing in the transcript, the top of what might be the letters "B" and "l" are plainly visible, and it is apparent that the date of 1880, originally written above the mistaken entry of the debit balance, was changed to 1882,—the date of the posting of the credit. The testimony clearly establishes that it was a common mistake of the bookkeeper to commence to place an entry at the beginning of a column of figures in the wrong column, and to correct it by an erasure, sometimes making the correction before he had finished the incorrect entry. Such mistakes and erasures abound in the ledger, but it is noticeable that no erasures of importance appear in the journal, or in the books of original entry; and none appear in the journal entry of this credit, which stands properly between entries which were unmistakably made in 1882,—prior to the death of Jerome B. Painter. It is not necessary to review in detail all of the evidence bearing upon the subject-matter of this credit. It has been carefully considered, and it is sufficient to say that, taken as a whole, in view of the well-settled presumption against fraud, it does not sustain the finding that this credit was fraudulent, but does tend to establish, on the contrary, that it was made in the lifetime of Jerome B. Painter, with his knowledge and consent, and was made on account of real estate belonging to the firm. If so, it was improperly charged back against Theodore P. Painter in the accounting between him and the estate of Jerome B. Painter.

4. The same is true of a credit to Theodore P. Painter of $4,282.98 on account of stock of the South San Francisco Dock Company, entered under date of June 30, 1882. The journal entry of that date appears to be regular, and refers by names and numbers to the certificates of stock for which the credit was given, and is immediately followed by another journal entry of the same date, of interest due the Bank of British North America for the month of June, 1882. No erasure appears in the posting of this entry. This stock was obtained from B. C. Vandall on account of a debt to the firm, and was redeemed and held in the name of Theodore P. Painter for the firm, in the same manner as the land deeded by Vandall to him. Theodore P. Painter testified that this entry was also made, with the consent and knowledge of Jerome B. Painter, at the date of the entry appearing on the books, and there is no proof to the contrary. Before making the entry, Darbey made a calculation of the principal and interest to June 19, 1882, but made a mistake against Theodore P. Painter of $1,000 in the calculation, thus attaining the precise sum entered upon the books to his credit. Under this state of the evidence, this credit was improperly rejected by the court, and the amount improperly charged back to Theodore P. Painter in the accounting.

5. The court also improperly rejected a credit to Theodore P. Painter of $1,961.87, entered on the journal March 31, 1882, and posted as of that date, on account of money advanced to F. P. Thompson, and interest thereon, in consideration of the note of F. P. Thompson, executed to the firm of Painter & Co. on the 29th of January, 1878, payable March 1, 1878. This note was drawn in the handwriting of Jerome B. Painter. Theodore P. Painter testified that F. P. Thompson was superintendent of state printing, and requested a loan from Painter & Co., and that Jerome B. Painter agreed to the loan, but did not want it to appear

upon the books of the company, and requested him to draw the money in several sums, on his private account, and loan it to Mr. Thompson upon his note payable to the firm. The note was not paid, and was about to outlaw in March 1882, when the amount advanced, with interest, was credited to Theodore, with the knowledge and consent of Jerome. There is nothing to contradict this explanation of the matter. The account book of Theodore P. Painter, kept by Darbey, shows that in January, 1878, unusually large sums of money, amounting to more than enough to cover the amount of the loan from the firm to Thompson, were charged to Theodore P. Painter, as having been drawn by him from the funds of the firm. Darbey's recollection is that the note was about to outlaw when this credit to Theodore was entered, which would correspond to the date of the credit in March, 1882. It appears that, for some unexplained reason, interest on the money advanced by Theodore P. Painter was calculated to the 18th of April, 1882; but such a calculation would evidently not have been made if the entry were antedated after the death of Jerome B. Painter, in 1883. That it was not so antedated further appears from the journal entry immediately following the credit of $1,961.87, which is proved by the invoice book to have been entered in March, 1882.

6. Theodore P. Painter is also improperly charged with $7,312.48, being the whole of the credit side of a branch account kept by him upon the books of Painter & Co., entitled "Mrs. M. B. Account." "Mrs. M. B." was the mother of the Painters, and Theodore used her initials, in her lifetime, to designate an account of moneys received by him from her as a gift, and also moneys received by him from other friends, which he advanced to the partnership. This account was in fact a separate branch of the account of T. P. Painter with the firm of Painter & Co. But it is evident that, if the items of this account had been entered upon the account kept in the name of Theodore P. Painter, the credit side of the Mrs. M. B. account would have appeared upon the credit side of his own account. No justification is apparent for debiting Theodore P. Painter, individually, with the whole of the credit side of this account. If it were shown that there were any improper items of credit in the account, they should, of course, be deducted therefrom. So, also, any improper items of debit should be corrected. But Theodore P. Painter should be credited, instead of charged, with any true balance of credit to the Mrs. M. B. account. The balance of credit appearing upon the face of the account is $6,508.15. Items of credit amounting to $2,477.33, consisting of $2,000, principal, received by Jerome B. Painter from Theodore P. Painter March 5, 1881, and interest on that amount, in the sum of $477.33, from that date until February 28, 1883,—the date of the entry of these items of credits,—are controverted, as having been improperly entered after the death of Jerome B. Painter, without any corresponding money appearing upon the books to have been paid into the account, or to have been received by Jerome B. Painter. Theodore P. Painter testifies in regard to this entry that just before the first Monday in March, 1881, at Jerome B. Painter's request, he withdrew from the bank $2,320 of the money due to this account. This amount appears on the face of the account to have been charged to the Mrs. M. B. account, March 5, 1881, as drawn by T. P. Painter individually; and the remaining $2,000 was deposited in the office of the firm, and was used by Jerome B. Painter personally, under a promise to replace it. He put off adjusting the matter, but finally promised to pay the money on the 20th of February, 1883, but died on the 6th day of that month, without having done so. After his death, Theodore P. Painter, by the advice of his attorney, Judge Cope, had the entry in question made upon the books to the credit of the M. B. account, under date of February 28, 1883. The claim for the adjustment of this matter appears to have been made in good faith, and to have been immediately announced to his coexecutors, who agreed that that sum should be paid. It also appears that in the months of March and April, 1881, the cash account of Jerome B. Painter showed few and small charges to him, indicating that he then had some other source of supply of funds. Under these circumstances, it would seem that the entry of the credit to the Mrs. M. B. account was justifiable, and should not be charged back to Theodore P. Painter. But the entry made by the bookkeeper was an incomplete adjustment of the matter, for the manifest reason that Jerome B. Painter, having actually received the money drawn from this account, which was deposited in the office of the firm by Theodore P. Painter at his request, should also be charged therewith. The credit to the Mrs. M. B. account appears, in itself, a proper manner of canceling the debit made to that account on March 5, 1881, when the money was merely drawn by Theodore P. Painter from the bank at the request of Jerome B. Painter, and deposited in the office of the firm. It must be regarded, therefore, as remaining in the custody of the firm until taken therefrom by Jerome B. Painter, whose account ought to be charged therewith, as an asset of the firm, instead of the account of Theodore P. Painter, while the firm liability would still remain to return the money to Theodore P. Painter through the Mrs. M. B. account. For these reasons the credit to that account should stand, and the account of Jerome B. Painter should be charged correspondingly. The same result would have been reached by the payment of the money and interest out of Jerome B. Painter's estate to Theo-

dore P. Painter individually; but that estate is in court, and, as the matter can properly be adjusted through the medium of the partnership accounting, I think it should be adjusted in the manner indicated. A surviving partner is not required to present a claim against the estate of a deceased partner, who has received money from the custody of the firm, or which constitutes, legally or equitably, a part of its assets, if the claim can be worked out through the settlement of the partnership. Manuel v. Escolle, 65 Cal. 110, 3 Pac. 411; Painter v. Painter, 68 Cal. 395, 9 Pac. 450. The mere fact that the entry of the credit to the Mrs. M. B. account was made upon the firm books after the death of Jerome B. Painter is not material, there being sufficient proof aliunde to justify the credit. The respondents have not contradicted the sworn statement of Theodore P. Painter as to the claim made by him to them immediately after the death of Jerome B. Painter in reference to the $2,000 received by Jerome B. Painter in March, 1881, and as to their agreement that it should be adjusted. That Jerome B. Painter had full confidence in the integrity of his brother Theodore is manifest from the terms of the will.

7. A charge of $349.52 is improperly made against Theodore P. Painter on account of payments made by him upon a firm note for $700, executed October 1, 1880, to Grace Meininger, payable one year after date, with interest at 10 per cent. per annum, payable quarterly. It appears that the money loaned by her to the firm, for which this note was given, was entered upon the books of the firm as an account in her name. But on February 28, 1881, the money was drawn out, and divided between the partners, and the account closed, though the note was not taken up or paid. The payments subsequently made on the note by Theodore P. Painter were charged to him, individually, in the accounting, on account of the apparent squaring of her account upon the books. But the note remained unpaid, and was a subsisting obligation of the firm. It is clear that all payments made by Theodore P. Painter upon the Grace Meininger note, out of firm funds, during the existence of the note, as a firm obligation, are properly chargeable to the firm, and not to Theodore P. Painter individually.

8. Sundry credit items, appearing on the books as credited to Theodore P. Painter, amounting in the aggregate to $5,988.75 in May, 1889, have been erroneously charged to him by the court in the accounting. These credits were matters of offset to charges made by the bookkeeper to Theodore P. Painter of cash received from sales of merchandise, or from collections reported by him, which appear from the books to have been credited back to him when the money was paid in; and to charge them back to him again is manifestly unjust. These credit items, furthermore, relate largely, if not entirely, to the business of the new firm, and, in so far as they do so relate, their justice is matter of inquiry and adjustment between Theodore P. Painter and J. Milton Painter, as partners. There is no proof that Darbey, the bookkeeper, fraudulently entered these credits to the account of Theodore P. Painter, and there is proof that he had charged Theodore P. Painter, individually, with a corresponding amount of cash received, to which the credits apply when the cash was returned, and paid over by him to the firm.

9. On the face of the cash book by Darbey, as bookkeeper, a total cash shortage of $17,432 appears to have occurred between June, 1881, and May, 1889, one-half of which ($8,656) has been charged to Theodore P. Painter in the accounting. A much larger amount of cash shortage appears on the face of the cash books to have occurred under former bookkeepers in the life-time of Jerome B. Painter, between 1871 and 1881. The cash books do not appear ever to have been kept in balance. The partners appear to have contented themselves with watching the actual cash receipts and disbursements, and seeing that proper entries were made upon their individual accounts and the accounts of the firm with third parties, without requiring the general cash account to be kept in accurate balance, or to correspond in balance with the balance of cash on hand. The proof is clear, from the examinations of many vouchers, that very many items of cash were not entered at all upon the general cash account. A sufficient number of these omissions were proved to reduce the apparent cash shortage by the amount of $5,722.69, and to make it evident that the apparent cash shortage was owing to a careless and slipshod manner of bookkeeping, especially as to entries upon the general cash account, which was never balanced, and not owing to any fraud, either on the part of the bookkeeper or of the members of the new firm, in their relation to each other, or in their relation to the old firm of Painter & Co. All entries made upon the books were made by the bookkeeper, Darbey, who was generally careless, and especially so in his posting of the general cash account, which was never balanced, or used by the partners, either of the old or new firm, as a criterion of the amount of cash which ought to be on hand. But Darbey is not convicted of dishonesty, and the manner in which he kept the general cash account goes far to acquit him of such a charge. Had he been dishonest, it is highly improbable that he would have kept that account in a condition to disclose a large cash shortage, for which the firm might call him to account. Indeed, it does not appear that Darbey ever handled any of the moneys of the firm, and it seems absurd to account for the cash shortage upon the suppo-

sition of his intentional dishonesty. Neither is there ground, from the evidence, for reasonable belief that either of the partners fraudulently directed the bookkeeper to make false entries in the general cash account, or to omit the making of other entries therein, so as to show, upon the face of the books, a cash shortage of many thousands of dollars. The court has erroneously credited Jerome B. Painter with one-half of the cash shortage of the old firm, which occurred under the administration of Darbey, as bookkeeper, during his lifetime. The evidence discloses that Jerome B. Painter was then the managing partner, and carefully supervised the accounts of the firm, and controlled its receipts and expenditures, while Theodore P. Painter, the younger partner, was unacquainted with bookkeeping, and had nothing to do therewith, except to see that some entries were made, affecting his interest, under the supervision and with the consent of Jerome B. Painter. Clearly, if any account were to be made of cash shortage occurring under the management of Jerome B. Painter, the whole should be charged to him, instead of crediting him with one-half thereof. But, in view of the presumption against fraud on his part, the proper conclusion is that all apparent shortage in the cash account during his lifetime should be disregarded, and not treated as assets of the firm. The same bookkeeper was employed both by the old and new firm, and, for his loose habits and negligence, Jerome B. Painter was at least in pari delicto with his younger brothers, who were less experienced in bookkeeping, and less familiar with Darbey's methods. Hottel v. Mason, 16 Colo. 43, 26 Pac. 335; Barrett v. Kling (City Ct. Brook.) 16 N. Y. Supp. 92. But, as respects the apparent cash shortage in the accounts of the new firm of Painter & Co. since the death of Jerome B. Painter, if regarded at all, it should be considered as a matter to be adjudged between the members of the new firm, consisting of Theodore P. Painter and J. Milton Painter, and having occurred solely on account of that portion of new business in which the new firm alone is entitled to share. It is evident that all sales of merchandise belonging to the old firm are sufficiently distinguished by the entries in the sales book to disclose what portion of the cash was received from those sales; and for all of that portion the new firm will be accountable to the old firm, regardless of any cash shortage in their general cash account. The same is true of all debts collected on account of the old firm, which must be accounted for in full. But in so far as the estate of Jerome B. Painter may be shown, upon a new accounting, to be entitled to share in the profits of the new business, on the ground of the employment of its assets therein, the apparent cash shortage should be disregarded, for reasons heretofore stated.

10. Appellants claim that an erroneous credit was allowed Jerome B. Painter on account of the purchase of school lands, which the court finds to be the property of the firm, but which appellants claim were purchased by Jerome B. Painter on his own private account. The proof that he did purchase these lands on his private account is conclusive, unless it can be held to be overcome by an entry which stood upon the firm books for a long time prior to the death of Jerome B. Painter. The written contract for the purchase of these lands was made with B. F. Mauldin by Jerome B. Painter individually; and the account of the purchases was kept in his private cash book, and never at any time entered to his credit on the journal or ledger, as payments made by him on account of the firm. They were afterwards entered upon the ledger simply as a "Land Account," containing a memorandum of the moneys paid, and interest thereon, but not describing any lands whatever. Theodore P. Painter, who was not accustomed to inspect the books as a whole, did not discover this ledger entry until long after it had been made, but, as soon as he did discover it, protested against it. He testifies to a conversation then had with the respondent Dallam, in which he complained of the entry, and denied that the firm had anything to do with those school lands, and that Dallam then advised him to complain to Jerome, and, if he would not correct the matter, to bring suit. This conversation is not denied by Dallam. Theodore testified that he then had a personal interview with Jerome, and complained of the ledger entry, and wanted it changed, reminding Jerome that he (Theodore) had refused to enter into the purchase of the school lands, to which Jerome replied: "O, well, that is all right. I just entered it there for the time being." He further testifies that: "No reference was made to the school lands after the conversation I just spoke of. That gave me to understand that they were not intended for the company. He said the equivalent of that." It appears that Theodore P. Painter has uniformly denied that the firm was interested in the purchase of these school lands, and that the respondents, as coexecutors of the will of Jerome B. Painter, treated the school lands as his individual property after his death. In view of the whole evidence upon the subject of the purchase of these school lands, and especially in view of the fact that Jerome B. Painter never demanded or received a credit upon his account with the firm on account of the cash paid for them, the finding that these lands were the property of the firm of Painter & Co., and that Jerome B. Painter should be credited with their price in the accounting, is against the evidence. There is nothing but this ledger entry, against Theodore's protests, to connect the firm, in any manner, with the contract of purchase. The lands were paid for out of the private funds of

Jerome, and were taken in his name; and there is no pretense that the original investment was on account of any business in which the firm had an interest, or was agreed upon, in its inception, by both partners. In this respect there is an essential difference between the purchase of the school lands in the name of Jerome, and the taking of the Vandall lands in the name of Theodore, on account of a firm transaction, at the suggestion of Jerome, for which Theodore received a credit upon the journal in 1882, with Jerome's consent, and by his order to the bookkeeper. On no tenable ground, so far as appears from the evidence, can the investment made by Jerome in these school lands be held to have been the original purchase of property by him on account of the firm, and on no principle of justice can Theodore be compelled to take or pay for one-half of these school lands. In view of the protest made by Theodore, he cannot be held estopped by the entry of the so-called "land account" upon the ledger of the firm.

11. Appellants have printed in the transcript the original order appointing the receiver, with the affidavit upon which the same was based, and also an order refusing to discharge the receiver, with the affidavit and counter affidavits used thereupon; but there is no appeal from either of these orders, and the affidavits are not made part of the record by any bill of exceptions, and therefore the correctness of these rulings cannot be reviewed upon this appeal. But the court has incorporated in its findings a fact, presumably based upon the evidence in the record, "that there was at the commencement of this suit, and ever since has been, and still is, great and imminent danger that the interest of J. B. Painter, and of his heirs and devisees, in the property of said firm would be entirely lost, and that the appointment of a receiver herein heretofore, and at the commencement of this action, made by the court, was and is proper, necessary, and warranted in the premises." This finding is not sustained by the evidence adduced upon the trial of the cause; and the further finding that, "since the death of said Jerome B. Painter, said surviving partner has so managed the business that he has, in large degree, lost the good will thereof, and has virtually wrecked the said business," has no evidence to sustain it. The ex parte showing made at the appointment of the receiver may have been sufficient, prima facie, to justify the order; but the whole of the evidence adduced at the trial shows that the appointment of the receiver was in fact unjustifiable, or at least that his appointment should not have been continued after the trial. The rule is well settled that the surviving partner being the one in whom the deceased himself reposed confidence, and being in law entitled to the possession and control of the firm assets, control should not be wrested from him, by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of the danger of ultimate loss to the estate of the deceased partner. Walker v. House, 4 Md. Ch. 39-44; High, Rec. § 497; Bates, Partn. §§ 993, 999; 17 Am. & Eng. Enc. Law, p. 115. In view of all the evidence adduced at the trial, the receiver should have been discharged by the court. I think the judgment and the order denying a new trial should be reversed, and a new trial granted, to be conducted in accordance with the principles stated in this opinion.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the order denying a new trial be reversed, and a new trial granted, to be conducted in accordance with the principles stated in this opinion.

102 Cal. 520

REID v. ROBRECHT. (No. 15,314.)

(Supreme Court of California. May 26, 1894.)

BANKRUPTCY—SALE OF ASSETS—NOTICE—QUIETING TITLE.

1. Under 18 Stat. p. 178, § 4, providing that all sales of property of a bankrupt shall be at public auction (unless otherwise ordered by the court), after notice of time and place of sale, a private sale of land by an assignee, without notice, and not ordered by the court, is void.

2. In an action to quiet title, the testimony of one that plaintiff placed the property in charge of his firm six days prior to the suit, to rent and collect the rents for him, and that thereafter his firm paid plaintiff some money received from the rent, is insufficient to support a finding that plaintiff was in possession.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by George W. Reid against Anton Robrecht. From a judgment for plaintiff, defendant appeals. Reversed.

Edward R. Taylor, for appellant. Schrivner & Schell and Horace Hawes, for respondent.

PER CURIAM. Action to quiet title to certain property in San Francisco. The plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial.

In 1874 one P. F. Cusick became the owner of and invested with the legal title to, the property in question. Prior to July 30, 1878, Cusick and his wife filed a declaration of homestead upon said property, and on July 30th he went into bankruptcy, and on August 12th was adjudged a bankrupt, and an assignee was appointed, to whom the register executed an assignment of the bankrupt's effects on September 2, 1878. This assignment was not recorded in the recorder's office of the city and county within six months, as required by the bankrupt act, nor until April 23, 1885, nor in the office of the clerk of the district court until April 22, 1885. On the 6th of April, 1885, the assignee, in consideration of the sum of $50, conveyed the premises in question to the plaintiff, which conveyance was recorded April 23, 1885. Defendant's answer denied plaintiff's ownership and possession, and alleged that in 1881 Cusick and wife executed a mortgage to him upon the same premises to secure their joint and several promissory note for $5,100, that the mortgage was duly recorded the same day; that in March, 1885, he obtained a decree of foreclosure of said mortgage, and that at the sale of the premises under said decree he became the purchaser, and, no redemption having been made, in due time received a deed from the sheriff therefor, and that notice of the pendency of the action was duly recorded June 30, 1884, at the time the action was commenced. Upon the trial the plaintiff put in evidence the title of Cusick, and the proceedings in bankruptcy down to and including the assignment by the register to the assignee, and then offered in evidence the deed from the assignee to the plaintiff, to the admission of which defendant objected. It was not shown by recitals in the deed, or otherwise, that the assignee had any authority to make the sale or conveyance. The act of June 22, 1874 (18 Stat. p. 178, § 4), provided that all sales of the property of a bankrupt shall be at public auction (unless otherwise ordered by the court), after three weeks' notice of the time and place of sale, given in such paper as should be determined by the judge to be best calculated to give general notice of the sale. No order was made by the judge directing a sale, nor designating the paper in which notice of the sale should be given, nor was any notice of the sale shown to have been given. When a sale is made under a power given by statute, all the requirements of such statute, so far as they are conditions precedent to the operation of the power to vest the estate, must appear to have been complied with. A sale, therefore, by the assignee of the bankrupt at private sale and without notice is absolutely void. The deed offered in evidence did not recite the performance of any of the acts required by the statute to precede the sale, nor were such facts otherwise shown, or offered to be shown. Plaintiff, therefore, acquired no title to the premises by the deed, and the court erred in receiving it in evidence.

The plaintiff called as a witness Mr. Bovee, who testified that he was a member of the firm of Bovee, Toy & Co., real-estate agents; that on the 1st day of July, 1885, the plaintiff came to them, and put the property in their charge, to let the premises and collect the rents, and that rents were collected and paid over to plaintiff. Upon cross-examination, the witness admitted that he had no personal knowledge that the premises were leased by them to the tenants, nor that the tenants paid the rent, but was so informed by the collector and bookkeeper, and that he had seen accounts and checks to the effect that it had been paid to plaintiff; that he did not know any of the tenants personally, nor had he any personal interview with them that he knew of. Upon objection being made by counsel for defendant, the court said: "I think they are entitled to this much of the testimony to remain in the record anyway: that is, to the effect that Mr. Reid went to the firm of Bovee, Toy & Co. for the purpose of getting them to lease or rent this property for him, and Bovee, Toy & Co. paid him the rent for it. I think that is sufficiently shown as the knowledge of the witness. I shall allow that portion I have stated to remain. The other portion in relation to the tenants being there I shall order stricken out." Plaintiff thereupon rested, and defendant moved for a nonsuit which was denied. The defendant introduced evidence tending to support his answer, and the court found all the issues in favor of the plaintiff, and it is assigned as error that the evidence does not support the findings. The finding that, at the commencement of the action, the plaintiff was the owner and in possession of the premises in controversy cannot be sustained. The sale and conveyance under which the plaintiff claims is, as we have seen, absolutely void. He could not, therefore, recover upon the strength of his title alone, though under the statute he might do so, if his title were good, even if he were not in possession. He contends, however, that he is in possession, and that possession is sufficient evidence of title to enable him to maintain this action against the defendant who has no title. Whether possession of lands the title to which has passed from the government, and become vested in a private owner, is sufficient to authorize such possessor to maintain an action to quiet title, where such possession has not by its character and lapse of time created a title in the possessor, need not be considered, as no possession was shown in the plaintiff at the commencement of this action. The complaint was filed July 7, 1885, six days after the plaintiff went to Bovee, Toy & Co. and requested them to rent the property and collect the rents for him. The testimony of Mr. Bovee simply shows that, at some time thereafter, money was paid over to the plaintiff as moneys received from rents of the property, but when such payments were made does not appear. Conceding all that may be properly claimed from this testimony, it only shows that, six days prior to the commencement of the action, the plaintiff claimed ownership of the property, and a consequent right to rent it, and does not show possession. The finding of title and possession in the plaintiff is therefore not sustained by the evidence. Judgment and order reversed.

HARRISON, J., being disqualified, did not participate.

102 Cal. 666

STEELE et al. v. MARSICANO. (No. 15,425.)

(Supreme Court of California. June 9, 1894.)

ACTION FOR CONVERSION—EVIDENCE.

A broker, having arranged with defendant's fruit-packing company, without his knowledge, to store with it a quantity of sugar, purchased the sugar from plaintiffs, in defendant's name, and had it sent to the packing establishment, the drayman taking a receipt in the name of defendant's company. Defendant, on learning that the sugar was on the premises, had the broker remove it, and, on receiving a bill for it, notified plaintiffs that he did not make the purchase. *Held*, that defendant was not liable as for conversion of the sugar.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by one Steele and others against one Marsicano for conversion of sugar. Judgment for plaintiffs and defendant appeals. Reversed.

John J. Roache, for appellant. Garber, Boalt & Bishop, for respondents.

HARRISON, J. The defendant carries on the business of packing fruit at a warehouse on Battery street, in San Francisco, under the name of Overland Packing Company, and is also the president of the American Salt Company, and has his office or headquarters at the office of that corporation, on Sacramento street, in that city. On March 19, 1892, a man named Laton visited the office of the salt company, and inquired for the defendant, saying that he wished to store some sugar with him at his place on Sacramento street. The defendant was absent from San Francisco, and the clerk in charge told him that they had no room; and, on his inquiring whether he could store it with the Overland Packing Company for a few days, the clerk, at his request, knowing that he was acquainted with defendant, telephoned the inquiry to that place, and received an affirmative reply. Laton then visited the Overland Packing Company's place, and, upon seeing where the sugar was to be stored, said he would send it up. He then went to the office of the plaintiffs, representing himself to be a broker for the defendant, and negotiated the purchase in his name of 21 tons of sugar, and directed that it be delivered to the Overland Packing Company. The plaintiffs employed their own drayman for that purpose, and when he reached the packing company's place, on Battery street, the foreman of that place, and one of his men, took it on the trucks and ran it into the building; and a receipt for its delivery was given to the drayman, in the name of the Overland Packing Company. The sugar was delivered on the 22d of March, but the defendant did not learn of its delivery until two days thereafter, when he immediately directed his foreman to tell Laton to take the sugar away, which he did, and Laton removed the sugar the next day. On the Monday following, which was collection day, the defendant received from the plaintiffs a statement of his account or purchase of the sugar, and immediately visited the office of the plaintiffs, and denied having made such purchase. The record does not show whether the plaintiffs made any explanation of the transaction with Laton, or what steps they took to investigate the transaction; but they seem to have become satisfied that the purchase of the sugar had not been authorized by the defendant, as, instead of bringing an action against the defendant for its value, they made a formal demand upon him, about two weeks later, for its redelivery, and then brought this action, charging him with the conversion of the sugar. Judgment was rendered in the court below in favor of the plaintiffs, and the defendant has appealed.

In order to charge the defendant with the conversion of the plaintiffs' goods, he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiffs' right of ownership, or in repudiation of such right. A simple act of intermeddling with another's property, which does not imply any assertion of title or dominion over the property, and which is done in ignorance of the owner's claim thereto, and without any intention to deprive him of it, will not constitute a conversion. If I find a horse in my lot, I am not guilty of its conversion if I turn it into the highway. Nor is the warehouseman, who receives goods from a wrongdoer, and afterwards redelivers them to him, in ignorance of the claim of another, guilty of their conversion. Conversion is a tort, and, to establish it, there must be a tortious act. "If a bailee have the temporary possession of property, holding the same as the property of the bailor, and asserting no title in himself, and in good faith, in fulfillment of the terms of the bailment, either as expressed by the parties or implied by law, restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty." Nelson v. Iverson, 17 Ala. 216. See, also, Burditt v. Hunt, 25 Me. 422. In Parker v. Lomard, 100 Mass. 408, where the defendant took possession of a warehouse in which there was certain cotton belonging to the plaintiff, but which the defendant, upon information to that effect received from his predecessor, entered upon his books as belonging to another, to whom he subsequently delivered it, it was held that he was not liable for its conversion. In Hill v. Hayes, 38 Conn. 532, some stolen money had been delivered to the defendant by the thief, to be kept for him. The defendant had no knowledge that the money had been stolen, and in a few days gave it to a third party, to be redelivered to her bailor; but it was held that she was not guilty of conversion. See, also, Frome v. Dennis, 45 N. J. Law, 515; Loring v. Mulcahy, 3 Allen, 575; Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389. A demand of the property, and a refusal to redeliver it, do not, of themselves, constitute conversion. They are merely evidence from which a conversion may be established, and, as evidence, may be repelled by proof that a compliance was impossible. Hill v. Covell, 1 N. Y. 522. A refusal is not evidence of conversion, unless the party had it in his power at the time to deliver up the goods. Kelsey v. Griswold, 6 Barb. 436. In order to establish the conversion by mere proof of the demand and refusal, the plaintiff must also show the ability of the defendant to comply with the demand at the time it is made. Whitney v. Slauson, 30 Barb. 276; Johnson v. Couillard, 4 Allen, 446.

Under these principles the judgment against the defendant cannot be sustained. As Laton had no authority to negotiate a purchase of the sugar for the defendant, the plaintiffs do not rely upon his pretended agency, but seek to charge the defendant with its conversion by reason of the acts done by himself; claiming that the delivery of the sugar to the defendant, and his subsequent refusal to redeliver it upon their demand, constitute such conversion. But the delivery of the sugar to the defendant was not the result of any act or authority on his part. It was delivered there at the instance of Laton, and must be considered as a delivery to Laton. As Laton had no authority to bind the defendant, his direction to the plaintiffs to deliver the sugar at the defendant's place of business, and their delivery in pursuance thereof, cannot create any obligations against the defendant in reference to the sugar. The taking of a receipt in the name of the Overland Packing Company is immaterial. It did not establish any relation of contract between the plaintiffs and the defendant; for it was shown by the plaintiffs that this delivery was made at the instance of Laton, and there was nothing in the receipt which indicated that the delivery was made in pursuance of a purchase on behalf of the defendant. The receipt was only a voucher to Laton that the plaintiffs had followed his direction, and had the same effect as though the sugar had been placed on board a vessel for transportation, or in some other warehouse, for which a drayman's receipt was given. It could not place the defendant under any obligation to the plaintiffs, for at the time of its delivery there was no statement on the part of the plaintiffs of the purpose with which it was brought to his place, and the defendant was justified in supposing that it was the sugar which Laton had requested might be placed there for a few days. The defendant must be considered as having received the sugar from Laton, and as his bailee. Before the defendant had any knowledge of the relation of the plaintiffs to the sugar, Laton had removed it from the defendant's packing house, at the direction of the defendant. This direction, and the removal, instead of being the exercise of any dominion or control over the sugar by the defendant, was for the purpose of avoiding its control, and freeing himself from any connection with it. It was restoring the sugar into the hands and under the control of the party by whom it had been placed upon his property, and was the reverse of assuming any dominion or claim to it. When, subsequently, the defendant visited the plaintiffs' place of business, in response to the bill for the sugar which they had sent him, and disclaimed the purchase, the plaintiffs do not seem to have acquainted him with the facts of the transaction, and did not question his declaration that he had not made the purchase until some two weeks later, when they made a formal demand for its redelivery. As, at this time, it was not in his power to comply with the demand, his refusal did not constitute a conversion; and as none of the previous acts done by him with reference to the sugar had been in the assertion of any dominion over it, or with any knowledge of the plaintiffs' rights, or from which any repudiation of their rights could be implied, he cannot be charged with the conversion. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

102 Cal. 663

BUTLER v. ASHWORTH et al. (No. 15,396.)

(Supreme Court of California. June 9, 1894.)

MUNICIPAL CORPORATIONS—LIABILITY OF OFFICERS—NEGLIGENCE.

1. The superintendent of streets of a city is liable for any damages resulting from his negligence in repairing a sewer, notwithstanding his official capacity.

2. If the cost of making the repairs of a sewer exceeded $100, the superintendent of streets had no jurisdiction to do the work (St. 1877–78, p. 544), and would be liable for damages unless he did it skillfully and diligently.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Butler against Ashworth and another for damages for negligence in repairing a sewer. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. B. Merrill, for appellants. Humphrey & Welch (W. C. Burnett and L. G. Burnett, of counsel), for respondent.

HARRISON, J. The plaintiff brought this action against the defendants to recover damages caused by them in repairing a sewer in Tenth street. The defendant Ashworth was superintendent of public streets and highways in San Francisco, and his codefendant was his deputy, under whose direction the work was done. The complaint alleges that in January, 1888, a break occurred in the sewer in Tenth street, near Bryant, and that the defendants undertook to repair it, and did the work in such a negligent and unskillful manner as to prevent the flow of sewage through the sewer, and cause it to flow back, and be discharged into her house through a private sewer connecting her house with the public sewer, from which she suffered the damage complained of. The defendants, in their answer, denied that the damage sustained by the plaintiff was caused by any of their acts, and alleged that the acts done by them were done in their official capacity; and that they performed said work of repairing the sewer in a skillful and workmanlike manner. The jury rendered a verdict in favor of the plaintiff for the sum of $800, and from the judgment entered thereon, and an order denying a new trial, the defendants have appealed.

Upon the issue whether the damage sustained by the plaintiff was caused by the acts of the defendants, the evidence before the jury was conflicting, and their verdict in her favor must be accepted as determinative of that question. There was also a great deal of evidence presented to the jury by both parties for the purpose of showing the manner in which the work of repairing the sewer was done by the defendants, and from the character of this evidence we cannot say that the jury was not justified in finding that the work was done in an unskillful and unworkmanlike manner. The jury were instructed by the court that, if they were satisfied from a preponderance of the evidence in the case that the defendants performed their duty in a negligent and unskillful or unworkmanlike manner, and that the injuries sustained by the plaintiff were directly caused by such negligence, she was entitled to recover, but that, if they were not satisfied that the defendants performed said work in a negligent or unskillful manner, or that, if they did so perform the work, the injuries alleged were not directly or proximately caused thereby, she was not entitled to recover. The denial of a new trial shows that in the opinion of the judge, who heard the evidence and saw the witnesses, the verdict of the jury was correct, and we are not at liberty to disturb this conclusion.

The court instructed the jury that, although it was the duty of the superintendent of streets to attend to the repairing of sewers, yet, if he undertook to make any such repairs, he must do it in a careful and skillful manner, and would be liable for any damages resulting from his negligence in making such repairs; that his claim to have done such work in his official capacity would not relieve him from responsibility for such damage if he did the work in an unskillful or negligent manner. The jury were further instructed that, if the cost of making the repairs exceeded $100, the superintendent had no jurisdiction to do the work, and that the defendants would be liable for the damage sustained by the plaintiff, unless, after they undertook to repair the sewer, they worked skillfully and diligently. The effect of this latter instruction was to place the acts of the superintendent in making the repairs on the same footing, in the contingency supposed, as any other person making the repairs. The instruction was given in view of the act of March 27, 1878 (St. 1877–78, p. 544), by which the superintendent is given authority, in cases of urgent necessity, to repair any of the public streets or sewers, either by contract or otherwise, provided that the repairs between two main streets shall not exceed $100. In the absence of this statute the superintendent would have no authority to make the repairs, and, if he would justify his acts, he must bring himself within the terms by which the authority is given. The instruction itself is in harmony with those previously given, in which the rights and liabilities of the superintendent are defined, as the jury were merely told by this the conditions under which the defendants could invoke their claim to protection by reason of their official character. The objection that there was no evidence by which the jury could determine whether the cost of the repairs exceeded $100 is unavailing. There was abundant evidence before the jury of the amount of labor required in making the repairs, and it was not necessary that there should be any evidence of the exact amount paid for that labor. The jury could determine from their own experience whether it would exceed $100 or not. Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625. We find no error in the record, and the judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

102 Cal. 595

REDMOND v. PETERSON et al. (No. 15,461.)

(Supreme Court of California. June 2, 1894.)

ACTIONS AGAINST INSANE PERSONS—APPEARANCE BY GUARDIAN—PLEADING—AMENDMENT.

1. A judgment against an incompetent person, rendered in an action wherein his general guardian appeared for him, is binding, though no summons was served upon such incompetent.

2. Where one appears and answers an amended complaint, he is bound by the judgment thereon, though such amended complaint was filed without leave.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by James Redmond against Hannah J. Peterson and others to foreclose a mortgage. From a judgment for plaintiff and a cross complainant, and an order denying a new trial, defendants appeal. Affirmed.

Edward A. Holman and Fred V. Wood, for appellants. M. C. Barney, R. E. Ragland, Shadburne & Herrin, Chas. J. Heggerty, and Wm. M. Madden, for respondent.

PER CURIAM. Appeal from a judgment against said incompetent, Hannah J. Peterson, in favor of the plaintiff, and from a judgment in favor of the defendant Liberty S. Henderyckx, as executor of R. S. Henderyckx, upon his cross complaint, against said Peterson, and also from an order denying the motion of said Peterson, by her guardian, to set aside said judgments. The action was brought by the plaintiff to foreclose a mortgage executed by R. S. Henderyckx (since deceased) to Hannah J. Peterson, to secure a promissory note made by the mortgagor to the mortgagee, and which note and mortgage were afterwards assigned to the plaintiff. Afterwards said Peterson purchased the mortgaged premises from Henderyckx, and executed a mortgage thereon to him to secure a part of the purchase money. After these transactions, and prior to the commencement of this suit, defendant Peterson was adjudged, by the superior court, "to be a person of unsound mind and an incompetent," and the defendant Gottshall was appointed the guardian of her person and estate. This action was brought by the plaintiff against "Louis Gottshall, guardian of the estate and person of Hannah J. Peterson, an incompetent, and Liberty S. Henderyckx, executor of the estate of R. S. Henderyckx, deceased," said Peterson not being made a party. Gottshall demurred, upon the ground that the complaint did not state a cause of action against him as guardian. Thereupon, without any ruling upon the demurrer or order of court bringing in a new party, the plaintiff amended his complaint, and made the incompetent a party. To this complaint Gottshall and Peterson filed a general demurrer, which was overruled by the court, and said defendants answered. The executor of Henderyckx answered, and also filed a cross complaint against Peterson to foreclose the junior mortgage, and Gottshall and Peterson answered the cross complaint. Findings and judgment went against Peterson both upon the complaint and cross complaint, the judgment being entered May 26, 1892.

On May 22, 1893, pursuant to notice previously given, the attorney for Gottshall and Peterson moved the court to set aside the said judgment, upon the following grounds: "(1) That said purported amended complaint was filed herein without the leave or order of this court; (2) that said purported amended complaint does not constitute an amended complaint in this action; (3) that said Hannah J. Peterson, an incompetent, was never made a party to this action by any order of this court or otherwise; and (4) that said purported amended complaint does not constitute a cause of action as to said Hannah J. Peterson, an incompetent." This motion was overruled, and a bill of exceptions taken, in which the grounds of the motion above recited are set out, and the statement is also made that, "in support of said motion, said defendant introduced in evidence the papers, files, records, and proceedings in this action," and an affidavit that no order was made or entered permitting the plaintiff to file an amended complaint, or to make said Peterson a party, and that said amended complaint was filed and said Peterson made a party without any order or leave of the court. Said motion was denied. None of the "papers, files, records, and proceedings" in the action are set out in the bill of exceptions, and no other evidence for or against the motion was given except the affidavit above mentioned. Neither the findings nor the judgment recite or allude to the service of process upon any of the defendants, but both state that the defendants appeared by their respective attorneys, naming the attorneys of each. That no cause of action existed against the guardian, from whom alone a recovery was sought in the original complaint, there is no question whatever. He was neither a necessary nor a proper party to the action. In Emeric v. Alvarado, 64 Cal. 593, 2 Pac. 418, in speaking of infants, the court said: "The guardian is to appear for them, and is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance." That no order was made permitting or directing a new party to be brought in, and the complaint amended by adding the sole party liable, is sufficiently clear upon the record. Nor does it appear from the record that any process was served upon the incompetent, either before or after the amended complaint was filed, but it does appear that Peterson, the incompetent person, appeared by attorney, and jointly with her guardian filed an answer to the amended complaint.

Under the foregoing facts, the question is, did the court have jurisdiction over the defendant Peterson, who was alleged in the complaint and found by the court to have been "a person of unsound mind and incompetent"? And the solution of this question depends solely upon the fact as to whether or not a general guardian of an incompetent or infant defendant has the power to appear in an action without service of summons upon the ward. It has been held by this court in several cases that the appointment and appearance of guardians ad litem, without a personal service of summons upon the incompetent, was void. Gray v. Palmer, 9 Cal. 638; Johnston v. Savings Union, 63 Cal. 554; McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943. It is very apparent in these cases that such of necessity must be the law, for the court has no authority to appoint a guardian ad litem until the personal service upon the infant or incompetent has first been made. But the rule in this state as to general guardians is not in line with the foregoing cases. In Smith v. McDonald, 42 Cal. 484, it is declared a rule of property that a general guardian has the power to waive a personal service upon the ward in the following explicit terms: "Under such circumstances, it has risen to the importance of a rule of property, and even though it were conclusively shown to have been, as an exposition of the statute it attempted to construe, incorrect at the outset, I think it nevertheless our duty to maintain it now, and not permit it to be disturbed. If its operation for eight years in practice has shown it to have unnecessarily facilitated the despoliation of the estate of infants, it certainly is not for us to abrogate it for such a reason." The doctrine here enunciated has been followed in various cases since that time; and if, when Smith v. McDonald was decided, the principle had then become a rule of property, it is certainly impregnable to attack at the present day. Its overthrow would result in disaster and ruin to many innocent holders of real estate who have purchased upon their counsel's advice that such was the law. Having arrived at the foregoing conclusion, the case presents itself exactly as though a party were here attacking a judgment rendered against him by a court having jurisdiction of the subject-matter of the action, where he had voluntarily appeared, filed an answer to the merits of the complaint, and gone to trial upon the issues made by his pleading. We do not see how the fact that he was brought into the action by an amended complaint, rather than by the original, is now material; nor is it material that the first defendant sued was wrongly sued, and that he (the incompetent) alone was the only proper party to the action. It is sufficient to say to all his present complaints in this direction that he voluntarily came into court, and submitted himself to its jurisdiction for all purposes. A judgment rendered against him under these circumstances is beyond all doubt binding, and in full force and effect, as far as any question of personal jurisdiction is concerned. The judgments and order appealed from are affirmed.

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102 Cal. 658

NICHOL v. LAUMEISTER. (No. 15,370.)

(Supreme Court of California. June 8, 1894.)

INSTRUCTIONS—BURDEN OF PROOF—EVIDENCE.

1. A verdict based on conflicting evidence will not be disturbed on appeal.

2. In an action against a sheriff for the wrongful taking of property under execution, an instruction, concerning the burden of proof, that plaintiff must prove the affirmative issues tendered by his complaint by a preponderance of evidence, is sufficient when no further instruction is requested.

3. The refusal of a request to instruct is not error where the court of its own motion gives an instruction fully covering the one requested.

4. The admission of a writ of attachment, and the sheriff's return thereon, in a certain case between plaintiff and his vendor, and a memorandum furnished by the garnishee, are admissible in connection with a cross-examination of such garnishee when they tend to contradict statements made by him on direct examination.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Frederick D. Nichol against Charles S. Laumeister. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Wal. J. Tuska and R. H. Taylor, for appellant. Dorn & Dorn (E. S. Heller and Geo. T. Wright, of counsel), for respondent.

BELCHER, C. This is an action to recover damages for the conversion of certain personal property, constituting the stock and fixtures of a restaurant in the city of San Francisco. At the time of the alleged conversion, defendant was the sheriff of the city and county of San Francisco, and took the said property under a writ of attachment issued in an action commenced against J. P. Dockery by one of his creditors, and subsequently sold the same under a writ of execution. The plaintiff claimed ownership of the property under and by virtue of a bill of sale thereof made to him by J. P. Dockery, the then owner, on September 14, 1890, and certain acts of possession thereafter; and the defendant justified the taking upon the ground that the sale was void as to the attaching creditor, because (1) the bill of sale was made by Dockery and accepted by the plaintiff with intent to hinder, delay, and defraud his (Dockery's) creditors; and (2) the transfer was not accompanied by such an immediate delivery and followed by such actual and continued change of possession as were required by law. The case was tried before a jury, and the verdict and judgment were in favor of defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order denying his motion.

1. The point that the evidence was insufficient to justify the verdict cannot be sustained. It would subserve no useful purpose to state the facts, but, in our opinion, the evidence on the part of the defendant was amply sufficient to show that the transfer was made with intent to hinder, delay, and defraud the creditors of Dockery, and was at the time known to be so made by both of the parties to the transaction, and also that the transfer was not accompanied by a sufficient change of possession. It is true there was a sharp conflict in the evidence in regard to this matter, and, as the court remarked, there were "undoubtedly some unblushing falsehoods uttered on the stand here on the part of either the witnesses for the plaintiff or for the defendant." But the question as to which witnesses told the truth was for the jury, and its determination of the question cannot be disturbed on appeal.

2. We see no material error in the rulings upon the admission of evidence. The writ of attachment in the case of Nichol v. Dockery and the sheriff's return thereon, with the memorandum furnished by Strause, gar-

nishee, were properly admitted in evidence in connection with Strause's cross-examination. They tended to show that some of the statements made by the witness on his direct examination were not true. The other papers in the case were irrelevant, and were properly excluded.

3. The instructions given to the jury as to the burden of proof stated the law correctly, so far as they went. They were: "In civil cases, and this is a civil case, the affirmative of the issue must be proven, and, where the evidence is contradictory, the decision must be according to the preponderance of the evidence. In this case the burden of proof is upon the plaintiff, so far as the issues tendered in his complaint are concerned, and, if such issues have not been established by a preponderance of evidence, then it will be your duty to find a verdict in favor of the defendant." If the plaintiff desired further instructions as to the burden of proof upon the issues raised by the answer he should have asked for them, and, having failed to do so, he cannot now be heard to complain.

Instruction No. 2, asked by the plaintiff, was properly refused. It related to change of possession, and upon that subject the court of its own motion charged the jury fully and fairly. Instruction No. 5, asked by the plaintiff, was properly modified by the court. As modified and given, it stated the law correctly. The instructions given by the court are quite lengthy, and must be read together as a whole. When so read, they appear to cover the whole case, and to state correctly the law applicable thereto. The record discloses no ground for reversal, and the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(102 Cal. 651)

HAWLEY v. LIVERPOOL & LONDON & GLOBE INS. CO. (No. 15,448.)

(Supreme Court of California. June 8, 1894.)

FIRE INSURANCE—IMMATERIAL MISSTATEMENT BY INSURED—TITLE OF PROPERTY.

1. An insurance policy provided that, if the insured misrepresented any material fact concerning the insurance, it should be void. A former policy on the property had been canceled because the company issuing it was going out of business. Plaintiff represented that no former policy had been canceled. *Held*, that the misrepresentation was not material.

2. The policy also provided that it should be void unless the insured was, at the date of the policy, the owner in fee simple of the land on which the building stood. Before the policy was issued, plaintiff gave a deed of the property, as a mortgage, and the policy stated that the property was mortgaged. *Held*, that plaintiff was the owner in fee simple.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Nancy Hawley against the Liverpool & London & Globe Insurance Company on a fire insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

Buck & Cutler, for appellant. J. F. Coonan and Denver Sevier, for respondent.

McFARLAND, J. This is an appeal by defendant, an insurance company, from a judgment recovered by plaintiff upon a fire insurance policy made by defendant to plaintiff, and from an order denying a new trial. There are only two points made by appellant which require notice:

The policy provided that it should be void "if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning said insurance, or the subject thereof." In the written application for the policy appear the following question and answer: "Has any company canceled or refused a policy on the property? No." This answer was not true, as another company had canceled a policy on the property, and appellant contends that the falsity of the answer vitiated the policy. The application was made by an agent of respondent, who testified that the question was never asked him, nor answered by him, and that he knew of the cancellation of a certain policy, and would have told of it if he had been asked. But, waiving that matter, the fact was that the canceled policy was one issued and canceled by the Alta Fire Insurance Company, and that "the reason of the policy being canceled was that the Alta Fire Insurance Company was retiring from business, and they wished to clear up everything." The cancellation of the Alta policy, therefore, was for no reason that could have influenced the appellant in granting or refusing the policy sued on, and the alleged misrepresentation was in no sense material.

It is also contended that the plaintiff was not, at the time of the issuance of the policy, the owner of the land on which the insured buildings stood, and that, therefore, she cannot recover, because the policy provides that it shall be void if the interest of the insured in the property was other than that of sole and unconditional ownership, and "if the subject of insurance be a building on ground not owned by the insured in fee simple." We do not think the position tenable. The facts on this point are that, for many years prior to the issuance of the policy, respondent had been the owner in fee and in possession of the land; that she was then in possession of it; and that she was then also the owner in fee, unless a change in the title had been effected by certain transactions which she had with one T. Needs about a year before the making of the policy. Needs had held mortgages on the land executed by respondent, and, as they were about to outlaw he had brought a suit to foreclose them. The suit was brought because the time to sue was about to expire, and because, as Needs testified, "it was in the winter time, and we could not get any letters to her," and not because he wanted to harass respondent. He said, "It had been a hard winter, and I didn't want to take the property away from the lady." Afterwards, on October 11, 1890, the suit was withdrawn, and the mortgages canceled; and respondent executed a deed to Needs, which, upon its face, purported to convey to him an absolute title to the land. But it is clear that this deed was intended as a mortgage to secure the debt that had been secured by the former mortgages, and the jury was warranted in so finding. The only possible objection to such a finding lies in the fact that, on the day the deed was executed, Needs gave to respondent a writing which was, in form, an agreement to convey the land to respondent upon the payment to him within a year of a certain sum of money that was the amount of the debt which she owed him and interest. It is contended that this writing absolutely precluded the jury from finding that the title to the land did not pass from respondent to Needs, no matter what the other evidence upon the subject was. But we do not think so. The question is, was the deed from respondent to Needs intended by the parties thereto to be a mortgage? Upon this question, parol evidence was admissible; and such evidence, introduced at the trial, abundantly shows that such was the intention of the parties. And, this being so, the mere form in which the instrument acknowledging that intention was put is not controlling, and appellant was not deceived in the matter. In the application for the policy appears the following: "Is property incumbered by mortgage or otherwise? (Answer) Yes." It was thus put upon inquiry as to the nature, amount, and form of the mortgage. The policy was issued on September 11, 1891; and the condition of the title was then just the same as it had been since the date of the said deed, and continued to be the same until the time of the fire. The authorities cited by counsel to the effect that there must be an indebtedness to constitute a mortgage are not in point, for there was here sufficient evidence to warrant the jury in finding that there was an indebtedness. McCormick v. Springfield, etc., Ins. Co., 66 Cal. 361, and McCormick v. Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003, are not in point. In those cases the insured represented themselves as the owners of certain manilla paper, which was the subject of the policy, when they were not such owners, but merely held stock in a corporation which did own it, and were engaged in selling the paper on commission; and the policy provided that the insured should be the sole and unconditional owners, or that their interest in the property should be truly stated. Other specific points made by appellant are involved in the above propositions, and they need not be specially noticed. We see no error for which the judgment should be reversed. Judgment and order affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.

(102 Cal. 661)

PEOPLE v. HOLLADAY et al. (No. 15,379.)

(Supreme Court of California. June 8, 1894.)

ADVERSE POSSESSION—LAND DEDICATED TO PUBLIC USE—RES JUDICATA—ACTION ON BEHALF OF STATE.

1. Act Cong. July 1, 1864 (13 Stat. 332), grants to the municipality of San Francisco all the rights and title of the United States in a certain public square known as "Lafayette Park," within the city limits as fixed by act of the legislature of 1851, "for the uses specified in the ordinance of said city, ratified by an act of the legislature" approved March 11, 1858. The ordinance referred to was passed in 1855, and provided for the location of Lafayette park. Defendant was in actual possession of the land in question, January 1, 1855, and so continued till after March 11, 1858. *Held*, that the land having been dedicated to the public by the act of the legislature of 1858, which dedication was confirmed by the act of congress of 1864, making it operative on the legal title in the government as well as on such title as the city held prior thereto, the defendant never acquired any title by possession. 29 Pac. 54, affirmed.

2. The city and county of San Francisco being a municipal corporation, endowed with full power and jurisdiction over the public parks within its territory, a suit prosecuted by such city, wherein it claims legal title to land as part of a public park and as trustee of the people of the state, is a bar to any subsequent action by the people of the state for the same land. 29 Pac. 54, affirmed.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the people against Holladay and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Hart (Craig & Meredith and William Matthews, of counsel), for the People. S. W. and E. B. Holladay and Mastick, Belcher & Mastick, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial. The litigation is about the ownership of a piece of land in the city of San Francisco, which respondents claim to own, and which, according to appellant's contention, was dedicated to public use as a park. The litigation has been in progress, under various forms, for over 30 years, and has generally resulted favorably to respondents herein. This present case was here before on an appeal by the present respondents, and the decision on that appeal is to be found in 93 Cal. 243, 29 Pac. 54. By that decision it was definitely determined, and it has become the law of the case, that the present respondents are the owners of the undivided nineteen-twentieths of the land in contest; but an order of the lower court, granting a new trial, was affirmed because the judgment erroneously included the other twentieth, which was not involved in the action. When the remittitur went down, the defendants (respondents herein) filed a supplemental answer, which put the said one-twentieth in the same category with the other nineteen-twentieths, so that the said decision on the former appeal applied to the whole of the property. On the present appeal there are no new points made which require notice. In the opinion of the court on the former appeal, delivered by Mr. Justice De Haven, the points upon which the case turns were fully discussed, and it would be useless to restate here the views there expressed. For the reasons given in that opinion, the judgment and order must be affirmed. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(102 Cal. 656)

Ex parte ORFORD. (No. 21,131.)

(Supreme Court of California. June 8, 1894.)

Claim against Decedent's Estate — Order Directing Payment—Effect of Appeal — Bond of Administratrix.

1. The right of appeal given by Code Civ. Proc. § 963, from an order of the superior court directing the payment of a claim against an estate, is independent of the amount involved.

2. Pending an appeal from an order of the superior court directing an administratrix to pay a claim allowed by it, she is not guilty of contempt in refusing to comply with the order.

3. The official bond of an administratrix operates as an appeal bond in probate proceedings, and also stays proceedings upon the order appealed from (Code Civ. Proc. § 965), without an order of the court to that effect.

Department 2.

Application by Mary Orford for writ of habeas corpus. Writ allowed.

Thos. F. Barry, for appellant. J. B. Reinstein, for respondent.

PER CURIAM. The petitioner is administratrix of an estate in probate. As such she was ordered by the superior court, in which the administration was pending, to pay a claim allowed on account of expenses of the last illness of her intestate. From this order she took an appeal to this court. Notwithstanding her appeal, she was cited by the superior court to show cause why she should not be punished for a contempt of its authority in failing or refusing to pay said claim. After a hearing, she was found guilty of the contempt charged, and sentenced to be imprisoned until she should make the payment as directed. Upon being taken into custody, she sued out this writ to test the legality of the imprisonment.

We are of the opinion that the imprisonment is illegal. This court has appellate jurisdiction in "all such probate matters as may be provided by law." Const. art. 6, § 4. By section 963, Code Civ. Proc., an appeal may be taken from an order directing the payment of a debt or claim. The statute makes no limitation as to the amount of the debt or claim, and the fact that the claim in question here is less than $300 does not impair the right of appeal. And the failure of petitioner to file an appeal bond does not render her appeal ineffectual. Her bond as administratrix stands in place of an undertaking on appeal, not only for the purpose of perfecting the appeal, but also to stay proceedings upon the order appealed from. Code Civ. Proc., § 965; In re Sharp, 92 Cal. 579, 28 Pac. 783.

It is contended that the official bond of an administratrix does not operate as an undertaking on appeal unless an order is made pursuant to section 946, Code Civ. Proc., dispensing with other security. But section 946 applies to cases in which the executor, administrator, or guardian is party plaintiff or defendant in an action, and appeals from a judgment or order in such action; while section 965 applies to appeals from judgments and orders made in the probate proceedings. In such a case the law dispenses with an undertaking on appeal, for the reasons mentioned in the opinion of this court in Re Sharp, supra. The prisoner, having appealed and stayed all proceedings upon the order which she is charged with violating, cannot, pending her appeal, be punished for a failure to obey it. Prisoner discharged.

(102 Cal. 615)

DYERVILLE MANUF'G CO. v. HELLER et al. (No. 15,330.)

(Supreme Court of California. June 5, 1894.)

Modification of Decree —Application for Relief.

A decree entered in excess of a stipulation therefor, through fraud of plaintiff's attorneys, cannot be corrected after six months; Code Civ. Proc. § 473, providing that application to correct a judgment entered through inadvertence or mistake must be made within six months.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Dyerville Manufacturing Company against Martin Heller and others for an injunction. There was a decree for plaintiff upon a stipulation. Thereafter an order was entered modifying the decree, from which order plaintiff appeals. Reversed.

Edmund Tauszky, for appellant. Rothchild & Ach, for respondents.

FITZGERALD, J. Appeal from an order modifying the judgment given for plaintiff in the above-entitled cause. The action was for an injunction to restrain the defendants from infringing its trade-mark, and for damages. The judgment, which was entered upon a stipulation between the parties, was filed August 7, 1891, and entered April 26, 1892. The proceedings for the modification thereof were instituted December 9, 1892, and the order granting the motion for that purpose was thereafter made, on the ground that "the decree awarded relief in excess of the stipulation and the prayer of the complaint, and had been inadvertently entered." The question to be determined on this appeal involves the power of the court to make the order.

Section 473, Code Civ. Proc., provides, among other things, that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect: provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken." The grounds upon which the application was made were excusable neglect and fraud practiced upon the court by plaintiff's former counsel by procuring the judgment to be given in excess of the stipulation. The grounds upon which the modification was made by the court were that the judgment exceeded the stipulation, and that it had been "inadvertently entered." Under the provisions of the foregoing section, it is clear that the court had no jurisdiction to make the order appealed from, as the proceedings upon which it is based were not commenced until nearly eight months after the judgment was entered. But it is claimed that, as there was matter of record by which the amendment could be made, the court had power to make it, notwithstanding the rule as to time laid down in the section of the Code referred to. This claim, in so far as it applies to clerical misprisions, is undoubtedly correct. But where the judgment is entered as rendered, but rendered in excess of the stipulation, as is claimed to be the case here, such judgment is erroneous, and the error one of law committed at the trial, the remedy for which is either by motion for a new trial or by appeal. Egan v. Egan, 90 Cal. 15, 27 Pac. 22.

It is further claimed that, as the judgment was procured by fraud, practiced by plaintiff's attorney upon the court, the provisions of section 473, Code Civ. Proc., above quoted, do not apply. This point was expressly decided against respondents' claim in the case of Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727. In that case the court, in discussing this question, uses the following language: "The notice of motion was filed and served more than six months after the judgment was entered. As an application under section 473 of the Code of Civil Procedure, it was too late. The application for summary relief by motion must, by the terms of that section, be made within the six months. The application must be made within six months, even though the mistake, inadvertence, surprise, or excusable neglect has been caused or brought about by fraud practiced by the party in whose favor the judgment or proceeding was taken. After that period, the question of 'mistake,' etc. (whatever the remedy in equity), cannot be tried by affidavit." It therefore follows that the order appealed from should be reversed, as the court was without jurisdiction to make it. So ordered.

We concur: DE HAVEN, J.; McFARLAND, J.

102 Cal. 615

FROST v. GRIZZLY BLUFF CREAMERY CO. (No. 15,436.)

(Supreme Court of California. May 28, 1894.)

Appeal—Review of Instructions—Exceptions.

1. Where the record consists merely of the judgment roll and a bill of exceptions to the instructions, error in refusing instructions is no ground for reversal, nor error in instructions given, unless these are incorrect under any conceivable state of facts.

2. A general exception, unless under stipulation, will not lie to the court's instructions given on its own motion.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Benjamin A. Frost against the Grizzly Bluff Creamery Company for damages for maintaining a nuisance. Judgment for plaintiff. Defendant appeals. Affirmed.

Chamberlin & Wheeler and J. N. Gillett, for appellant. J. H. G. Weaver and Frank McGowan, for respondent.

McFARLAND, J. This is an action to recover damages for a nuisance. The jury returned a verdict in the sum of $400, for which amount judgment was rendered for plaintiff. Defendant (a corporation) appeals from the judgment, and brings up the judgment roll, and a bill of exceptions, which merely shows the instructions given and refused, and the exceptions thereto. Nothing else appears. A reversal is asked solely upon alleged errors in giving and refusing instructions. In such a case a judgment will rarely be reversed. All intendments are in favor of sustaining it. If the averments in the complaint in the case at bar are true,—and we must assume them to be true,—the nuisance was a very aggravated one, and the amount of damages allowed was exceedingly small. There was no demurrer to the complaint. Its averments were denied without any point taken as to their legal sufficiency. No objection appears to any evidence offered by respondent. It does not appear what evidence was or was not introduced, and we cannot tell upon what theory the case was tried. Under these circumstances, the alleged error of the court below, in refusing certain instructions asked by appellant, cannot be considered as a ground for reversal. Nelson v. Lemmon, 10 Cal. 49; White v. Abernathy, 3 Cal. 426; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432, and cases there cited. The same may be said of instructions given, unless they "would have been erroneous under any conceivable state of facts." Carpenter v. Ewing, supra.

Moreover, the main alleged errors relied upon by appellant occur in the instructions given by the court of its own motion, and to these there are no sufficient exceptions. The exceptions are in these words: "We except to the instructions the court gave for the plaintiff, to such as he refused to give for defendant, to such as he modified, and such as the court gave of its own motion." It would not be contended that all of the instructions given by the court of its own motion are erroneous, and the parts thereof considered erroneous should have been specifically pointed out, in the absence of a stipulation by respective counsel waiving all but a general exception. Hicks v. Coleman, 25 Cal. 147; Sill v. Reese, 47 Cal. 348; Robinson v. Railroad Co., 48 Cal. 425; Rogers v. Mahoney, 62 Cal. 613. In the latter case the court refers to the other authorities, and thus states the rule: "The whole charge cannot be excepted to generally. The exceptions should be sufficiently specific to call the attention of the court to the alleged error." The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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102 Cal. 633

HOLLAND v. ZOLLNER. (No. 15,281.)

(Supreme Court of California. June 7, 1894.)

CANCELLATION OF DEED — MENTAL INCOMPETENCY —OPINION EVIDENCE.

In an action to set aside a deed for mental incapacity of the grantor, a nonexpert witness may be asked as to the grantor's appearance at a given time, with reference to his being rational or irrational, as the question calls for a fact, and not an opinion as to his mental condition, concerning which only experts and intimate acquaintances (Code Civ. Proc. § 1870, subd. 10) can express an opinion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Augusta Holland, administratrix of the estate of Henry Holland, deceased, against Alfred Zollner, to annul a deed on the ground of undue influence, and imbecility of intellect. There was a decree for plaintiff, from which, and from an order denying a new trial, defendant appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, J. W. Jellett, and A. Ruef, for appellant. Lloyd & Wood and A. Heyneman, for respondent.

SEARLS, C. This is an action to have a deed declared fraudulent and void, and that it be set aside, annulled, and declared of no effect. Plaintiff had a decree in her favor, from which, and from an order denying a motion for a new trial, the defendant Alfred Zollner appeals.

The plaintiff and Henry Holland intermarried at the city and county of San Francisco on the 16th day of July, 1885, prior to which time plaintiff was a widow, and the mother of four children, of whom the defendant Alfred Zollner is one. On the 2d day of February, 1891, Alfred Zollner obtained from Henry Holland a deed of conveyance of a lot of land on Montgomery avenue, San Francisco. At the same date, Alfred Zollner executed an agreement in writing, whereby he agreed to pay to Henry Holland, during the lifetime of the latter, the net proceeds arising from the rents and profits of the property conveyed, and, after the death of said Holland, to pay to the plaintiff herein, during her natural life, the sum of $100 per month. Henry Holland died on the 21st day of February, 1891, leaving surviving him, as his sole heir, his widow, the plaintiff herein, who was duly appointed the administratrix of his estate, and qualified as such before the commencement of this action. In response to the issues made by the pleadings, the court found that, at the date of the execution of the deed, Henry Holland was greatly enfeebled in body and mind, and wholly unable to transact any business; that he was of advanced age (72 years), of weakened mental faculties, indifferent to and incapable of the transaction of business of importance, physically and mentally prostrated, and wholly unable to give any valid consent to any contract, or to execute or deliver any valid deed, and remained in such condition to the time of his death, some 20 days later. The findings then proceed to state that the defendant Zollner, well knowing the premises, fraudulently designed and intended, and did fraudulently and designedly take an unfair advantage of the mental weakness of mind of said Holland, and fraudulently, and without consideration, procure the execution and delivery of the said deed so conveying the property to himself; that defendant procured said conveyance by Holland to himself by the exercise of undue influence over the former. The other defendant, Auguste Orton, was the tenant in possession of the premises conveyed by the deed in question, and was made a party defendant to the end that he might be enjoined, etc. He made default, and has not appealed.

At the trial, after testimony had been introduced on the part of plaintiff tending to show the enfeebled condition of Henry Holland, and his failure to notice his surroundings, his neglect to notice his friends, or to respond to conversation, etc., and that towards the end of October, 1890, he was by the advice of his physician, taken by his wife and her daughter to Bryon Springs, etc., thereupon Mrs. L. L. French was called as a witness on the part of plaintiff, and testified, in substance: That she was at Byron Springs when Holland and wife came there. That she became acquainted with them, and sat next Mr. Holland at table, and occasionally with them in the afternoon, and talked with them. That, at table, he behaved peculiarly,—would grab all the milk in reach, and drink four or five glasses of it in succession, as quickly as he could; would eat enormously at times, and then scarcely at all; would throw food offered him away, push things across the table. Was at times irritable to his wife and daughter, and at others unnaturally pleasant and agreeable, and at times would look so wild that his eyes would almost stand out of his head. Would shovel food into his mouth, and swallow it without chewing it. That, on one occasion, witness spoke to him, whereupon he stared and looked so wild that she left, and was glad to get away,—and other testimony tending in the same direction. Whereupon, plaintiff's counsel asked witness the following question: "Q. What was the apearance of this man at that time, with reference to his being rational or irrational?" To which question counsel for defendant objected upon the ground that it was incompetent, and upon the ground that it does not appear that the witness is a competent person to answer the question, or pass upon it,—the question as to his mental condition. "The Court: The objection is overruled, on the authority of People v. Lavelle, 71 Cal. 351," 12 Pac. 226. To which ruling, defendant, by his counsel, excepted. To the question proposed, the witness answered, "Irrational," and this ruling is assigned as error. A similar question was put to L. D. McKissick, who had testified similarly; like ruling had, and answer given, and exception noted. These alleged errors may be considered together.

These witnesses had been with Mr. Holland, at Byron Springs, but a single week, and it is not contended that they were within the category of "intimate acquaintances," who, under subdivision 10 of section 1870 of the Code of Civil Procedure, are entitled to give an opinion "respecting the mental sanity of a person, the reason for the opinion being given." Counsel for appellant rely upon Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101, in support of their contention. In that case the question discussed was as to what constituted such a degree of intimacy as entitled the witnesses to give an opinion as to the mental condition of the testator. Temple, C., said: "The allegation of mental incompetency was supported, in a large degree, by the opinions of witnesses claimed to be intimate as to his mental condition. Objection was made in the case of each witness on the ground that the witness was not shown to be an intimate acquaintance within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure, which makes competent 'the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.'" The learned commissioner then proceeds to discuss the meaning of the term "intimate acquaintance," points out the difficulty of "drawing a definite line between things which are separated only by degrees of difference," and concludes that in such cases "a very large discretion must be conceded to the trial court." In that case there was no question but that the witnesses had given opinions as to the mental sanity of the testator. They had testified as experts, and the question related to their competency as such. In the present case there is not, as I understand it, any claim that the witnesses were "experts," within the meaning of that term, as defined by section 1870, supra. The contention of respondent is that the question put to the witnesses did not call for an opinion as to the mental sanity of Holland, but was confined to an open, patent fact, indicated to all alike,—the nonexpert as well as the expert,—viz. did he appear to be rational or irrational? In confining the opinions of witnesses, respecting the mental sanity of a person, to the intimate acquaintances of such person, our Code has set at rest a question upon which diverse opinions have existed in different states. Except so far as modified by the statute, the law of evidence remains subject to such rules as experience has demonstrated to be best calculated to promote the ends of justice. As a general rule the opinions of nonexpert witnesses are not admissible in evidence. They must state facts, and not opinions deduced from the facts; leaving to the jury, whose province it is, to draw the proper inference from the facts when stated. To this general rule there are a number of exceptions, as clearly defined and as thoroughly established as the rule itself. One only of these exceptions need be mentioned here. It is as follows: "The opinions of ordinary witnesses, derived from observation, are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained." Lawson, Exp. Ev. p. 3.

It is said the exception quoted applies to questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, etc. Note to Whart. Ev. § 513. The reason underlying the exception is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eyewitnesses to form an accurate judgment in regard to it. De Witt v. Barly, 17 N. Y. 340. The paucity of language, and the incompetency of witnesses to describe graphically the photograph left upon the mind by observed facts, renders every effort to convey to a jury an adequate conception of the ultimate fact futile, except by announcing the conclusion in their own minds. A witness may describe a person as having gray hair, a wrinkled face, an uncertain gait, and by such other facts as indicate advanced years; and a jury, from such statement, could determine nothing as to his exact age, beyond the conclusion that he was an old man. Yet the witness who has detailed all the facts of which he was capable can give an opinion as to the age of the man he has described, which is almost exactly the truth. We identify men. We cannot tell how, because expressions of the face, gestures, motions, and even form, are beyond the power of accurate description. Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation; but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call "opinion." To say that a man acts "rational" or "irrational" is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be, like drunkenness, easy of detection, and difficult of explanation. Such conduct is not so much a matter of judgment as of observation. The conclusion is reached, not as a sequence of knowledge in reference to occult mental conditions, but as a result of observed facts, patent to all, concerning which the nonexpert is as competent to judge as the trained specialist. No one will doubt but the facts in relation to the conduct of Holland were admissible in evidence, and that, could the witnesses have explained every look, gesture, expression, and motion, it would have been competent to do so. All that the exception we have quoted seeks to do is, in such cases, by reason of the impossibility of giving form to all these varied manifestations, to permit the witness, from necessity, to produce the result of the manifestation as a whole. People v. Lavelle, 71 Cal. 351, 12 Pac. 226, was a case in which the defendant was charged with an assault with intent to commit murder. One Keeney, a deputy sheriff, who was present at the time of the arrest, which immediately followed the assault, was asked the precise question put here, viz.: "What was the appearance of this man [the defendant] at that time, with reference to his being rational or irrational?" The question was objected to, the objection overruled, etc., and on appeal the ruling was assigned as error. In affirming the judgment, Myrick, J., said: "The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was as to a fact, namely, his appearance at the time. The appearance of a person at a given time is one thing. The opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another." The ruling in that case is conclusive of the contention here in favor of the respondent.

Appellant's counsel have argued at considerable length the question of the insufficiency of the evidence to uphold the facts as found by the court. A review of the testimony here would be of no benefit to the appellant, or to the profession or public. I therefore content myself by saying that, after a careful perusal of the long statement on motion for a new trial, I am clearly of opinion the court below made no mistake in its findings of fact, and that, had it reached a different conclusion upon the testimony before it, the result might well have been challenged, as against the great preponderance of evidence. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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102 Cal. 552

PEOPLE v. WYMAN. (No. 21,064.)

(Supreme Court of California. May 31, 1894.)

EMBEZZLEMENT—WHAT CONSTITUTES—EVIDENCE.

1. Where, on the decision of a contest before the United States land office, involving the right to purchase government land, the successful party has 60 days in which to make payment to such office, and 14 days thereafter sends to her attorney the money to make such payment, the attorney is not guilty of embezzlement because he fails within 13 days after receiving the money to make the payment, in the absence of any demand for a return of the money, or any directions by his client as to the time when he should pay for the land.

2. Where such client sent to the attorney part of the necessary sum in cash, and the balance in orders, the facts that when arrested, 13 days after the receipt of the money, he did not have all of it on his person, and up to that time had neglected to cash the orders sent, are insufficient to show that he had fraudulently appropriated the money to his own use.

3. On the trial of such attorney for embezzlement, evidence that, after his arrest and the filing of the information against him, he did not pay for the land or offer to return the money, is not admissible.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

C. H. Wyman was convicted of embezzlement, and appeals. Reversed.

James H. & J. E. Budd and F. H. Gould, for appellant. Atty. Gen. Hart, for the People.

DE HAVEN, J. This is an appeal by the defendant from a judgment convicting him of the crime of embezzlement, and also from an order denying his motion for a new trial. The defendant was acting as the attorney for the prosecuting witness, Mrs. Annie Philp, in a contest before the United States land office involving her right to enter and purchase from the United States 160 acres of timber land. The case was finally adjudged in her favor, and the defendant, as her attorney, was notified of the fact by the register or receiver of the United States land office at Stockton on August 17, 1893, and was also further notified that the prosecuting witness would be allowed 60 days from that date—that is, until October 16, 1893—within which to make payment at that office for the land referred to in the notice. On the same day the defendant informed the prosecuting witness by letter of the result of the contest, and also requested her to send him $420 with which to make the required payment. In this letter he said: "Send at once, and it will go up with this month's returns, and your patent will come that much quicker." On August 28, 1893, the prosecuting witness sent to defendant from her home in Mariposa county a registered letter inclosing $233 in United States gold and legal tender notes, and an order on Scholle Brothers, San Francisco, for $103.75, and an order on the United States treasury for $83.33, making in all the sum requested by defendant. This letter and its contents were received by the defendant on August 31, 1893, and on the day following he went to Oakland, in the adjoining county of Alameda, and there remained until September 12, 1893, when he returned to Stockton, where he was arrested the next morning upon the charge of embezzlement, which is the subject of this prosecution. At the time of his arrest there was found on his person the order on Scholle Brothers for $103.75, a bank note and a United States legal tender note for $20 each, and four or five dollars in coin. The defendant's office and the United States land office at Stockton are in the same building. No demand was ever made upon defendant for the return of the money, and the prosecuting witness never had any communication with him in reference to it or the business of entering her land after sending him the money, and he never gave any explanation whatever as to the cause of his failure to cash the order on Scholle Brothers, and his neglect to make payment for the land. The information in this case, which was filed October 3, 1893, charges the defendant with having, on or about August 31, 1893, embezzled the $233 in money intrusted to him by his client, Mrs. Philp. The trial was had on October 20th of the same year, and up to that date the defendant had never paid for the land, or offered to return the money intrusted to him for that purpose.

The foregoing is, in substance, a statement of all the evidence in the case, and, in our opinion, it is not sufficient to justify the verdict. The complaint charging the defendant with the crime named in the information was laid before the magistrate, and the defendant arrested therefor, as early as September 13, 1893, and, in order to warrant the conviction of defendant, it was necessary for the people to prove that he had before that date fraudulently converted to his own use the money alleged to have been embezzled by him, and the evidence does not show this. In considering the question of defendant's guilt or innocence of the particular crime with which he is charged, his failure to make payment for the land after his arrest must be disregarded. That fact has no tendency whatever to show that defendant, prior to the filing of the information, converted the money therein referred to, and was improperly admitted in evidence. The only other facts relied upon to sustain the verdict are: First, that defendant neglected up to the time of his arrest, a period of 13 days, to cash the orders sent him, and to pay for the land which his client desired to purchase from the government; and, secondly, that, when arrested, he did not have on his person all of the money which had been intrusted to him for the purpose of making such payment, and did not offer to account for the same. These facts are clearly insufficient to prove that defendant had fraudulently appropriated the money of the client to his own use prior to the filing of the complaint upon which he was arrested. The fact that he did not have upon his person all of the money sent to him by his client was not of itself sufficient to justify the jury in finding or believing that he had fraudulently appropriated such money to his own use before his arrest, because such fact is not necessarily inconsistent with the fact that he may still have retained such money under his control, or subject to his order. The circumstance, to say the least, is inconclusive, affording only slight, if any, ground for suspicion, and is not strengthened by the other evidence in the case. Nor can the failure of the defendant to pay for the land prior to his arrest be regarded as a conversion by him of his client's money, much less as evidence of the fraudulent appropriation of such money to his own use. The money was sent to him to be paid over to the proper officer within the time allowed by law and the practice of the United States land office, so as to preserve the right of the client to purchase the land for which she had applied. The time within which to make such payment had not expired when defendant was arrested, nor until after the information against him was filed. In saying this, we have not overlooked the fact that the defendant, in his letter of August 17th, requested the witness to send him the money immediately, and, in effect, promised, if she would do so, to pay for the land during that month, so that its receipt would be noted in the official return of the United States receiver for that month; and, if she had complied with this request, perhaps it could be said that the defendant received the money under an agreement to pay it over during that month. But the prosecuting witness did not send him the money in time to make the payment during that month, and, in remitting, she gave no special direction as to the time when the defendant was to pay for the land. Under these circumstances, she must be deemed to have intrusted the money to defendant, as her attorney, to make payment for the land within the time allowed for that purpose, and so as to fully preserve her rights. The prosecuting witness never gave any different direction as to the time when the business should be transacted, and never made any demand for the money. It is very clear that, under these facts, the client could not, at the time of the filing of this information, have maintained a civil action against defendant for the recovery of the money so intrusted to him, and with much greater reason can it be said that such facts are not sufficient to show a fraudulent conversion or embezzlement of such money by the defendant.

The rule applicable to this case is correctly stated in Fitzgerald v. State (N. J. Sup.) 14 Atl. 747, as follows: "When the owner of goods which have been intrusted to another seeks redress for their conversion in a civil action, he is compelled to establish the fact of conversion by proof of the exercise of some dominion over the goods inconsistent with the right of the owner. Proof that the owner had demanded the goods, and that the person in possession had refused to return them, is accepted as evidence of conversion; but mere neglect to return, in the absence of a demand, has never been admitted as proof of conversion. Still less will the mere neglect to pay over proceeds lawfully received prove a fraudulent conversion thereof." If a demand had been made upon the defendant either to return the money to his principal or to make immediate payment into the United States land office, and he had refused, or if the time when under the terms of his employment he was to make such payment had expired at the time of his arrest, the case would be different, but, upon the facts disclosed by this record, the defendant was improperly convicted. Judgment and order reversed.

We concur: BEATTY, C. J.; McFARLAND, J.

(102 Cal. 569)

In re PEARSONS' ESTATE. (No. 15,510.)

(Supreme Court of California. June 1, 1894.)

EXECUTORS AND ADMINISTRATORS—SALES—RIGHTS OF EXECUTOR.

An executor sold land under a power in the will for part cash, the balance to be paid on confirmation of the sale. The sale was affirmed, and the executor tendered a deed. The purchaser appealed from the order, there being a bona fide objection to the title. The executor moved for a resale, but it was afterwards agreed that the motion should be continued until the appeal was decided, and that, if the order was affirmed, the purchaser should pay the balance of the price. Pending the appeal, the executor remained in possession, paid taxes, and received the rents. *Held*, on a confirmation of the order, that the executor was not entitled to receive interest from the date he made tender of the deed or to taxes.

Department 2. Appeal from superior court, city and county of San Francisco; C. W. Slack, Judge.

In the matter of the estate of Hiram A. Pearsons, deceased. E. J. Moore, executor, sold land under a power contained in the will. The sale was affirmed, and the purchaser appealed from the order of confirmation. The order was affirmed, and the executor refused to deliver the deed until the balance of the purchase money, together with interest thereon from the date of the tender of the deed, was paid. On application by the purchaser, an order was made requiring the executor to execute conveyance on payment of the unpaid purchase money, without interest thereon, and from the order the executor appeals. Affirmed.

J. H. Moore, for appellant. W. S. Goodfellow, Rosenbaum & Scheeline, and Naphtaly, Friedenreich & Ackerman, for respondent.

McFARLAND, J. This is an appeal of E. J. Moore, executor of the will of Hiram A. Pearsons, deceased, from an order of the court below requiring him to complete the sales of several pieces of real property made by him to John F. English and others, respondents herein, and confirmed by the court March 18, 1892, and to execute to them deeds of conveyance of said property upon their payment of the balance of the purchase money.

On January 28, 1892, the appellant, as executor, sold the said property at auction to the respondents, under a power of sale contained in the will of said Pearsons, deceased. The terms of the sale were cash in gold coin, 10 per cent. to the auctioneer at the time of sale, and balance on confirmation of sale by the superior court. When the matter of confirming the sale come up before the court on March 18, 1892, the respondents herein objected to the confirmation, on the ground that, under the will, the executor had no power to sell the property without a previous order of the court; but the court made an order confirming the sale. Thereafter, on April 18, 1892, appellant tendered to each of the respondents a deed of the property sold to him, and demanded payment of the balance of the purchase money, which amounted to $33,345, and notified them that, on default of immediate payment thereof, "such recourse will be taken as is afforded by law." Payment not having been made, the appellant, on April 28, 1892, served and filed in court his affidavit and motion for an order directing a resale of said property. Respondents appealed to this court from the order of March 18, 1892, confirming said sales. On March 23, 1892, the parties made a written agreement and stipulation, in which, after a recital of the foregoing facts, it was stipulated that the appellant herein "shall consent that his motion of resale be continued until after said appeal to the supreme court shall be determined;" and that, if the order confirming the sale should be affirmed by the supreme court, the respondents herein should pay to the appellant, "within thirty days after the determination of said appeal against them, the unpaid balance of the purchase price of the lots of land purchased by them respectively as aforesaid, on receipt of the deeds of said properties, respectively." This stipulation, as originally drafted, contained the following clause: "With interest thereon from the date of said order of confirmation at the rate of five per cent. per annum;" but this clause was erased before execution, and there was inserted in its stead, in the handwriting of the attorney of the purchasers, the final words of the stipulation, viz.: "On receipt of the deeds of said properties, respectively." During the pendency of said appeal the present appellant, Moore, remained in possession of all the property, made leases thereof, received the rents, and fully controlled it, without any consultation with the respondents herein. He also during said time paid some taxes levied against said property. The said appeal was determined by this court on June 13, 1893, by a decision affirming the order confirming said sales. In re Pearsons' Estate, 98 Cal. 603, 33 Pac. 451. On July 18th the purchasers, respondents herein, tendered to the appellant the unpaid balance of said purchase money, and demanded deeds of conveyance of said properties. The appellant refused to deliver the deeds until respondents should have paid the balance of the purchase money, "together with interest thereon from the date of the tender" of his deeds made on April 18, 1892, as aforesaid, and "all taxes paid by him since the date of said sale," he agreeing to account for the rents. Thereupon respondents made application to the court for an order requiring appellant to complete said sales, and execute deeds of conveyance to respondents, upon their payment of said unpaid purchase money; and the court made the order without requiring them to pay said interest or taxes. From said order the said executor appeals.

We will pass over the point made by respondents that the order is not appealable, and all technical points made by them. Appellant's point now made—that the tender was not in gold coin—is not tenable, for it is clear that the only objection made to the tender was that it did not include interest and taxes. The real question is, were respondents compelled, under the circumstances, to pay said interest and taxes? And we think that they were not.

The sale involved in the case at bar was not strictly a judicial sale. "The purchaser from an executor at a sale under a power in the will deals with him in making the purchase as he would with any other vendor." In re Pearsons' Estate, supra. In an ordinary case of a contract for the sale and purchase of land, when an action has been brought by the vendor for specific performance, a court of chancery will sometimes allow interest on the purchase money from the time when the contract ought to have been consummated, although the vendor has remained in possession and in receipt of the income of the land, when the circumstances show such allowance to be equitable. Such allowance is not, however, an absolute legal right of the vendor. Where there is a bona fide objection to the title, and during the delay caused by its judicial investigation the vendor remains in possession, and receives the rents or profits of the land, such rents or profits, in the absence of an express contract upon the subject, should frequently be considered in equity as all that the vendor is justly entitled to during this delay. In the case at bar, respondents' objection to the title was certainly not a trivial one; for the opinion of this court (98 Cal. 603, 33 Pac. 451) shows that their said objection raised a question worthy of grave and elaborate consideration. We do not think that, if appellant were suing for specific performance, equity would be called upon, under the circumstances, to allow him, during the delay caused by the litigation, anything more than the rents and profits of the land. But appellant did not sue for specific performance. After having tendered deeds to respondents, he did not keep the tender good, but notified them that he would proceed to resell the property, and, of course, would hold them for damages if the property sold for less than their bid and the expenses of the previous sale, under section 1554 of the Code of Civil Procedure. Moreover, under the stipulation above mentioned, it was clearly agreed by all parties that the whole matter should rest and remain in statu quo until after the decision by this court of respondents' said appeal; and that the contract should be in abeyance until such decision should have clearly established the rights in the premises of each party to the contract of sale. Under the stipulation, the consummation of the contract was suspended by the act of the parties until after the determination of the appeal. The stipulation did not provide for interest; and, in fact, it appears that respondents expressly refused to execute it when it did contain such a provision. Under these circumstances, appellant did not hold the land as trustee for respondents, nor were the latter trustees of the purchase money for the appellant. The time for the consummation of the contract had not come. Of course, the taxes are in the same category. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(102 Cal. 592)

PERPOLI v. GRAND LODGE OF LEGION OF THE WEST. (No. 15,337.)

(Supreme Court of California. June 1, 1894.)

MUTUAL BENEFIT SOCIETIES—SPECIAL ENDOWMENTS.

1. Where a mutual benefit society issues to each of its members of a certain class special endowment coupons, entitling him, at the maturity of a coupon, to the whole amount of one assessment from every member of that class, the number of such assessments being regulated annually by the grand lodge of the society, and paid into a special fund, a member whose coupon falls due, with others, at a time when there is not enough in said fund to pay them all in full, can only recover his pro rata share of the fund.

2. A mutual benefit society, being trustee for its members of a certain class of a special benefit fund, can assert their rights to a pro rata share therein against one of their number who seeks judgment for more than his share.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Pietro Perpoli against the grand lodge of the Legion of the West on an endowment coupon. Judgment for plaintiff for $45. Plaintiff appeals. Affirmed.

Rogers & Chilstrom, for appellant. F. Wm. Reade, for respondent.

DE HAVEN, J. The plaintiff sought by this action to recover a judgment against the defendant for the sum of $600 upon a coupon maturing September 7, 1891, attached to a special benefit certificate, entitling him to participate in the special benefit fund of the defendant in an amount to be computed in accordance with its laws. The plaintiff is a special benefit member of the sixth class, belonging to one of the subordinate lodges of defendant, and the laws of defendant provide: "If the member is a special benefit member of the sixth class at the time of maturity of the coupon, he shall receive the whole amount of one assessment from every special benefit member in good standing at the date of such maturity." The court below found "that the defendant was and is a mutual benefit association, organized for the purpose, in consideration of certain moneys paid to it, of paying at the death of its members a stipulated sum of money to a designated nominee, subject to its constitution and by-laws. * * * That each installment of said endowment was and is paid to each member out of a fund created for that special purpose, and held by the defendant in trust for the purpose of said payment." This fund is known as the "Special Benefit Fund," and is derived from assessments made upon special benefit members of the defendant. The number of these assessments is regulated by the grand lodge at its annual meetings. The court further found "that there was some $2,200 in the special benefit fund at the time of the maturity of plaintiff's coupon; that the said fund was subject to two prior attachments upon claims of similar character to plaintiff's, for the sum of $600 each, with costs, and to plaintiff's attachment for $600 and costs; that there are other remaining members who have claims upon the said sum largely exceeding the sum of $2,200." As a conclusion of law from the foregoing facts, the court found that, inasmuch as the special benefit fund held by defendant is not sufficient to pay all the coupons of the same class as that of plaintiff, and maturing at the same time, the fund should be divided equally between all the holders of such maturing coupons; and that the plaintiff was only entitled to recover in this action his proportionate part of such fund, amounting to the sum of $45, and thereupon gave judgment in favor of plaintiff for said sum of $45. The plaintiff appeals.

The conclusion reached by the learned judge of the superior court is clearly right. The plaintiff is not entitled to recover the entire amount of his coupon to the exclusion of members of the same class as himself, and who possess an equal right to share in the special benefit fund, under the constitution and laws of the defendant. Nor is the case changed by reason of the fact that the other members are not before the court asserting in their own names their right to participate in the fund in controversy. The defendant, as trustee of this fund in which such members are entitled to share, may assert such rights for them, and resist plaintiff's right to recover more than his proportionate share of such fund. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

(102 Cal. 583)

BODE et al. v. LEE et al. (No. 14,094.)

(Supreme Court of California. June 1, 1894.)

APPEAL—PLEADINGS—TROVER—LIMITATION—EVIDENCE.

1. On appeal from an order denying a new trial, though the pleadings may be referred to, to ascertain the issues, and review the rulings on evidence objected to as outside such issues, the court cannot decide whether the complaint was sufficient to support the judgment, or whether a demurrer thereto was properly overruled.

2. Warehousemen have an entire cause of action, in trover, against persons who have bought goods stolen from their warehouse, though such goods may have belonged to divers bailors.

3. In trover, for tin stolen from plaintiffs, and sold to defendants, through a series of years, one defendant, while testifying, presented

a statement, drawn from their books, of all the tin they had bought from the alleged thief for five years. Plaintiffs offered this as evidence, and it was admitted, over defendants' objection of limitation as to the transactions of the first two years. *Held* no error, the jury being instructed as to the effect of the statute on such evidence, after all the evidence was received.

4. Plaintiffs' defaulting manager testified that the shortage of tin in their warehouse arose from his irregular sales; that all such sales were to defendants. One of defendants testified to dealings with said manager for more tin than plaintiffs claimed. *Held*, that the identity of the tin was sufficiently proven.

In bank. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by George C. Bode and another, trading as Bode & Searle, against John Lee and others, trading as John Lee & Co., for damages for conversion of personalty. Judgment for plaintiffs. From the order denying a new trial, defendants appeal. Affirmed.

Garber, Thornton & Bishop, for appellants. John H. Dickinson (Henry E. Monroe, of counsel), for respondents.

HARRISON, J. The plaintiffs were the proprietors of a bonded warehouse in San Francisco, and had one R. P. Scott in their employ as foreman or manager of the warehouse. In February, 1886, they discovered that Scott had been unfaithful to his trust for a number of years, and had privately and corruptly sold various articles of merchandise that had been stored in their warehouse. A portion of the merchandise so sold by him consisted of boxes of sheet tin, which were purchased by the defendants, and upon the discovery of the fact the plaintiffs brought this action to recover from the defendants the value of the tin thus received by them. The complaint alleges the character of the business conducted by the plaintiffs; the relation held to them by Scott; the knowledge of these facts by the defendants, and that, with such knowledge, the defendants had conspired and confederated with Scott for the purpose of wronging and defrauding the plaintiffs out of these boxes of tin, and had procured Scott to fraudulently remove them from the warehouse at divers times within the four years last past, and, as a consideration therefor, had paid him for said property a sum of money greatly below its market value, with the knowledge that he had fraudulently obtained the property as the employe of the plaintiffs, and had thus stolen and embezzled it; that in pursuance of said conspiracy the defendants had come into the possession of 1,626 boxes of tin, of which the plaintiffs were entitled to the immediate possession, and for the value of which they were responsible to the owners; that said fraudulent conversion occurred between the 1st day of January, 1879, and the 10th day of February, 1886; and that the transactions set forth in the complaint were not discovered by the plaintiffs until the 10th day of February, 1886. Upon this complaint the plaintiffs asked judgment against the defendants for the wrongful conversion, and that they be adjudged guilty of fraud, and that execution issue against their persons. To this complaint the defendants demurred upon the ground that the cause of action was barred by the statute of limitations; that the complaint was ambiguous, uncertain, and unintelligible; and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants answered, taking issue upon the averments in the complaint, and alleging that they had purchased the tin from Scott in good faith, under the bona fide belief that he was the owner thereof, and had paid therefor its full market value. The cause was tried by a jury, and a verdict rendered in favor of the plaintiffs for the sum of $7,339.75. A motion for a new trial was made by the defendants, and denied, and from the order denying a new trial an appeal has been taken. No appeal has been taken from the judgment.

1. An appeal from an order granting or denying a new trial does not involve any consideration of the correctness of the judgment. That question can be determined only by an appeal from the judgment itself. The motion for a new trial is in the nature of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends. In the present case this record consists of a statement of the case prepared after the trial. Upon the hearing of this motion, reference may be had to the pleadings (Code Civ. Proc. § 660), but the correctness of the order must be determined by the record upon which it rests. This "reference" to the pleadings is for the purpose of ascertaining the issues in the case, and determining the correctness of any rulings of the court upon objection to the introduction of evidence on the ground that it was not within such issues; but whether the complaint is sufficient to support the judgment, or whether the court erred in overruling a demurrer to the complaint, can be considered only upon an appeal from the judgment. Neither of these matters is involved in the "re-examination of an issue of fact after a trial and decision by a jury or court." Id. § 656; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Evans v. Paige (Cal.) 36 Pac. 406.

2. It is strenuously urged by the appellants that the plaintiffs were limited at the trial to establishing a single conversion of tin, and could not introduce testimony in support of their complaint showing that the tin for which they sued had been received by the defendants at different times. Without determining whether this objection should not have been taken by special demurrer to the complaint, upon the ground of uncertainty, we think that the appellants should at least have made this ground a special objection at the trial when the evidence was offered.

Such evidence cannot be regarded in any other light than as a variance from the allegations of the complaint, and it is very evident from the record in this case that the defendants were not misled by its introduction. Code Civ. Proc. § 469. If the objection had been made when the evidence was presented, the plaintiffs might have amended their complaint. The defendants, however, did not make this objection to any evidence of this character which was offered by the plaintiffs; and in fact this evidence was first brought to the notice of the jury in the cross-examination by the defendants of one of the plaintiffs, who was testifying as a witness in his own behalf. While the plaintiff Searle was being examined with reference to the shortage in the tin in the warehouse, he stated, in reply to a question by the defendants' counsel, that there was more than one party short of tin in his warehouse; and thereupon the defendants' counsel objected "to any further testimony, upon the ground that the complaint states only one cause of action, whereas the proof shows that there were as many causes of action as there were parties short of tin. Plaintiffs sue as bailees, and they have as many causes of action as there were bailors. The Code requires each cause of action to be stated separately." This objection was overruled, but the witness did not give any evidence of the character objected to until he was asked in reference thereto upon his cross-examination by the defendants. The objection that was made is, however, untenable. The plaintiffs, as bailees of the tin, had the right to its recovery from any one who had fraudulently obtained it through the embezzlement of Scott, and it was immaterial to the defendants whether they were the bailees of one or more bailors. Their cause of action was as entire and single as would be that of an owner of property whose title was derived through different vendors.

3. Much of the argument of counsel has been directed to the question of the statute of limitations, the appellants claiming that the plaintiffs were not entitled to recover for any tin that was abstracted from the plaintiffs' warehouse prior to three years before the commencement of this action. The sufficiency of the complaint in this respect is extensively discussed; but, as we are not at liberty to pass upon that question on this appeal, it is unnecessary to consider this part of the argument. This defense was pleaded in the answer; and at one stage of the trial, in answer to the following question put to one of the defendants, "In those transactions, did the name of the Greenwich Dock Bonded Warehouse, or of Bode & Searle, appear upon any of the writings connected with them?" the defendants objected that the plaintiffs "have no right to prove that we got any tin previous to the three years prior to the commencement of this suit. Action is barred upon all received before that time." This witness did not, however, give testimony that the defendants had received any tin prior to three years before the commencement of the action, except in the following manner: At a later stage of his examination a list of the tin received by the defendants from April, 1881, to February, 1886, that had been made out from their books, was presented by the witness, while giving his testimony, as "a statement of all the tin we bought from Scott, and the time it was bought." It was offered in evidence by the plaintiffs as a part of the testimony of the witness. The defendants objected to that portion of the list which showed that which was bought between April, 1881, and December, 1882, "because no recovery can be had for that. It is barred by the statute of limitations." But their objection was overruled, and the statement was admitted in evidence. There was no error in this ruling. The statement had been prepared at the instance of the defendant witness, and was produced by him for the purpose of showing the nature of the transactions between his firm and Scott. It was not rendered inadmissible by reason of its containing entries of transactions that had occurred prior to 1883. It often happens in the trial of a cause, where the statute of limitations is pleaded as a defense, and when the cause of action depends upon a series of continued transactions, that these transactions are so interwoven as to render it impossible to limit the evidence to a particular point of time. It is also frequently the case that the sufficiency of this defense will depend upon the establishment of other facts at the trial, and is to be determined by the jury, under proper instructions, after all of the evidence has been introduced. In such cases an objection to any piece of evidence, on the ground that it relates to a transaction claimed to be barred by limitation, is unavailing, for the reason that it cannot be known until after the determination of other facts whether this period of time constitutes a limitation. The proper practice, in such cases, is to allow the evidence to go before the jury, and to have them properly instructed with reference to the statute of limitations, and its application to the facts of the case before them. In the present case the defendants did request the court to instruct the jury that the plaintiffs could not recover for any tin purchased by them prior to the 18th of February, 1886. This instruction was refused by the court, and its ruling is now assigned as error. The appellants have not given any reason for fixing this date as the point when the statute began to run, and we are unable to see that the court erred in refusing to give the instruction. The plaintiffs had alleged in their complaint that they discovered the frauds for the first time on the 10th day of February, 1886. It does not appear, however, that the verdict of the jury includes

any tin received by the defendants prior to this date. The court instructed the jury to the effect that the plaintiffs could recover only such damage as they had sustained as bailees of the tin, and that, if they had settled with their bailors, they could recover only such amount as they had paid in such settlement, not exceeding the actual value of the tin. The testimony upon this point was that the plaintiffs had paid to Nicholson $7,042.75, and to Balfour, Guthrie & Co. $297,—making, in the aggregate, $7,339.75,—and the jury rendered their verdict for this amount. There was no evidence that any of the tin of these bailors was received by the defendants prior to April 18, 1886.

4. The court instructed the jury that the plaintiffs, in order to recover, must show that Scott sold to the defendants the identical tin for which they sought judgment in this action, and the appellants urge that this instruction was disregarded by the jury; that the evidence fails to show that the tin for which the plaintiffs were short in their warehouse, and for which they settled with their bailors, was ever received by the defendants from Scott. Naturally, the evidence to connect the defendants with the shortage of the tin in the warehouse, and to bridge the intervening space between its embezzlement by Scott and its receipt by them, is fragmentary, and devoid of the accuracy of mathematical demonstration; but we think that the evidence before the jury was sufficient to authorize them to connect the two, and will uphold their verdict. Scott testified: "The shortage in tin in this warehouse arose from my irregular sales. All I disposed of irregularly was to John Lee & Co." (the defendants). One of the defendants testified that their dealings with Scott amounted to over $20,000 within five years, though most of the transactions were since 1883; and the list of tin bought by them from Scott, which he produced in evidence, showed a greater number of boxes than was claimed by the plaintiffs. We think that in view of this testimony, and of the testimony concerning the manner in which the transactions with Scott were had, the burden was thrown upon the defendants to show that the tin thus purchased from Scott was not a portion of that for which the plaintiffs found a shortage in their warehouse, and settled with their bailors. There was evidence before the jury tending to show that the defendants were not entirely innocent in their dealings with Scott, and the jury were not required to be too strict in demanding proof against them of facts which it was within their power to disprove, but for which they made no attempt.

5. There are certain specifications of errors of law in the admission of evidence, and in refusing certain instructions which were asked by the defendants, but they are not of a character to require comment. The substance of the instructions thus refused, which were proper to be given, had already been given to the jury in other language, and the evidence which was received against the objections of the defendants could not have changed the result. The case seems to have been fully and carefully tried upon its merits. A great deal of evidence upon the various issues was introduced by the respective parties, and submitted to the jury, with extended and elaborate instructions from the court, evidently given at the instance of the respective parties, and to which no exception was taken. These instructions seem to cover the propositions contended for by the appellants, and to have fully and fairly directed the jury in their deliberation upon their verdict; and, as we find no error in the record which affects the substantial rights of the parties, we think the action of the court below must be affirmed, and it is so ordered. The order is affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.

102 Cal. 528

O'CONNOR v. HOOPER. (No. 15,205.)

(Supreme Court of California. May 29, 1894.)

ACTION FOR WORK IN GRADING STREET—EVIDENCE—NONSUIT—GROUNDS OF MOTION.

1. A contract between O. "and certain owners of property, lots, and lands fronting on L. street, * * * each contracting severally, parties of the second part," provided that O. should do certain grading on L. street at prices named, and that such second parties, "each for himself and not for the others," should pay O. "their pro rata of the total cost, * * * each one paying therefor according to the ratio that their respective frontage bears to the whole." It was signed by O. and by the others as follows: "H., for grading only, 127 feet 8¼ inches. W., for grading only to center of street fronting my lot, 65 feet. C., for grading front of my lot to center of street, 62 feet 8¼ inches." *Held*, in an action by O. against H. to recover for such work, that the contract was admissible as against an objection that it was signed by plaintiff as an entire contract, whereas the other parties severally limited the obligation of each to pay for a specified part.

2. Since such contract was not illegal or invalid for any reason, it was not inadmissible because the work was not authorized by the board of supervisors.

3. The contract providing that the payment by each property owner should be in proportion to his frontage, a certificate of the city engineer, who it was agreed should estimate the amount of work, which recited that he found the work "to official line and grade. Exc. 5,616 cu. yds.," was admissible as against an objection that it did not show "how much of the excavation was to be made in front of defendant's lot and to the center of the street."

4. The fact that there was evidence that the survey and field notes from which the number of cubic yards was estimated in the city engineer's office were made by such engineer before he came into office did not render the certificate inadmissible as "not made by the city engineer," there being no evidence that the person who signed it was not city engineer at the time he issued it.

5. A motion by defendant for nonsuit is properly denied if made, not on the ground that the

evidence admitted did not support plaintiff's cause of action, but only on the grounds on which portions of the admitted evidence were objected to when offered, to the admission of which evidence he excepted, since errors in admitting evidence cannot be reviewed on a motion for nonsuit.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by James J. O'Connor against John A. Hooper to recover a sum alleged to be due plaintiff on a contract for grading on Laguna street, in the city and county of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

Page & Eells, for appellant. D. T. Sullivan, for respondent.

VANCLIEF, C. It is alleged in the complaint, substantially, that on the 1st day of September, 1891, the defendant was indebted to the plaintiff in the sum of $937.55, for work and labor theretofore done and performed by plaintiff at defendant's instance and request, in grading on Laguna street, between Clay and Washington streets, in the city and county of San Francisco; and that defendant has refused to pay said sum, or any part thereof. By the answer of the defendant, each allegation of the complaint is specifically denied. The cause having been tried without a jury, the court found that the defendant was indebted to plaintiff for the alleged work and labor, including interest, in the sum of $687.91, for which sum, with costs, judgment was rendered against defendant. The defendant appeals from the judgment on the judgment roll, containing a bill of exceptions; but the bill of exceptions specifies no particular in which it is claimed that the evidence admitted is insufficient to justify the decision, and therefore raises no such question.

1. Defendant's motion for nonsuit was not made on the ground that the evidence which had been admitted did not substantially tend to prove all the facts essential to plaintiff's cause of action, but only on the same grounds upon which portions of the admitted evidence had been objected to when offered, and to the admission of which defendant duly excepted, so that the exception to the order denying the nonsuit added nothing to the exceptions before taken to the admission of the evidence, and does not raise the question whether the admitted evidence tended to prove all the material allegations of the complaint; and, since errors in admitting evidence cannot be reviewed on a motion for nonsuit, it follows that the nonsuit was properly denied.

2. The plaintiff offered as evidence the following instrument:

"This agreement, made and entered into on this —— day of July, A. D. 1891, by and between James J. O'Connor, of the city and county of San Francisco, state of California, party of the first part, and certain owners of property, lots, and lands fronting on Laguna street, between Clay and Washington streets, in the said city above mentioned, whose names are hereunto subscribed, each contracting severally, parties of the second part, witnesseth that the said party of the first part, for and in consideration of the covenants of the said parties of the second part hereinafter expressed, promise, covenant, and agree to and with the said parties of the second part that he will furnish all the materials and perform the work of constructing in a good and workmanlike manner of grading to the official grade said above-named street; also to macadamize the same, and to construct rock gutter ways, and to lay redwood curbs where not already laid or where granite curbs are not laid, at the following prices, viz.: Grading, per cubic yard, $.85 (eighty-five cents); macadamizing and rock gutters, per front foot, one dollar and thirty cents; redwood curbs, per front foot, thirty cents. Estimate of the number of cubic yards to be made by the city and county surveyor, all incidental expenses to be paid by the party of the first part. And the said parties of the second part, in consideration of the premises, each for himself and not for the others, promise, covenant, and agree to and with the said party of the first part that they will pay to said party of the first part, upon the completion of the work aforesaid to the satisfaction of the superintendent of public streets, highways, and squares, their pro rata of the total cost of the above-described work, each one paying therefor according to the ratio that their respective frontage bears to the whole frontage here represented. In witness whereof, the said parties have hereunto set their hands and seals, the day and year aforesaid.

"[Signed] Jas. J. O'Connor, 2927 Clay street.

"[Signed] John A. Hooper, for grading only, 127 feet 8¼ inches.

"[Signed] Robert Watt, for grading only to center of street fronting my lot, 65 feet.

"[Signed] M. E. Castle, for grading front of my lot to center of street, 62 feet 8¼ inches."

To the introduction of this instrument the defendant objected, on the grounds (1) that the contract for grading, macadamizing, curbing, etc., was signed by plaintiff, the party of the first part as an entire contract, whereas the parties of the second part severally limited the obligation of each to pay for only a specified part of the grading; and (2) that no authority from the board of supervisors, nor resolution of intention to do the work, was shown.

I think the objection was properly overruled. The instrument expresses three distinct contracts, by which each of the parties of the second part promised to pay to the party of the first part his pro rata of the total cost of the grading only, "according to the ratio that his frontage bears to the whole frontage," at the rate of 85 cents per cubic yard, the whole frontage being 510 feet 9 inches, and the frontage of defendant, for which he promised to pay, being 127 feet 8 inches. The effect of each of these contracts is the same as if it had been written on a separate paper. As written, the instrument is of the nature of a subscription contract, whereby the obligation of each subscriber is limited and several, and not joint.

As to the objection that the work was not lawfully authorized by the board of supervisors, it is only necessary to say that, whether so authorized or not, the contract for doing it does not appear to have been illegal, nor for any reason invalid. Yet it was proved that by resolution of the board of supervisors, the mayor was "authorized to enter into private contracts for the performance of certain street work, for a portion of the cost of which the city is assessable at the same rates as agreed upon by the property owners, to wit: * * * With J. J. O'Connor, to grade the official line and grade Laguna street, between Washington and Clay streets, in front of Lafayette Park." The evidence shows this to have been the same work described in the contract in question, and that the city contracted with plaintiff to do its proportion of the grading, and paid him for it at the rate of 85 cents per cubic yard.

3. The contract provides that the estimate of the number of cubic yards is to be made by the city and county surveyor. To prove the number of cubic yards, plaintiff offered as evidence the following instrument: "Duplicate, No. 337. San Francisco, July 11, 1891. I certify I have examined the work of grading Laguna street, from Clay to Washington streets, and find the work to official line and grade. Exc. 5,616 cu. yds. C. S. Tilton, City Engineer." Defendant's objection to this was that it did not show "how much of the excavation was to be màde in front of defendant's lot and to the center of the street." This objection was properly overruled, for the reason that the defendant promised to pay for the grading in the proportion that the frontage of his lot bore to the whole frontage on the improvement. To estimate what sum he should pay, it was only necessary to know the extent of his frontage, the extent of the whole frontage, and the whole number of cubic yards of grading. The number of cubic yards of grading in front of his lot was not a factor in the calculation. After the certificate of the city engineer had been read in evidence, defendant moved to strike it out, on the ground "that it was not made by the city engineer." The evidence relied upon to support this ground was the testimony of Nicholas King, as follows: "I am a deputy city and county surveyor, and have been so for five years. I was deputy under Mr. Tilton. The certificate dated July 11, 1891, signed 'C. S. Tilton, City Engineer,' and already in evidence, was issued by our office, showing the amount of grading on Laguna street from Clay to Washington. * * * I did not do this work of surveying on Laguna street, and do not know who did. * * * This is the only certificate that was given in reference to this work. * * * The work was done by Mr. Tilton, under his direction, before he came into office. We only made an examination of the work. * * * Ques. The city and county surveyor never made any survey of this property? Ans. Only an examination. Ques. Only an examination of Mr. Tilton's field notes? Ans. Yes, sir. Ques. That was for the superintendent of streets? Ans. Yes, sir." The court denied the motion, and it does not appear that in doing so it erred. The evidence does not even tend to prove, as contended by counsel, that Tilton was not city engineer at the time he signed and issued the certificate, though it does tend to prove that the survey and field notes from which the number of cubic yards was estimated in the office was made by or under him before he came into office. But the ground of the motion is not that he made the survey without authority, nor that it was improperly made, as to which, however, there is no evidence, except the fact that the field notes were in the office of the city and county surveyor, and were there used as official data from which to estimate the amount of the grading, and upon which estimate the certificate in question was issued by Mr. Tilton after he came into office. But it is a sufficient answer to the objection that the bill of exceptions contains no evidence that Mr. Tilton was not city engineer at the time he issued the certificate, this being the only ground upon which the objection was made. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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102 Cal. 575

McNAMARA v. MACDONOUGH et al. (No. 15,123.)

(Supreme Court of California. June 1, 1894.)

VICE PRINCIPAL—FELLOW SERVANTS—INCONSISTENT INSTRUCTIONS.

1. One employed by the architect of a building to construct the scaffolds on which the bricklayers and hod carriers shall work is, in the construction thereof, a vice principal, and not a fellow servant of a hod carrier.

2. Inconsistency between instructions given at request of plaintiff and those given at request of defendant, arising from the latter being too favorable to defendant, cannot be complained of by him.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Terence McNamara against Kate

Macdonough and others. Judgment for plaintiff. Defendants appeal. Affirmed.

E. F. Preston, for appellants. **D. J. Toohy** and Mich. Mullany, for respondent.

PER CURIAM. Action to recover damages for a personal injury suffered by plaintiff, alleged to have been caused by the negligence of defendants in constructing a scaffold on which they employed plaintiff to work as hod carrier, and by the breaking and falling of which plaintiff was injured. The cause was tried by a jury. Verdict and judgment for plaintiff in the sum of $4,500. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

At the time of the accident the defendants were constructing a building known as the "California Hotel and Theater," on Bush street, in the city of San Francisco. Some time before the accident the defendants departed from this state, and did not return before the commencement of this action; but during their absence they were directly represented here by Mr. E. F. Preston, as general superintendent of the construction of the building. Mr. Preston employed J. M. Wood as architect and general manager upon the ground. James McIntire was employed as foreman of the work, and he generally employed the laborers,—masons, bricklayers, hod carriers, etc.; but the architect employed George Scarf, a carpenter, to construct all the scaffolds on which the bricklayers and hod carriers were to work, and Scarf constructed all such scaffolds from materials furnished by defendants. As to whether the materials furnished for scaffolds were suitable for that purpose, and whether the particular scaffold, by the falling of which plaintiff was injured, was negligently and insecurely constructed, the evidence was substantially conflicting, but quite sufficient, under the rule applicable here to conflicting evidence, to justify a verdict in favor of the plaintiff on both these issues. All the mechanics and laborers who worked on the building were employed and paid by the defendants, through their agents, by the day, week or month; that is to say, no part of the work was done by job contract, excepting, perhaps, the work of the architect. There is no evidence of any contract, understanding, or custom to the effect that the bricklayers or hod carriers were to construct the scaffolds on which they were to stand while doing their work; and no evidence that they did construct any of such scaffolds, except as one or more of them may have been ordered to assist Scarf, in which case they worked under Scarf's direction, and did only what he ordered them to do. In constructing the scaffold on which plaintiff was injured, Scarf was assisted by Thomas McGowan, a hod carrier employed on the building, who testified: "My business there was that of a mere laborer attending on the mechanics; and, in that capacity, I waited upon Mr. Scarf and attended on him while he built the scaffold that broke down. * * * Q. Did you have any management or superintendence or direction of this scaffold? Ans. Not the slightest. I was a common laborer, and had to do as I was told." And there was no evidence in conflict with this testimony. The scaffold in question was constructed inside of three walls of an elevator shaft, the front side of which was open, the shaft being about nine feet square. The scaffold covered the whole space inside of the shaft, except a few inches next to the walls. The bricklayers and hod carriers went to work upon it immediately after it was constructed; and within an hour or two thereafter, while the plaintiff and a bricklayer were working upon it, it fell, and with it the plaintiff and bricklayer fell to the bottom of the shaft, a distance of about 18 feet, whereby the plaintiff was seriously, and perhaps permanently, injured. The evidence tends to show that the defects and insufficiency of the scaffold were not apparent or visible to the plaintiff; that his means of knowledge of such insufficiency were not equal to those of the defendants, by whose agency the scaffold was constructed; and that he did not know that the scaffold was insufficient or unsafe, but trusted and relied upon the defendants having performed their duty in the construction thereof. So that it may be said, as a legal conclusion, that there was no evidence of contributory negligence.

At request of plaintiff, the court gave the following instruction: "It was the duty of the defendants to furnish a suitable and safe scaffold, both as to the materials used, and the mode of the construction thereof, such as a reasonable and cautious and prudent man would adopt, in view of the use for which the same was intended to be used, and in view of the fact that the mechanics and workmen treading upon the same, and carrying their loads of brick and mortar, depended upon the material and construction thereof for their personal safety. And if you find from the evidence that the scaffold which broke down, and caused the injury complained of, was not constructed in a safe and suitable manner, and composed of suitable and safe materials, in view of the purpose for which it was intended, and the use to which it was to be put by the workmen, including plaintiff, you will find a verdict for the plaintiff, and assess the damages in his favor, and against the defendants, at such sum—not to exceed $25,000—as you shall deem reasonable and proper, under all the circumstances of the case, and the evidence adduced on the trial, if you should find, also, from such evidence, that the plaintiff did not know, or had no equal means of knowledge with defendants, of ascertaining whether the scaffold was constructed in a suitable or safe manner for the work intended, or constructed of safe, sound, and proper material, and further find that the plaintiff did not know, or could not have known, under all the circumstances, that his employment on such scaffold involved danger to himself. This instruction I give you on behalf of the plaintiff, with such modifications as I think are proper, and I will instruct you further on as to that matter." The court, of its own motion, afterwards elaborated, and added to, the above instruction, as follows: "The law requires every person to use his natural faculties. Whatever any man might have seen, whatever he might have heard, he is presumed to have heard; and this plaintiff is chargeable with negligence in the use of this scaffolding, if he had an opportunity equal to the defendants, to see and inspect the same before its use, and understood the risk to which he was exposed thereby. That an employer who provides appliances, such as a scaffold, as in this case, must see that it is suitable and fit for the use for which it is intended. This rule is, however, subject to this limitation: that when a person works upon a platform or scaffold, as the plaintiff did in this case, and such platform or scaffold is insufficient for the purpose for which it is used, or for any reason unsafe or dangerous to work upon, and such person so uses it or works upon it with a knowledge, or means of knowledge, equal to that of the employer, that it is defectively constructed, unsafe, and dangerous to work upon, then, in that case, he takes the risk incident to such employment, and cannot recover against such employer for injuries sustained which arise out of accidents resulting from such defective, unsafe, and dangerous condition of such scaffold." At request of defendants' counsel, the court instructed the jury as to the law of contributory negligence and fellow servants. The principal points made by appellants, and the only points requiring consideration, are—First, that the evidence is insufficient to justify a verdict of negligence on the part of the defendants in the construction of the scaffold, which is sufficiently answered in the foregoing statement of the case; second, that the court erred in giving the instruction above set out, at request of plaintiff, with the additions thereto by the court.

The objections to the instruction are that it assumes that Scarf, who constructed the scaffold, was not a fellow servant, by whose negligence the accident happened, and that there was no contributory negligence on the part of the plaintiff, and also that it is inconsistent with the instructions given at request of defendants, defining what constitutes fellow servants, and to the effect that if the injury to plaintiff was caused by the negligence of a fellow servant, or if the negligence of plaintiff contributed to the injury, the verdict should be for the defendants. In the absence of any evidence tending to prove contributory negligence on the part of the plaintiff, it was proper for the court to assume that there was none, but the instruction in question did not so assume. On the contrary, it assumed that the plaintiff might have been negligent in going upon the scaffold, if his knowledge, or means of knowledge, of the danger was equal to that of his employers, and that if he did so he could not recover. This was sufficient, even assuming that there was evidence tending to prove that he had, or with proper care might have had, notice of the danger. No instruction as to the law of fellow servants was applicable to the evidence, except, perhaps, an instruction to the effect that the law of fellow servants had no proper application to Scarf, who, in constructing the scaffold, represented the defendants, whose duty it was to exercise ordinary care in furnishing for the plaintiff a reasonably safe place in which he was to work, as well as safe machinery and appliances with which he was to work, and that Scarf's relation to the defendants, while constructing the scaffold, was that of "vice principal," as it is sometimes called by courts, in which relation his negligence is deemed the negligence of the defendants, and not that of a fellow servant with plaintiff, even though his work promoted the erection of the building. Congrave v. Railroad Co., 88 Cal. 369, 26 Pac. 175, and cases cited; Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Railroad Co. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 914; Alledge v. Railway Co. (Cal.) 34 Pac. 720; Bowen v. Railway Co., 95 Mo. 269, 8 S. W. 230; Nixon v. Lead Co. (No. 15,204; filed May 16, 1894) 36 Pac. 803. The facts of the case at bar bring it fairly within the rule of the cases here cited, for a clear understanding of which these late cases should be especially consulted. There is no error in the instructions above quoted, to the prejudice of the defendants; and if the instructions given at request of defendants are inconsistent with those, in the respects claimed by counsel for appellants, or otherwise erroneous, they are so to the advantage of the appellants, and the respondent alone could have been injured by them. The order and judgment are affirmed.

FITZGERALD, J., did not participate.

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102 Cal. 618

DENNISON v. CHAPMAN. (No. 15,336.)

(Supreme Court of California. June 5, 1894.)

Change of Venue—After Default Opened.

When a defendant's time to appear has been repeatedly extended, and he has finally suffered default, the court, in opening the default, can impose reasonable conditions; and, after allowing him 10 days "to answer upon merits," it may properly deny him a change of venue.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by W. E. Dennison against E. W. Chapman for damages for breach of contract. From an order denying defendant's motion for change of venue, defendant appeals. Affirmed.

Maxwell & McEnerney, for appellant. George A. Rankin, for respondent.

McFARLAND, J. This is an appeal by defendant from an order of the court below denying his motion for a change of place of trial. The action was commenced in the superior court of San Francisco August 26, 1892, and summons was served on appellant September 2, 1892; and by various orders his time to answer was extended to and including October 31, 1892. On that day, being the last day for answering, appellant filed a motion for a change of venue to El Dorado county, which he claimed as his place of residence; but no answer or demurrer was filed. The motion was afterwards denied, without leave to renew it. On November 3, 1892, default was regularly entered against appellant. Afterwards he moved to set aside the default; and on November 18, 1892, the court ordered that the motion be granted, "and defendant allowed ten days to answer upon merits." On the last of the 10 days appellant filed an answer, and also another motion for a change of venue. The court denied the second motion, and from the order denying it this appeal is taken.

We think the order appealed from should be affirmed. It is not necessary to inquire whether the first motion was a nullity because premature, and whether, under any circumstances, a second motion could have been entertained without leave having been given to renew when the first was denied. The appellant, after his time to appear had been repeatedly extended, finally suffered default. The court, in opening the default and allowing appellant to appear notwithstanding his laches, had undoubtedly the power to impose reasonable terms. It is clear that the court did impose the condition that he should not come in for the purpose of further delay, or to file dilatory pleas, but should answer upon the merits; and it is equally clear that the condition, under the circumstances, was not unreasonable. The order is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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102 Cal. 600

ELDRED v. WHITE et al. (No. 15,264.)

(Supreme Court of California. June 2, 1894.)

JUDGMENT—EQUITABLE RELIEF—PLEADING.

1. A bill to set aside a judgment of foreclosure, entered 13 months previously, on the ground that an attorney appeared for plaintiff (then defendant) without authority, must show why plaintiff did not file his bill sooner, or proceed, under Code Civ. Proc. § 473, for leave to answer to the merits of the original action, or exhaust his other remedies at law.

2. It is not enough to aver that plaintiff stated the facts of the former case to certain attorneys, and was by them advised that he has a good defense, without averring that he has such a defense, and setting out the facts constituting it.

3. A bill to set aside a foreclosure judgment should show that such judgment worked injustice or prejudice, or was without jurisdiction, or is irregular on its face.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Horace A. Eldred against George E. White and others to set aside a judgment of foreclosure. Judgment for defendants. Plaintiff appeals. Affirmed.

J. A. Cooper and J. H. Seawell, for appellant. T. L. Carothers and Henley & Swift, for respondents.

McFARLAND, J. This is an appeal by plaintiff, upon the judgment roll, from a judgment in favor of defendants. The action was brought on the equity side of the court, to set aside and annul a judgment and decree of foreclosure rendered against plaintiff, in the superior court, on April 23, 1890, upon three certain promissory notes and a mortgage made and executed by plaintiff to one Jacob Updegraff, and assigned by him to White, defendant herein. The main ground upon which appellant rests his claim for relief is that in the foreclosure suit an attorney at law appeared for appellant (defendant therein) without authority, and filed a demurrer for him; that afterwards, by stipulation of attorneys therein, alleged to have been forged, the demurrer was withdrawn, and judgment entered against appellant; and that no summons in said suit was ever issued or served on appellant. There are also some averments about certain unauthorized changes made in the complaint in the foreclosure suit, which we do not deem material. This present action was not commenced until 13 months after the date of the judgment in the foreclosure suit; and no reason is shown why it was not commenced sooner, or why appellant did not proceed, under section 473, Code Civ. Proc., to obtain leave "to answer to the merits of the original action," or why he has not exhausted other remedies at law, before invoking the aid of a court of equity. There is no averment or finding that he did not know of the former judgment at the time of its rendition. Although there is a general averment in the complaint that appellant stated the facts of the cause in which the former judgment was rendered to certain attorneys, and was advised by them that he has a good defense, there is no averment that he has such defense, nor of any facts constituting such defense. There is no averment or finding of the insolvency of the attorney who appeared for appellant in said cause, who was himself a defendant in said cause, and is not charged with having willfully or fraudulently appeared for appellant.

It is not averred or found that appellant did not make and execute the notes and mortgage, or that the judgment was taken for too much, or that it was unjust; and the court found that appellant has not thereby "sustained any damage." It is not claimed that appellant was not generally within the territorial jurisdiction of the court rendering the former judgment, or that said judgment is not regular and valid on its face. We think that under these circumstances the judgment should be affirmed. "Courts of chancery do not lightly interfere with judgments at law. It is only for the prevention of fraud, or to relieve from substantial injury or gross injustice, that its high and extraordinary power of interference by injunction is ever resorted to. It is never exerted merely for the correction of informalities or irregularities in legal or judicial proceedings. He who seeks to avail himself of such defects must prosecute his remedies at law. From a court of equity he can receive no countenance. A court of chancery, too, looks well to the consequences of its acts; and the case must indeed be a strong one, which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt which he does not deny to be justly due." Gregory v. Ford, 14 Cal. 143. "In order to obtain equitable relief against a judgment alleged to have been fraudulently obtained, it must be averred and shown that there is a valid defense on the merits." White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71.

The only pretense that appellant has a meritorious defense to the former action is found in an assertion in his brief that one of the notes is apparently barred by the statute of limitations. But the bar of the statute is not set up in the complaint, and defendants had no opportunity to deny it, or to plead facts showing that it did not exist; and there is no evidence brought here by appellant upon the record on which he chooses to rely. He complains that the court did not make any finding as to the said matter of limitation, but there was no such issue. If the court had made a finding about the only averment which appellant made as to merits, to wit, that appellant had stated the facts to an attorney, who advised him that he had a defense, and had found such allegation to be true, such finding would have been of no consequence. Moreover, the case is one in which appellant should have asked for relief by motion in the original case; and if he had been prevented from asking relief there within the statutory time, by want of knowledge of the rendition of judgment, he should have averred that fact in his complaint. It would be unjust and inequitable to now annul the judgment, after such a lapse of time, and allow the appellant to avoid the payment of his just debt by pleading the statute of limitations in a subsequent action. The judgment is affirmed.

DE HAVEN, J. I concur.

BEATTY, C. J. I concur in the judgment upon the ground that the complaint does not show any excuse for the failure to proceed by motion in the original action.

102 Cal. 611

HASSEY v. SOUTH SAN FRANCISCO HOMESTEAD & RAILROAD ASS'N et al. (No. 15,387.)

(Supreme Court of California. June 5, 1894.)

PRACTICE—DISMISSAL FOR WANT OF PROSECUTION —REVIEW ON APPEAL.

1. The superior court has power to dismiss an action therein pending for want of prosecution.

2. Where plaintiff has done nothing for 11 years towards bringing a cause to trial, and defendant's motion to dismiss has been pending 2 years, a dismissal for want of prosecution will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; W. H. Levy, Judge.

Action by Francis A. Hassey against South San Francisco Homestead & Railroad Association and others to foreclose a mortgage. From an order dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

A. C. Freeman, for appellant. R. H. Lloyd, Newlands, Allen & Herrin, and C. E. Nougues, for respondents.

SEARLS, C. This action was brought in the district court of the fourth judicial district in and for the city and county of San Francisco, state of California, on the 12th day of November, 1868, to foreclose a mortgage upon certain lands in South San Francisco. Defendants filed their answer on the 1st day of August, 1870, setting up facts which, if true, constituted a defense to the action. The case was transferred to the superior court in and for said city and county, and on the 9th day of April, 1892, was, on motion of counsel for defendants, dismissed for want of prosecution. Plaintiff appeals from the judgment of dismissal, and fortifies his appeal by a bill of exceptions.

The motion to dismiss the cause was noticed for hearing on the 3d day of January, 1890, and was based upon the pleading and affidavits on file and the affidavit of H. F. Williams, one of the defendants, which was served with the notice. The motion was not heard until March, 1892. The affidavit of Williams, in addition to a defense to the action, tended to show that, from the date of the answer in 1870, plaintiff had taken no steps to bring the cause to trial, or evinced any desire so to do, and that no action had been taken in the cause except that in 1882 the presiding judge of the superior court assigned it to department No. 7 of said court. The affidavit further shows that a large number of the defendants (of whom there were, say, 200) died, etc. On behalf of plaintiff it was shown by affidavits that the cause was, prior to 1889, several times set for trial, and on each occasion was continued by consent of Mr. Sharp, attorney for defendants, and, as plaintiff believed, there was an understanding between said Sharp and plaintiff's attorney that it should be set for trial only when it was mutually convenient for them, and that no time came when it was convenient for Mr. Sharp to try the action. The firm of Sharp & Lloyd were attorneys of record for defendants. Sharp died in May, 1878. It further appears that, in 1889, plaintiff gave to the firm of Lloyd & Wood, attorneys, notice that he would apply to have the cause set for trial, and that thereupon Lloyd appeared in court, declared that he knew nothing of the case, that Sharp had really been the attorney therein for defendants, and asked for time to notify the defendants, that they might engage counsel, etc.; whereupon it was postponed, and defendants notified, who procured counsel, and moved to dismiss before the motion was finally disposed of.

Two propositions are well settled by the previous rulings of this court: (1) That the superior court had power to dismiss an action therein pending for want of prosecution. Kubli v. Hawkett, 89 Cal. 642, 27 Pac. 57; Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530; Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502; Kornahrens v. His Creditors, 64 Cal. 492; Lander v. Fleming, 47 Cal. 614; Simmons v. Keller, 50 Cal. 38; Chipman v. Hibberd, 47 Cal. 638; Grigsby v. Napa Co., 36 Cal. 585. (2) That the superior court having the power to dismiss in its discretion an action for the want of prosecution, this court, on appeal, will not go beyond the inquiry whether or not such discretion has been abused. Kornahrens v. His Creditors, supra; Grigsby v. Napa Co., supra. In the present case we find no sufficient showing of an abuse of discretion to warrant a reversal. Concede, what is evidently true, that a case should not be dismissed on motion of a defendant who has requested the postponement (Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57), and that the delay for many years to bring the cause to trial was by consent or at the request of Sharp, the attorney of defendants, and it is hard to perceive how the case is materially altered. Sharp died in 1878, and thereafter, for 11 years, plaintiff remained quiescent. Again, when in 1889 defendants moved for a dismissal, and for two years permitted their motion to stand over without bringing it to a hearing, plaintiff seems to have taken no action toward procuring a trial. Under such circumstances, the court below was right in dismissing the action. The power of the court to dismiss an action under section 581 of the Code of Civil Procedure, or independent of that section, has been too often exercised and upheld by this court to leave the question an open one. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

102 Cal. 542

STREETEN v. ROBINSON. (No. 15,260.)

(Supreme Court of California. May 31, 1894.)

POWER OF OFFICERS TO BIND CORPORATION—EMPLOYMENT OF COUNSEL.

1. Where the directors of a corporation, by resolution, authorize its vice president to sign all legal documents relating to its business, he is empowered to retain an attorney for the corporation, and to pay him for his services.

2. Where the services of an attorney are rendered a corporation, a settlement had and payment made without objection on the part of the corporation or any of its officers, it cannot recover back the money so paid, even though its vice president had no authority originally to employ him.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by James M. Streeten, assignee of the American Bridge & Building Company, against C. P. Robinson. From a judgment for plaintiff, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

S. C. Denson, for appellant. T. M. Osmont, for respondent.

SEARLS, C. This is an action by Streeten, as assignee in insolvency of the American Bridge & Building Company (a corporation), to recover from the defendant the sum of $8,967.52, averred to have been received by defendant to the use of said insolvent, and by him converted to his own use. The cause was tried by the court, and findings in writing filed in defendant's favor, upon which he had judgment, from which and from an order denying a motion for a new trial plaintiff appeals. According to the findings, the insolvent, on the 8th day of October, 1890, received from the government of the United States a check or draft drawn upon the subtreasury at San Francisco, for $8,967.52, which draft, properly indorsed, was delivered to defendant for collection, collected by him; and, with the consent of said insolvent, $5,000 was retained by him in payment for services rendered by him as an attorney for said insolvent, said sum being an agreed fee allowed him by said insolvent, and the residue was paid to said insolvent and to one Charles C. Rohlffs, by its direction and authority. Defendant is an attorney at law, engaged in the practice of his profession in San Francisco. As such attorney he was employed by, and rendered legal services to, the insolvent, for which a settlement was had, and a fee of $5,000 was agreed upon and paid as above stated. The contention here grows out of the following facts: The contract for the professional services of defendant was made by John P. Sheldon, vice president of the insolvent, the president being absent in Mexico at that time and during the period covered by the services in question. The draft was indorsed and delivered to defendant for collection by order of said vice president, and the settlement had with defendant as to the amount of his fee, the payment thereof, and the disposition of the residue of the money, were all had with, and done by the consent and order of, said vice president. The board of directors of the insolvent took no action in the premises from the beginning to the ending of the business, for which reasons appellant contends the retainer of defendant, the settlement, allowance, and payment of his fee for services, etc., were and are invalid, null, and void; and hence that the evidence showing that the employment and settlement was by the vice president, without the sanction or authorization of the directors, does not support the findings that those things were done by the corporation. There was testimony tending to show that Thomas Thomson, the president, and John P. Sheldon, the vice president, of the insolvent, owned all but three shares of the stock of the corporation; that they together attended to its business, managed its affairs, and made contracts; and that, when the president was absent, Sheldon acted as manager. There had been no meeting of the directors since May, 1890. In 1885 a resolution was passed by the board of directors, by which the president or vice president was given full power to sign any and all legal documents relating to the business of the company, after which time they, or one of them, seem to have made all contracts on behalf of the company and to have managed its affairs.

At common law it was well settled that corporations aggregate were incapable of making contracts, or of appointing agents or attorneys, except by a deed or power in writing under their corporate seal. With the progress of time, corporations have not only increased in number, but their activities have extended to nearly every class of business known to the commercial and industrial world. As a consequence of these changed conditions, and to secure that celerity of action essential to the conduct of business by modern corporations, these rules have been so far modified that, as was said by Bronson, C. J., in Gillett v. Campbell, 1 Denio, 522, "corporations, like individuals, may appoint agents, and make most of the contracts which fall within the scope of their general powers without the use of a seal." The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been repeatedly recognized. Bank v. Gilstrap, 45 Mo. 419; Turner v. Railroad Co., 51 Mo. 501; Southgate v. Railroad Co., 61 Mo. 89; Insurance Co. v. Oakley, 9 Paige, 496; Mumford v. Hawkins, 5 Denio, 355; Pixley v. Railroad Co., 33 Cal. 183. Crowley v. Mining Co., 55 Cal. 273, was similar in principle, and the reasoning there, and the authority of the cases cited, seem conclusive here. We must not lose sight of the fact that the contract here was executed, —that the engagement was made by the vice president, who, in the absence of the president, conducted the business affairs of the corporation,—the services rendered, a settlement had, and payment made without objection on the part of the corporation or any officer thereof, and that this is not an action upon an executory contract, but a suit by the assignee to recover the money so paid upon an executed agreement. If, therefore, it be conceded that the vice president had no authority to engage the services of the respondent, it does not follow that a recovery can be had in this case. Pixley v. Railroad Co., supra, is conclusive of this question. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 664

FITZGERALD v. FITZGERALD et al. (No. 15,357.)

(Supreme Court of California. June 5, 1894.)

APPEAL—DELAY IN TAKING—DISMISSAL.

An appeal, not having been taken within the statutory time, will be dismissed.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Fitzgerald, administrator, against Fitzgerald and others. Judgment for defendants, and order denying new trial. Plaintiff appeals. Appeal from judgment dismissed. Order affirmed.

Archer & Bowden and J. H. Campbell, for appellant. Wilcox & Patton, for respondents.

McFARLAND, J. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. The appeal from the judgment, not having been taken within the statutory time, must be dismissed. The only question presented on the appeal from the order denying a motion for a new trial is this: was the evidence sufficient to sustain the facts found by the court? The facts found were these: "First. Walter

Fitzgerald, deceased, did not in his lifetime enter into any agreement or have any understanding with the defendants, or either or any of them, that they would enter into a copartnership of any character. Second. No copartnership business was in fact entered upon or conducted by the said defendants, or either or any of them, with or for the said Walter Fitzgerald in his lifetime." We have thoroughly examined the evidence, and we think it fully sufficient to support said findings. A detailed statement here of the testimony as disclosed in the transcript would serve no useful purpose. The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

(4 Cal. Unrep. 663)

Ex parte CHATFIELD. (No. 21,128.)

(Supreme Court of California. June 4, 1894.)

HABEAS CORPUS—PROBABLE CAUSE FOR COMMITMENT.

On application for discharge on habeas corpus, asked on the ground that petitioner was committed for obtaining money under false pretenses, without probable cause, in that the false pretenses were not proven by corroborating circumstances in addition to the testimony of one witness, as required by Pen. Code, § 1110, the evidence must be taken as establishing all that it tends to prove.

Department 1.

Application of Chatfield for discharge on habeas corpus. Discharge denied.

S. C. Denson, for petitioner. Piexotto, Dist. Atty., for respondent.

PER CURIAM. Petitioner was examined in the police court of the city and county of San Francisco on a charge of obtaining money under false pretenses, and was committed for trial to the superior court. He asks to be discharged on habeas corpus, under subdivision 7 of section 1487 of the Penal Code, upon the ground that he was committed without reasonable or probable cause. His contention is that the evidence was not sufficient to warrant his being held, in that the alleged false pretense was not "proven by the testimony of two witnesses, or that of one witness and corroborating circumstances," as required by section 1110 of the Penal Code. There was, as appears by the record, but one witness to the false pretense,—the prosecuting witness; but after a careful examination of all the evidence upon which the commitment was based, and applying, as we must, the rule that the evidence is to be taken as establishing all that it tends to prove, we are not prepared to say that there are no corroborating circumstances within the purview of the section relied upon. For these reasons the petitioner must be remanded, and it is so ordered.

(102 Cal. 642)

MALLOY v. BOARD OF EDUCATION OF CITY OF SAN JOSE. (No. 15,353.)

(Supreme Court of California. June 7, 1894.)

BOARD OF EDUCATION—POWERS—CONTRACT WITH TEACHER.

1. A provision in a city charter authorizing the board of education to enact rules for the conduct of its proceedings does not empower it to change a rule in the charter that a majority of its members shall constitute a quorum, and that a majority of those present at a meeting may transact business.

2. A vote of the board of education of a city in favor of employing a certain person as teacher does not constitute a contract with such person, and mandamus will not lie to compel her employment by the board.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Petition by Alice B. Malloy for a writ of mandamus to compel the board of education of the city of San Jose to meet, and declare her elected teacher. Judgment for petitioner, and defendant appeals. Reversed.

S. F. Lieb and Wm. B. Hardy, for appellant. Morehouse & Tuttle, for respondent.

BELCHER, C. The charter of the city of San Jose provides that the board of education of the city shall consist of eight members, and that "a majority of the board shall constitute a quorum for the transaction of business, but any smaller number may adjourn from time to time. The board may enact rules for the conduct of its own proceedings," and it shall have power "to employ and dismiss" teachers, and to fix and order paid their salaries or compensation. St. 1873, p. 395, §§ 3, 50, 52. Prior to January 5, 1893, a rule was adopted by the board, and was then in force, providing that "no measure or proposition shall be valid unless passed by five votes, except motions to adjourn, to postpone, to reconsider, to commit, to lay on the table, to amend, or the previous question." On January 5, 1893, there was a regular meeting of the board, but only seven of its members were present. There was then a vacancy in the corps of teachers of the city, and the members present regularly proceeded to ballot for the election of a teacher to fill the vacancy. Seven ballots were cast, and four of them were for the respondent, Alice B. Malloy. But notwithstanding a majority of the members present, who constituted a quorum for the transaction of business, voted for respondent, the board then and there refused, and ever since has refused, to declare her elected to fill the vacancy, or to permit her to engage in keeping the school. She possessed all the qualifications for the position of teacher required by law, or the rules and regulations of the board, and has at all times been ready, willing, and able to perform the duties of teacher. Before filing her complaint, she duly demanded of the board that it do its duty in this behalf, and declare her duly elected to fill said vacancy, but it refused to do so. On February 3, 1893, respondent commenced this proceeding, alleging the facts, and praying that a writ of mandate be issued, commanding the said board, and each and every member thereof, to immediately meet as a board of education, and declare her elected teacher, etc. The answer denied that on the 5th day of January, 1893, or at any other time, the defendant board of education regularly, or at all, proceeded to, or did, elect respondent a teacher; denied that it is, or ever was, the duty of the board to declare her elected as a teacher in the said schools; and averred that the board never employed her as a teacher. The court below found the facts to be substantially as above stated, and, as conclusions of law therefrom, "that plaintiff was duly and regularly elected teacher, * * * and that it is the duty of said board to declare her so elected, and to cause the school superintendent of said schools of said city of San Jose to assign her to said position, and that she is entitled to a peremptory writ of mandate directed to the said board of education," etc. Judgment was accordingly so entered, from which the defendant appeals.

On behalf of the respondent, it is contended that the authority given the board to enact rules for the conduct of its own proceedings did not authorize it to overthrow or change the rule, declared by the statute, that a majority of the board should constitute a quorum for the transaction of business; and this is undoubtedly true. It may be assumed, therefore, that a majority of the members present at the meeting referred to had power to transact any business then legitimately before them, and requiring action. It is further contended that, as four of the seven ballots cast were in favor of respondent, she was duly elected to fill the position of teacher, and, having been so elected, the board had no right to refuse to declare the result, and hence she was entitled to the relief awarded her. The board, as we have seen, was authorized to employ teachers, but in what way the employment might be effected was not prescribed. The question, then, is, did the board, by the ballots cast, employ the respondent as a teacher? If not, it is manifest that she cannot maintain this action. Employment implies a contract on the part of the employer to hire, and on the part of the employe to perform services; and, until such a contract is mutually entered into, it can have no binding obligation upon either party. The words "to employ" teachers can mean nothing more, therefore, than that the board was clothed with power to contract with suitable persons to engage in the work of teaching in the public schools of the city for a fixed salary or compensation. The record shows that immediately after the ballots relied upon as constituting employment were cast, and presumably before respondent could have had any knowledge of the matter, the board, "then and there," refused to declare her elected. The ballots were only an expression of choice on the part of the members casting them, and had no greater force or effect than an oral vote would have had. At most, they amounted only to an offer of employment, which respondent had a right to refuse, and the board had a right to revoke or cancel at any time before acceptance. But when the board refused, then and there, to declare respondent elected, it did in effect revoke and cancel the offer, and leave nothing thereafter for her to accept; and whether, in doing so, the board acted under the supposed requirement of its rule, or by law, or independently of it, is quite immaterial. We conclude that the court below erred in granting the writ of mandate, and advise that the judgment and order be reversed, and the cause remanded, with directions to dismiss the action.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded, with directions to the court below to dismiss the action.

4 Cal. Unrep. 661

PEOPLE v. BRADY. (No. 21,071.)

(Supreme Court of California. June 2, 1894.)

CRIMINAL LAW—EVIDENCE—STATEMENTS OF CONFEDERATE.

Where defendant, in the presence of witness, by arrangement with his partner in crime, agreed that witness should accompany his partner, who should tell witness where the stolen property was, and that witness should get it, and turn it over to defendant's partner, statements made to witness by such partner, in defendant's absence, as to where the property may be found, are admissible against defendant.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Joseph Brady was convicted of robbery, and appeals. Affirmed.

N. C. Bledsoe, for appellant. Atty. Gen. Hart and Wm. H. Layson, Dep. Atty. Gen., for the People.

PER CURIAM. The defendant appeals from a judgment and conviction of robbery, and asks a new trial upon various grounds. It is conceded that a robbery was committed, but it is claimed that the evidence at the trial was insufficient to identify the defendant as one of the robbers. Upon examination of the record, we consider the evidence amply sufficient in that regard. The robbery was committed by three men. It is now contended that the judgment must be reversed by reason of the admission in evidence of the statements of one of the robbers made to a third party, and not in the presence of the defendant, the day after the offense was committed. It is an elementary principle of law, which has been recognized by many of the decisions of this court, that the declarations and statements of a co-conspirator, made after the accomplishment of the conspiracy, in the absence of the defendant, are inadmissible. People v. Moore, 45 Cal. 19; People v. English, 52 Cal. 212; People v. Aleck, 61 Cal. 137; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; People v. Irwin, 77 Cal. 494, 20 Pac. 56; People v. Dilwood, 94 Cal. 89, 29 Pac. 420. But the present objection and exception do not furnish a case coming within the principle of law declared in the foregoing authorities. Fairly construed, the circumstances as shown by the record are these: The defendant, in the presence of the witness, and by mutual arrangement with his alleged co-conspirators, agreed that the witness should accompany one of his partners in crime, who should inform him (the witness) where the stolen property was concealed, and that thereupon the witness should secure the possession of the property, and turn it over to the co-conspirator. In pursuance of this plan, and while the two were on the way to the spot where the property was concealed, the co-conspirator described the location of the place, and the stolen property was subsequently found at that point. It is now insisted that the statement made to the witness, in the absence of the defendant, as to the location of the stolen property, should not have been admitted in evidence. We think, under the foregoing circumstances, the defendant has no right to complain of the evidence admitted. The case stands exactly as though he himself had described to the witness the location of the stolen property. There is nothing additional in the record demanding our attention. Judgment and order affirmed.

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102 Cal. 620

BAKER v. BRICKELL. (No. 15,435.)

(Supreme Court of California. June 5, 1894.)

Supplemental Complaint—Entering Judgment.

A supplemental complaint, which Code Civ. Proc. § 464, provides must allege facts material to the case occurring after the former complaint, does not so do by alleging that, since the commencement of the action, defendant, at his own expense, caused the decree to be entered, in a suit in which plaintiff was defendant and B. was plaintiff, without the consent or authority of B.; the former complaint, which sought to have a trust in lands declared in favor of plaintiff because of fraud in the suit of B. against plaintiff, which was to quiet title to said lands, having alleged that said decree quieting title in B. was ordered and signed by the court, and the evidence showing that it was signed and filed before the commencement of plaintiff's action, and that, before that time, defendant had acquired B.'s title; as B. could not then impair the effect of the decree or prevent its entry.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Adam S. B. Baker against John Brickell. Judgment for defendant. Plaintiff appeals. Affirmed.

Fox & Kellogg, for appellant. E. J. & J. H. Moore and A. N. Drown, for respondent.

BELCHER, C. The plaintiff brought this action to establish a trust in certain lands in the city and county of San Francisco against the defendant Brickell. Maria Baker Batchelder, the mother of plaintiff, was made a party defendant but failed to appear, and her default was duly entered. The case was tried, and judgment given and entered in favor of the plaintiff. From that judgment, and an order denying his motion for a new trial, Brickell appealed to this court, where the judgment and order were reversed, and the cause remanded. Baker v. Brickell, 87 Cal. 329, 25 Pac. 489, 1067. When the case went back to the trial court, the plaintiff filed an amendment to his complaint, and also a supplemental complaint. The defendant demurred to the supplemental complaint, and his demurrer was sustained. The case was then again tried, and the findings and judgment were in favor of the defendant, from which judgment, and an order refusing him a new trial, the plaintiff prosecutes this appeal.

In the opinion delivered on the former appeal the facts of the case are very fully stated, and the law applicable thereto is declared. And in the late case of Whelan v. Brickell (Cal.) 33 Pac. 396, an action prosecuted by the administrator of the estate of plaintiff's father, that decision is referred to and approved. In the record presented on this appeal the facts are the same as on the former appeals and the decision on that appeal must therefore be treated as the law of the case, and be followed here. The amendment to the complaint stated no new facts, and added nothing material to the amended pleading. The averments were simply of rights resulting from facts already stated. The demurrer to the supplemental complaint was properly sustained.

In his original complaint plaintiff alleged that in May, 1876, an action was commenced against him, then a minor about 14 years of age, in the name of his mother, Maria Baker Batchelder, as plaintiff, to quiet her title to the land now in controversy, and that in August, 1876, "a judgment and decree of the court was ordered and signed, quieting the title of the plaintiff in said action against this plaintiff as defendant therein." The complaint makes various charges of fraud on the part of the defendant Brickell in the institution and prosecution of that action, which, as found by the court in this case, were wholly without foundation and false. An appeal was taken by the defendant in that case, and in May, 1889, the judgment was affirmed. Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754. The supplemental complaint "avers that since the commencement of this action, and during the progress of the first trial thereof, * * * said defendant Brickell, at his own cost and expense, and without the consent or knowledge or authority of said Maria Baker Batchelder, caused said decree in said action" of Batchelder v. Baker "to be entered, and that such entry was the first entry of said decree ever made, and was more than ten years after the signing thereof, and that such entry of said decree was ordered by the attorneys herein of said Brickell, and, being so ordered and made without the consent or knowledge or authority of said Maria Baker Batchelder, was and is fraudulent and void, and of no force or effect whatever; and that for the reasons above stated, and in plaintiff's complaint in this behalf stated, all proceedings in said action last named were and are fraudulent and void."

A supplemental complaint must allege "facts material to the case occurring after the former complaint." Code Civ. Proc. § 464. No facts material to the case are alleged in the supplemental complaint here. In the original complaint it is stated that a judgment and decree of the court were ordered and signed, and the evidence introduced by the plaintiff shows that findings and decree were signed by the judge and filed September 1, 1876. It was then and thereafter the ministerial duty of the clerk to enter and docket the judgment, and to prepare and file the judgment roll (sections 633, 668, 670–672, Code Civ. Proc.), and he could not, by neglecting to perform that duty, destroy or impair the effect of the judgment (Casement v. Ringgold, 28 Cal. 335; Estate of Newman, 75 Cal. 213, 16 Pac. 887; Estate of Cook, 77 Cal. 220, 17 Pac. 923, and 19 Pac. 431). It was therefore immaterial who set the clerk in motion to discharge this ministerial duty, or who paid him his fees therefor. He might perform his duty of his own motion, or the court could direct him to do it, or any party interested in having it done could procure him to do it. Here it appears that Brickell was interested in having the judgment entered, for it is charged in the complaint that through the mortgages which Mrs. Batchelder and her husband had given him, and the foreclosure of those mortgages, and the sale by the sheriff under the decree of foreclosure and the purchase at such sale, he had acquired all the estate or interest of Mrs. Batchelder in and to the lands in question. This was in November, 1878, and the "consent," "knowledge," or "authority" of Mrs. Batchelder that the judgment be entered in January, 1887, was clearly not necessary. She could not, by withholding her consent or authority, tie the hands of the clerk and prevent the entry. Although nominally in her favor, the judgment had become a muniment of title to her successor in interest, and she could not impair its effect. On the authority of the former decision in this case, the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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103 Cal. 67

LANCASTER et al. v. MAXWELL et al.

(No. 15,017.)

(Supreme Court of California. June 12, 1894.)

APPEAL—NOTICE TO CODEFENDANT — WHEN NECESSARY.

Where, in an action to foreclose mechanics' liens, it is decreed that the land, buildings, etc., of the owner, be sold to satisfy the liens, and that if the proceeds of sale are not sufficient to pay the liens the deficiency shall be docketed as a personal judgment against the contractor, a notice of appeal by the owner from the judgment, and from an order denying a motion for a new trial, must be served on defendant contractor, under Code Civ. Proc. § 940, providing that such notice must be served on every "adverse party."

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. R. Lancaster and others against Thomas Maxwell and C. B. Gregory to foreclose mechanics' liens. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant Gregory appeals. Dismissed.

Ash & Mathews, for appellant. W. Mathews and A. D. Lemon, for respondents.

McFARLAND, J. This is an action to foreclose certain mechanics' liens. Defendant Gregory is the owner of the buildings involved, and defendant Maxwell was the original contractor. Both defendants suffered default. The liens sued on grew out of labor and materials done for, and furnished to, the contractor, Maxwell. By the judgment it was decreed that the land, buildings, etc., of Gregory, be sold, and the proceeds appropriated to the payment of the amounts found due upon the liens, and that, if such proceeds should not be sufficient to pay all the liens, "the deficiency thereof shall be docketed as a personal judgment against said defendant Thomas Maxwell." The defendant Gregory appeals from the judgment, and also from an order denying her motion to set aside her default, made upon the grounds of surprise, excusable neglect, etc. The notice of appeal was not directed to, nor served upon, the codefendant, Maxwell, and, for that reason, respondents move to dismiss the appeal.

The court did not abuse its discretion in refusing to set aside the default; and while we have looked through the transcript and briefs, and see no reason why the judgment should, under any view, be reversed, it is not necessary to discuss the other points suggested, because we think that the appeal should be dismissed. A notice of appeal must be served on every "adverse party" (section 940, Code Civ. Proc.), and adverse parties are those who are "interested in the judgment, and would be affected by its reversal." O'Kane v. Daly, 63 Cal. 319. "Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party,' within the meaning of these provisions of the Code, irrespective of the question whether he appears, upon the face of the record, in the attitude of plaintiff or defendant or intervener." Senter v. De Bernal, 38 Cal. 637. And it is quite clear that in the case at bar the interest of Maxwell would be "affected by the reversal" of the judgment. Appellant seeks particularly a reversal of that part of the judgment which decrees her property to be sold to satisfy the liens, and it is apparent that such reversal would be adverse to the interest of Maxwell. The appeal is dismissed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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102 Cal. 558

PEOPLE v. MARTIN. (No. 21,030.)

(Supreme Court of California. May 31, 1894.)

False Pretenses—Particeps Criminis—Evidence.

1. The false pretenses charged being statements that a large judgment had been obtained against prosecutrix, the fact that prosecutrix made the transfer to avoid paying said judgment, even if it constituted her particeps criminis, could not bar the state's right to prosecute.

2. An assignment of notes, mortgages, etc., by their owner, accompanied by their delivery, even if intended by said owner to create a trust in her own favor, passes the title as well as the possession, and, if induced by false statements of the assignee, is foundation for a prosecution for obtaining property on false pretenses, rather than for larceny.

3. The state, having introduced a contract between prosecutrix and defendant for the transfer of the property, valid on its face, and not annulled by any decree in equity, is not estopped to impeach it by showing that the property was in fact obtained by false pretenses.

4. The transfer having been made under a contract, the information should charge as the property obtained, not the contract, but the valuables transferred thereunder; since, even if the contract were property, it was simply a means to the end desired.

5. The state's theory was that defendant had worked on prosecutrix to make her believe that she was in imminent danger from her enemies and their hired detectives, who desired to seize her property and person. There was evidence that defendant had suggested her moving to another bedroom in defendant's house, for fear of being chloroformed. *Held*, that prosecutrix's testimony that one morning she had found the gas burner, which she had turned off the night before, partly turned on, and had been made sick by the gas, was relevant, if not of much weight.

In bank. Appeal from superior court, Alameda county; W. L. Greene, Judge.

Mary E. Martin, convicted of obtaining property by false pretenses, appeals. Affirmed.

Welles Whitmore and M. C. Chapman, for appellant. Atty. Gen. Hart and Dist. Attys. Chas. E. Snook, Geo. W. Reed, L. S. Church (E. M. Gibson, of counsel), for the State.

GAROUTTE, J. The appellant was convicted of obtaining money and other personal property from one Sarah E. Leonard by false and fraudulent pretenses. The information is laid under section 532 of the Penal Code, and the false pretenses upon which it is based consisted in the representations to said Leonard by the defendant that a judgment in a large sum of money had been obtained against her in the state of New York, and that her property would be seized and sold to satisfy such judgment. The information further states that said Leonard believed such statements, and so believing, and in order to avoid the application of her property to the satisfaction of such judgment, she was induced to and did transfer and deliver said property to defendant. The information contained various allegations other than those just noticed, and a demurrer was offered thereto upon various grounds, but we think the information well drawn, and our consideration of the alleged defects therein will be limited to the contention of appellant that the allegations we have in substance quoted therefrom constitute a bar to the prosecution of the accused. Possibly the state might be barred from conducting a criminal prosecution by reason of the acts of its duly-constituted officers representing the state in such matters; but it is a novel proposition that the acts and conduct of a private individual, even though such individual be what is termed in law the "prosecuting witness," could under any imaginable circumstances bar the state from the prosecution of a criminal. Appellant states her position as follows: "If, at the time that Sarah E. Leonard placed her property in the possession of the defendant, she believed that there was a valid and existing judgment for $17,000 or $18,000 against her in the state of New York, and she placed her property out of her hands to avoid its being applied towards the satisfaction of such judgment, her intentions were dishonest, and she was herself guilty of a criminal offense, and became particeps criminis." The case of McCord v. People, 46 N. Y. 472, appears to support the doctrine insisted upon by appellant, but the great weight of authority is to the contrary. It is said by the court in Com. v. Morrill, 8 Cush. 571: "Supposing that to be otherwise, and it should appear that Lynch (the party defrauded) had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally." The doctrine of the foregoing case is approved by Mr. Bishop in his work on Criminal Law (8th Ed. § 469). The principle is also declared in the same work at sections 256 and 257. See, also, Cummins v. People (Colo. Sup.) 27 Pac. 887. From any aspect of the case the contention has no sound support. If the party defrauded is also guilty of a violation of the law, he, too, should be prosecuted, rather than his offense should serve as a shield to the other's crime. The offense is committed against the public, and not against the individual. The guilty party is prosecuted in the interest of the people of the state, and not in the interest of the party defrauded of his property. There is no principle of law that will bar the state from prosecuting a criminal because some other person is a particeps criminis. But, viewing the facts of this case in the light of the indictment, the defrauded party committed no offense whatever. How could she possibly do so, when the pretenses were all false, and the whole thing was but a scheme of lying and deceit? If such be a crime, she transferred no property to evade its application upon a money judgment which stood against her, for there was no such judgment. Her intention to make a transfer for that purpose avails nothing, for a person's intentions alone violate no law.

It appears from the testimony of the defrauded party, Leonard, that by reason of the statements of the defendant as to the existence of a judgment for a large amount against her in the state of New York, and for the purpose of preventing the seizure of such property upon executions based upon such judgment, she transferred and assigned to the defendant, in addition to other property, one mortgage and bond for the sum of $4,000, four certain bank books evidencing deposits in the sum of $7,381, in the name of Sarah E. Leonard, in certain banks located in the city of Rochester, N. Y., it further appearing that the defendant subsequently secured the money represented by such books. Section 1110 of the Penal Code provides that in a case like the present one, where the false pretense is oral, it must be proven by the testimony of two witnesses, or of one witness and corroborating circumstances. Without entering into a discussion of the interesting question as to whether corroborating circumstances may not be shown by the evidence of the same witness who testifies directly to the false pretense, we are well satisfied that other evidence in the record is amply sufficient to furnish the corroboration demanded by the statute. The entire conduct of the defendant, taken in connection with her statements to third parties, especially her declarations to J. J. Norman, Mrs. Hagan, and to Charles N. Leonard, when she went to the state of New York for the purpose of realizing upon the $4,000 mortgage and bond, furnish the corroborating evidence contemplated by the law.

It is insisted that, if the evidence in the case disclosed defendant guilty of an offense, it is the offense of grand larceny, and not the statutory crime of obtaining property from another by false pretenses. Conceding the distinction between these two offenses to be as claimed by defendant's counsel, to wit, that in grand larceny the owner of the property does not intend to part with the title and possession of it, while in the offense of obtaining property by false pretenses the owner does intend to part with the title and possession, still, tried by such a test, the evidence in this case determines that the information is properly laid. The proper assignment of notes, mortgages, and bank books by the true owner thereof, accompanied by a delivery, not only passes the actual possession, but transfers the title to the assignee. Looking at this question in its most favorable light for the accused, it is at least apparent that the title to this property by the assignment thereof passed to her in trust.

The prosecution offered in evidence an agreement and assignment entered into between the defendant and the prosecutrix at the time the alleged false pretenses were made, wherein the property described in the information was transferred and assigned to the defendant in consideration of an agreement upon her part to support and care for the prosecutrix during the remainder of her life. It is now insisted that, this contract showing upon its face a valid transfer of the property to the accused, the prosecution is bound by the evidence, and is estopped and barred from proving a different state of facts, and that, until that contract is set aside by a court of equity upon some ground in equity, this prosecution cannot be maintained. The contention is directly in line with the principle insisted upon by the accused upon a former branch of the case, where it was claimed that the acts of Leonard had barred the prosecution of the defendant. The parties to that contract and the parties to this prosecution are not the same. The state is a party to the prosecution, but no party to the contract. If the contract, when offered by the people, is conclusive as against them, it certainly would be a perfect defense if offered by the accused; but it is not possible that the people, in the prosecution of a defendant charged with crime, can be estopped in any such manner. The contract is simply a piece of evidence in the case, and stands upon the same plane as any other piece of evidence, and is weighed in the same scales. As tending to assist the cause of the defendant, the contract by its terms indicates that the prosecutrix parted with this property to the defendant in a lawful way, and for a lawful purpose, and that crime, or even fraud, was an entire stranger to the transaction. But the complaining witness testified that her reasons for parting with her property were those set forth in the information, and this conflict in the evidence was a matter purely for the jury's consideration. The defendant's guilt of the offense charged must appear to the jury beyond a reasonable doubt, from all the evidence placed before it; and this contract but bears its part in furnishing light—be that light strong or weak—upon the ultimate fact as to the guilt or innocence of the defendant. The rules of evidence in civil cases, as to a direct or collateral attack upon the contract by any of the parties to it, are entirely inapplicable to anything involved in this case.

We see no variance between the allegations and the proof, as to portions at least of the property described in the information, and a variance as to any particular piece of property is in no way fatal to an affirmance of the judgment. The information and the evidence appear to be in line as to the bond and mortgage, and, even conceding that the bank books were not transferred to the defendant, still the money deposited in the banks and evidenced by the books was transferred, and such fact was alleged in the information. Under instructions from the prosecutrix, the money was collected by the First National Bank of Oakland and paid to the defendant. If it was not all actually paid to her, it was deposited to her credit in the bank, and subject to her order alone, and this was in all respects equivalent to payment.

It is further insisted that the written contract entered into between these parties, and to which reference has already been made, was obtained from the defrauded party by reason of the false pretenses; that such contract of itself was property; that the property described in the information was transferred to the defendant by virtue of the terms of that contract, and not by reason of the false pretenses; and that, consequently, the prosecution should have been based upon a procurement of the contract by the false pretenses, and not upon a procurement of the property described in the information. This principle is contended for upon the ground that the pretenses are too remote from the obtaining of the property. After an examination of many cases, we are well satisfied that sound reason and a great preponderance of authority is opposed to this view. It is said in Reg. v. Martin, L. R. 1 Cr. Cas. 56: "It is impossible to contend seriously that the case is not within the statute because the chattel is obtained under a contract induced by the false pretense." Desty, in his American Criminal Law (section 149H), states the rule to be as follows: "The false pretense must be the operative cause of the transfer of the property, and there must be a causal relation between the pretense and the transfer that must directly cause the transfer. That the goods were obtained immediately through a contract to which the false pretenses induced the prosecutor to consent is no defense if a causal relation exists between the contract and the false pretense." And Wharton and Bishop state a similar doctrine. If this contract or assignment is such that it may be treated as property, and thus form the basis of a prosecution for obtaining it under the pretenses relied upon in this case, as is claimed by appellant, then we can only say that such claim shows the accused to be guilty of an additional offense, rather than that it creates a bar to the present prosecution. The creation of this instrument, whatever it may be termed, as we view the matter, was but one step towards the commission of the crime of which the defendant has been convicted. It was a part of the machinery employed in obtaining the property. It was but the first act of the play, for it was not the purpose of the accused simply to procure an execution of the instrument. Actual possession of the property was the important thing, and the creation of the writing was but a means to the end. This instrument creates no bar to the present prosecution, and the property described in the information was secured by defendant by means of the false pretense she is shown to have made.

Under objection of the defendant, the prosecutrix testified that she got up one morning and felt quite sick, and, upon examination, she discovered the gas to be turned on slightly in her room, and that she was positive it was turned off when she retired the previous night. This incident occurred when she was stopping at the Jones street house with defendant. Previously to this event she had removed to this room from a front room, owing to the suggestion of the defendant that there were a great many windows in the front room, and for that reason she was in danger of being chloroformed by detectives. The entire tenor of the defendant's conversations addressed to the complaining witness was that she was continually surrounded by danger, and that her enemies and hired detectives were ever on the alert for the purpose of both despoiling her of her property and forcibly seizing her person. It is the theory of the prosecution that this course of conduct upon the part of the defendant was all a sham and a lie, and carried on for the purpose of frightening the prosecutrix, and thereby more effectually to keep her under absolute control, that she might be more readily looted of her property, for, at these times, the defendant was posing as the one friend who was protecting her in the midst of her enemies. As a part of such scheme, and as directly in line with the suggestion of a change of room and the liability of being chloroformed, this incident of the gas escaping was offered in evidence. The evidence is somewhat remote, and the incident not directly traceable to the accused, but these objections go to its weight rather than to its admissibility, and we perceive no error in the ruling of the court in this regard. We have examined the additional assignments of error based upon the rulings of the court as to the admission and rejection of evidence, and hold none of them to be well taken. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; VAN FLEET, J.

103 Cal. 1

ROBINSON v. EXEMPT FIRE CO. OF SAN FRANCISCO. (No. 15,383.)

(Supreme Court of California. June 9, 1894.)

DIVISIBLE CONTRACT—ACTION FOR BREACH—DAMAGES—EVIDENCE.

1. Where defendant agreed to pay plaintiff a certain sum each week that he was sick and disabled, the contract was divisible, and plaintiff was not entitled to recover benefits accruing between the commencement of the action and the trial, but only such as had accrued when the action was commenced.

2. Where the sickness of plaintiff is a matter in issue, a witness who has observed him and talked with him under various circumstances may give his opinion as to whether plaintiff was or was not apparently well.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by T. B. Robinson against the Exempt Fire Company of San Francisco for sick benefits. Judgment for plaintiff, and defendant appeals. Reversed.

Davis Louderback, for appellant. Geo. D. Collins, for respondent.

VAN FLEET, J. The defendant and appellant is an organization, with certain fraternal and charitable features, whose membership is composed of exempt firemen. Its by-laws provide for the payment of sick benefits to any member who from sickness or accident becomes unable to earn a livelihood. The plaintiff, a member of the organization, brings this action to recover a considerable amount claimed to be due him for sick benefits, and which defendant refused to pay. Trial was had before a jury, and verdict and judgment went for plaintiff. From the judgment and an order denying its motion for a new trial, defendant appeals.

1. The action was commenced in November, 1885, but was not tried until November, 1893. At the trial the court, against the objection of defendant, admitted evidence offered by plaintiff upon the theory that plaintiff was entitled to recover for benefits accruing intermediate the commencement of the action and the date of trial; and the court also charged the jury in accord with this theory, and refused an instruction requested by defendant limiting the plaintiff's right to recover to the benefits accrued at the date of commencing his action, to all of which defendant excepted. These rulings, we think, were clearly erroneous. The idea upon which the lower court seems to have proceeded and the contention of defendant is that the contract sued on is entire, and not severable; that it imposed a duty upon defendant to pay benefits so long as plaintiff remained sick and disabled; that, the defendant having made default before suit, this default worked a breach of the entire contract; and that all damages accruing subsequently from that sickness must be deemed to have originated in the default, to have proximately resulted therefrom, and can be recovered in the action although accruing subsequently to its commencement. But we think respondent mistaken as to the character of the contract between the parties. The contract is not entire in the sense used by respondent. It is, to the contrary, in its nature severable. The obligation it casts upon defendant is distinctly separable into independent parts. It requires defendant to pay plaintiff a certain sum each week that he is sick and disabled. The right of plaintiff to this payment for any one week accrues at the end of that week, and he is entitled to sue immediately upon default in its payment. Such default, however, does not breach the entire contract; the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them. The accidental circumstance that the plaintiff in this instance continued disabled from the same cause subsequent to the bringing of his action, and that defendant continued to default in payment of benefits, can in no way affect the construction to be put upon the contract. Each default was a separate cause of action in itself, and the damage accruing to the plaintiff therefrom did not flow proximately or otherwise from any previous default. The successive defaults of the defendant, and the damage resulting to plaintiff from each, were as separate and apart as though arising from entirely distinct and widely-separated causes of disability. Mr. Parsons, speaking on the subject of the rule of damages applicable to a contract that is severable into parts, says: "It may happen that the injury complained of is the breach of a contract that extends over a considerable space of time, and includes many acts, or it is a tort divisible into may parts. The question then arises whether the action should be for the whole breach or the whole

tort, and damages be given accordingly. This must depend upon the entirety of the contract or of the tort. If it be a whole, formed of parts, which are so far inseparable that, if any are taken away, there is no completed breach or tort left, all must be included in the demand and in the damages. But, if they are separable into many distinct breaches or torts, then an action may be brought as if each stood alone, and damages recovered." 3 Pars. Cont. c. 8, § 6. This we take to be a correct statement of the rule. If the default of defendant in the payment of any one week's benefits carried with it a breach of the whole contract, defendant could sue for and recover all damages proximately flowing from that breach; and this is the extent to which the authorities relied upon by respondent go. But the breach being separable, as we have seen, and not entire, plaintiff is only entitled to recover those benefits accrued at the commencement of the action.

2. It became a subject of material inquiry at the trial as to the state of health of plaintiff during the period for which he claimed benefits, the main defense of defendant resting upon its denial of the sickness or disability of plaintiff. Many witnesses were examined upon the subject, and a large number of exceptions are urged by defendant to rulings of the court in excluding evidence. The rulings complained of are all upon one general feature of the evidence; that is, as to the physical appearance and apparent state of health of plaintiff. It would not conduce to brevity nor subserve any useful purpose to notice these rulings in detail. Many of them were correct, but some we deem erroneous. Of the latter, one instance will serve to point the rule which should be observed by the lower court on a new trial: A witness who knew plaintiff quite intimately, and saw him frequently, and had conversations with him about his health during the period covered by his claim against defendant, was asked this question: "Well, now, when you saw him on these occasions walk along, when he noticed you, was he or was he not apparently well?" Plaintiff objected to the question as calling for the opinion of the witness, and the objection was sustained. We think the question was competent, and should have been allowed. It is true, as contended by respondent, that, to a certain extent, the question tended to elicit the opinion of the witness; but it called at the same time for the fact of the plaintiff's physical appearance, as a result of the witness' observation, and that fact the party was entitled to lay before the jury. There are many cases where a witness, though not an expert, may be permitted to state the result of his observation, notwithstanding it involve in a sense his opinion or judgment, such as the apparent state of health of a person, whether a person is drunk or sober, or other characteristic or state which manifests itself to the apprehension of the common observer. It is sometimes difficult to distinguish between that which is purely matter of opinion, and so not admissible, and that which partakes of the nature of a fact by reason of being the result of personal contact and observation by the witness, but this difficulty does not in any sense militate against the rule. There are many matters of importance to the investigation of truth that could not be established or presented to the jury if this were not the rule. Lawson, in his work on Expert and Opinion Evidence, at page 480, lays down the rule that health or sickness is provable by opinion, and cites many authorities from many states to sustain the principle. In City of Shawneetown v. Mason, 82 Ill. 337, it was held that the fact of disease, when perceptible to the senses, may be testified to by any witness. So, in the case of Parker v. Steamboat Co., 109 Mass. 449, the plaintiff sued a common carrier for personal injuries, and, on the trial, her daughter was permitted to testify that her mother "was decidedly worse than she was two months after the accident." The testimony was held proper, the court saying: "The witness had the means of observing the plaintiff from time to time, and her testimony was as to facts within her observation, and not a mere expression of opinion reached by a process of reasoning and deduction. She stated what she saw,—that the plaintiff was not able to do as much work and was not as well as she was two months after the accident." The same principle has been upheld in this state in a number of cases. See People v. Lavelle, 71 Cal. 351, 12 Pac. 226; People v. Wreden, 59 Cal. 392; and Estate of Carpenter, 94 Cal. 416, 29 Pac. 1101. In the instance stated, and several others of like character, we think the court should have allowed the evidence.

3. The court did not err in relieving plaintiff from the effect of his stipulation submitting the case on motion for nonsuit, and allowing him to file an amended complaint. It was a matter purely in the discretion of the court, and, upon the showing made, we cannot say the discretion was abused. Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. Neither did the court err in its ruling as to the statute of limitations, nor on the doctrine of ultra vires. As to the latter question, we are satisfied that the objects contemplated by and provided for in the by-laws are clearly within the language of the act conferring upon defendant control of the fire department charitable fund. We have carefully examined the record, and find no other error. For the reasons above given, the judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

102 Cal. 624

GREENEBAUM et al. v. TAYLOR. (No. 15,-251.)

(Supreme Court of California. June 5, 1894.)

Conversion of Fixtures—Damages—Evidence.

1. A demurrer to a complaint as "ambiguous, unintelligible, and uncertain" will be overruled unless the complaint is defective in each and all the points mentioned.

2. In an action of trover, a description of the property as "all the saloon fixtures on the premises No. 424 M. street," giving city and county, is sufficient.

3. In an action for the detachment and removal of saloon fixtures, it is proper to exclude evidence of the value of the fixtures when removed from their position, and considered without reference to their intended uses.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Alfred Greenebaum and another against J. W. Taylor for conversion. Judgment for plaintiffs, and defendant appeals. Affirmed.

The property alleged to have been converted was described in the complaint as "all the saloon fixtures contained in and being on the premises No. 424 Montgomery street, in the city and county of San Francisco."

J. C. Bates, for appellant. H. N. Clement, for respondents.

McFARLAND, J. This is an action to recover the value of certain personal property alleged to have been converted by defendants. The verdict was for plaintiffs in the sum of $475, for which sum they had judgment. Defendant appeals from the judgment, and from an order denying a new trial.

The demurrer to the complaint was properly overruled. It was upon the ground that the complaint "is ambiguous, unintelligible, and uncertain," for the reason that it does not contain a sufficient description of the property sued for. It is clearly not ambiguous or unintelligible; therefore, if it were uncertain as to description, the demurrer did not reach it. Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137; White v. Allatt, 87 Cal. 245, 25 Pac. 420. We think, however, that the description is sufficient.

The property in suit consisted of bar fixtures put by respondents into a saloon on premises owned by a third party, and appropriated and converted by appellant; and whether, as between the owner of the building and respondents, they could have been removed by the latter, is a question which does not arise here. Appellant removed part of the property, detached other parts of it, and removed them from their position in the saloon, against respondents' wishes, and refused to deliver them to respondents, or pay for them. This was a conversion. There was sufficient proof of a demand. We see no error committed by the court in ruling upon the admissibility of evidence on the issue of the value of the property. It was proper to consider the cost of the property as a circumstance tending to show value. Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729. And it was no error to exclude evidence of the value of the fixtures when removed from their position, and considered without reference to the uses for which they were intended. We see no error in that part of the charge to the jury to which appellant excepted. There is no reason to think that the amount of the verdict is excessive. The question whether an attorney's fee for trying the case could be allowed does not arise. There are no other points which need to be noticed. We see nothing in the record that would warrant a reversal. Judgment and order affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

4 Cal. Unrep. 677

DE LONG v. WARREN. (No. 14,924.)

(Supreme Court of California. June 13, 1894.)

CHANGING STREET GRADE—FAILURE TO MAKE COMPENSATION—DAMAGES.

Under Const. 1879, art. 1, § 14, providing that private property shall not be taken "or damaged" for public use without just compensation having been first made, damages peculiar to property of an abutting owner may be recovered of one who fills earth into a street to conform to a new grade to which it had been lawfully changed, though he is duly authorized to do so.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Elida De Long against C. A. Warren. Judgment for plaintiff. Defendant appeals. Affirmed.

J. C. Bates, for appellant. Henley & Swift, for respondent.

PER CURIAM. This action was brought to recover damages caused by the regrading of a street upon which plaintiff is an abutting proprietor. The complaint was not verified. The answer denied all the allegations of the complaint, and averred that the acts complained of consisted in the performance by him of the work of grading Frederick street, between De Long avenue and Ashbury street, in the city and county of San Francisco; that the work was done in a good and workmanlike manner, and not otherwise; and that the damage to the property of plaintiff, if any, is by reason of the lot of the plaintiff being below the official grade of said street as established by the board of supervisors. The court found that the plaintiff was the owner of a lot having a frontage of 185 feet on Frederick street, in the city and county of San Francisco, and extending to the center of said street; that on June 1, 1890, the defendant entered upon said street, and dumped rock, sand, gravel, and other material into and upon the street in front of plaintiff's lot, and raised the grade five feet above what it was previously; that plaintiff was injured thereby, her grounds lessened in value, etc., to the extent of $350, which injury and damage is peculiar to her property, and does not affect the property of any other landed proprietor, etc.; that defendant is continuing and threatens to continue said trespass, etc., and will do so unless restrained. The court concluded the acts a nuisance, and rendered judgment in favor of plaintiff for $350, and enjoined defendant from further and like acts in the premises. Defendant appealed from the judgment and from an order denying a motion for a new trial.

We are of opinion the judgment and order appealed from should be affirmed. Conceding, without deciding, that defendant could, without pleading the facts in justification of his acts, show that the grade of Frederick street had been lawfully changed by the board of supervisors, and raised above the former official grade, and that defendant was duly authorized to fill the street to such new grade, and that such filling constituted the grievance of which plaintiff complains, and the fact is still patent that by the alteration of the grade, and filling the street to conform thereto, the property of the plaintiff was damaged, and that such damages were, as found by the court, "peculiar to her property, and do not extend to or affect the property of any other landed proprietor on said street." Section 14 of article 1 of the constitution of California, adopted in 1879, is as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made," etc. Under our former constitution, which provided that "private property shall not be taken for public use without just compensation," it was held in this state, in uniformity with the decisions in most other states with like clauses in their constitutions, that persons appointed or authorized by law to make or improve public streets are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill. Shaw v. Crocker, 42 Cal. 435; Northern Transp. Co. v. Chicago, 99 U. S. 635. Under the clause of the present constitution above quoted the rule is reversed, and in Reardon v. City and County of San Francisco, 66 Cal. 492, 6 Pac. 317, it was held the municipal corporation was liable for such special consequential damages resulting from a street improvement as the adjoining land proprietors suffered over and above the common injury to the other abutters on the street, or the general public. The point decided there is conclusive of the questions here, and need not be elaborated. The other points made are either unimportant or unsupported by the record. The judgment and order appealed from are affirmed.

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103 Cal. 89

SHANAHAN v. TOMLINSON et al. (No. 15,466.)

(Supreme Court of California. June 13, 1894.)

ADVERSE POSSESSION—CLAIMS AGAINST TRESPASSER.

Section 325, Code Civ. Proc., providing that title by adverse possession cannot be established unless the party claiming it has occupied the land for five years, and paid all taxes thereon during that time, applies only to actions between the holder of the legal title and the party claiming adversely, and not to actions by an adverse claimant against a trespasser.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by J. K. Shanahan against Milton Tomlinson and another to recover possession of a piece of land. Judgment for plaintiff, and defendants appeal. Affirmed.

Chamberlin & Wheeler, for appellants. Buck & Cutler, for respondent.

McFARLAND, J. This is an action to recover possession of a certain piece of land. Judgment went for plaintiff, and defendants appeal from the judgment.

The court found that, from 1878, plaintiff was in the uninterrupted and quiet possession of the land in contest, having it inclosed, and using it for pasturage, and part of the time for purposes of cultivation, until January, 1892, when defendants, without right or title, entered upon said land, and ousted plaintiff therefrom, and since then wrongfully withheld the possession thereof from plaintiff. Appellants contend that these findings are not sustained by the evidence, but we are satisfied that this contention cannot be maintained. The evidence, although somewhat conflicting, was of such a character as to put the determination of the facts entirely within the province of the court below.

Appellants, in their assignment of errors, say that "there is no proof in the case that plaintiff has ever paid any taxes on the land in dispute prior or subsequent to April, 1878;" and in their brief they say that the findings are defective because they do not show that taxes were paid. No point as to the payment of taxes seems to have been raised at the trial, or called to the attention of the court. But, assuming that the point is here properly raised, this is not a case to which the provisions of section 325 of the Code of Civil Procedure, about the payment of taxes by one claiming adverse possession, applies. That provision applies to a case in which there is a contest between the holder of the legal title and a party who claims that he has been in possession for five years "adversely to such legal title." See section 321. In the case at bar, respondent is not claiming by adverse possession against the holder of the legal title. He is simply protecting his possession against one who entered thereon without right or title; and prior possession is always sufficient ground for the maintenance of ejectment against a naked trespasser. The judgment is affirmed.

We concur: DE HAVEN, J.; GAROUTTE, J.

102 Cal. 647

McSHERRY v. GULLIVER et al. (No. 15,473.)

(Supreme Court of California. June 7, 1894.)

STREET ASSESSMENTS—LIABILITY OF LOT OWNERS—INEQUALITIES—ESTOPPEL.

1. A street assessment is not objectionable, as being unequal, because the charge for laying and curbing sidewalks was against only two lots while the charge for regrading and macadamizing, etc., was on the whole district; the resolution of intention showing that the work as to curbing and sidewalks was to be confined to the portions of the district in which curbing and sidewalks had not been laid.

2. In an action to enforce a street assessment against part of a lot defendant cannot contend that, the assessment having been made on the lot as an entirety, a release given as to the other part, on payment of its proportionate share by the owner of such part, was fatal to the right of recovery against defendant as owner of the residue, where it appeared that defendant requested the street superintendent to assess the lot as an entirety, and that the latter, not knowing the owners, assessed it as an entirety, and to unknown owners.

3. One who failed to appeal to the city council as provided by Acts 1885, p. 156, for irregularity in a street assessment is precluded from urging before the supreme court an irregularity which might have been corrected on such appeal.

Department 2. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by Hugh McSherry against Harriet E. Gulliver and another to recover for street assessment. From a judgment for plaintiff, and an order denying a new trial, defendant Wood appeals. Affirmed.

J. M. Wood, for appellant. D. H. Whittemore and Parker & Ells, for respondent.

PER CURIAM. This action is brought to recover from the defendants a street assessment levied upon a lot having a frontage of 110 feet on the easterly side of Fillmore street, and between Vallejo and Broadway streets, city and county of San Francisco. The lot in question was assessed to unknown owners. Defendants answered separately. Defendant Harriet E. Gulliver, in her answer, set up ownership in herself in severalty of four feet of frontage in the lot on Fillmore street, averred her willingness to pay the assessment on said four feet frontage, and that she had in fact made such payment. She further averred that her codefendant was the attorney of plaintiff, and that, with a view of defrauding her, he procured the lot to be assessed as one parcel of land. Defendant Wood denied the allegations of the complaint. The court found that defendant Gulliver was the owner of a portion of the lot having a frontage of four feet, and that defendant Wood was the owner of the residue thereof, having a frontage of 106 feet; that defendant Gulliver had paid her proportion of the assessment; and that the assessment was made upon the lot as a whole by the street superintendent, at the request and demand of defendant Wood, who was the agent of the plaintiff herein. The court rendered judgment against the defendant Wood for the amount of the assessment less the amount levied against the four feet of which defendant Gulliver was the owner, from which judgment, and from an order denying a new trial, said defendant Wood appeals.

At the trial plaintiff introduced in evidence the original assessment, diagram, warrant, and affidavit of demand and nonpayment, together with the indorsements thereon showing the due recording thereof, etc., to the introduction of which counsel for defendant objected upon the grounds: (1) That the assessment was not equal nor uniform. (2) That the item of $137.50 for laying plank sidewalks was not distributed on all the frontage within the district assessed, but was imposed upon only a part of the lots of land benefited and to be charged. The objections were overruled, and an exception taken, which ruling is assigned as error. We see no merit in the alleged error. The only apparent inequality consists in the showing on the face of the assessment that the charge for laying redwood curbs and sidewalks is only against lots 3 and 4, while the charge or assessment for sewering, regrading, and macadamizing, etc., is upon the whole district. The resolution of intention shows that as to the latter the work was to extend from Vallejo to Broadway street, while as to curbing and sidewalks it was to be confined to the portions upon which such curbing and sidewalks were not laid. This the board had a right to do, and, in the absence of a showing to the contrary, the presumption will be indulged that no sidewalks were laid except in front of the lots as shown in the assessment. Diggins v. Brown, 76 Cal. 318, 18 Pac. 373, and Gately v. Bateman, 7 Pac. Coast Law J. 364, cited by appellant in support of his contention, were decided under the act of 1872, and have no application under the act of 1885, as amended in 1889. St. 1889, p. 157.

The further point is made by appellant that, the assessment having been an entirety, the release or dismissal as to a part was fatal to the right of recovery against defendant as to the residue. Whatever the general rule may be, we think the doctrine invoked is not applicable to the present case, for the reasons:

First. The complaint avers the assessment of the lot with a frontage of 110 feet on Fillmore street, and that it is owned by defendants, Wood and Gulliver. The answer of Wood, while it denies most of the allegations of the complaint, expressly admits as follows: "Except the allegation of the ownership by the defendants, Jos. M. Wood and Harriet E. Gulliver, of the land in the complaint described, and as to such ownership defendant admits the same." There was, therefore, no issue as to ownership as between plaintiff and defendant Wood.

Second. The court finds that defendant Wood requested and demanded that the street superintendent assess the lot as a whole, and, as the latter appears not to have known the owners, he so assessed it, and to unknown owners. In such a case, defendant Wood should not now be permitted to assert that the lot was improperly assessed in such respect.

Third. The assessment being for a fixed sum per front foot, and the defendants owning in severalty each a given number of front feet, it was capable of segregation without doing injustice to either owner, and bears no analogy to a case in which a foreclosure is sought against a portion only of the owners of undivided interests in a lot against which a like assessment is levied.

Fourth. The defendant having failed to appeal to the city council, as provided by section 11 of the act of 1885 (St. 1885, p. 156), on account of irregularity in the assessment, is precluded from urging here an irregularity which might have been corrected on such appeal. Dorland v. McGlynn, 47 Cal. 47; Himmelmann v. Hoadley, 44 Cal. 276, and cases there cited.

The other objections need not be noticed. The judgment and order appealed from are affirmed.

102 Cal. 627

BRADLEY et al. v. ANGLO-AMERICAN GAS CONTROL CO. et al. (No. 15,449.)

(Supreme Court of California. June 5, 1894.)

CANCELLATION OF CONTRACT—LICENSE TO SELL PATENTED ARTICLE.

Under section 3412, Civ. Code, providing that "a written instrument which if left outstanding may cause serious injury to a person against whom it is void or voidable, may upon his application be so adjudged, and ordered to be delivered up and cancelled," plaintiff, who granted to defendant the sole and exclusive right to sell a patented machine in certain states, with a provision for the termination of the agreement in case the latter failed to faithfully prosecute the introduction or sale of the article, could sue to cancel the agreement when defendant, having made an agreement with the proprietor of a rival machine, with the intention that the introduction and sale of plaintiff's machine within a portion of the territory covered by plaintiff's agreement should be thereby prevented, repudiated plaintiff's right to then terminate the agreement, threatening to obtain an injunction to restrain sales by plaintiff in such territory.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by William H. Bradley and another against the Anglo-American Gas Control Company and another to obtain a judgment for the cancellation of a contract. From an order of the court sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Geo. A. Johnson, for appellants. J. P. Langhorne and Pomeroy & Pomeroy, for respondents.

HARRISON, J. The plaintiffs, being the proprietors of letters patent issued to one Stott for a certain gas regulator or governor, entered into an agreement February 7, 1891, with the defendant Gaden, by which they granted to him and his assigns the sole and exclusive right, during the life of said letters patent, to buy, sell, rent, and otherwise dispose of the said governor, for use within the state of California and other states constituting the Pacific slope. Gaden did not receive the right to manufacture the governors, but it was provided that he should purchase from the plaintiffs all that he might require, and that, in case he failed to faithfully prosecute their introduction or sale, the plaintiffs might terminate the agreement, and resume and enjoy all rights under it as fully as if had never been made. Gaden assigned an interest in the agreement to the defendant Anglo-American Gas Control Company, and this corporation continued to act under the agreement until May, 1892, since which time it has ceased to purchase any of said governors; and in January, 1893, Gaden informed the plaintiffs that they would no longer use this governor in San Francisco. In pursuance of an agreement between these defendants and the other defendant, the Gas Consumers' Association, the interest in said agreement, so far as it relates to San Francisco and the counties of Alameda and Marin, has been assigned to the last-named defendant. The complaint alleges that the Gas Consumers' Association is a rival and competing corporation, and that the assignment to it and the agreement between it and the other defendants are for the purpose of freezing out and wrecking the Stott patents in the city of San Francisco and the counties of Marin and Alameda, and were made in the interest of this rival corporation, and are in violation of the provisions of the aforesaid agreement that Gaden and his assigns would faithfully introduce the said governors into the aforesaid territory, and that the effect of the transfer to the Gas Consumers' Association is to exclude the Stott machines from this territory, and to entirely deprive the plaintiffs of any market therein. The plaintiffs thereupon notified the defendants that, on account of their failure to diligently and faithfully push the introduction and sale of the said Stott machines, the said agreement was terminated, and that they resumed all the rights they had before it was entered into; but, notwithstanding such notice, the defendants still claim all the rights and interests secured to them by said agreement, and that said notice by the plaintiffs is inoperative, and threaten to bring an injunction suit against the plaintiffs if they should attempt to deal in or sell the said Stott machine within the foregoing territory. The plaintiffs thereon have brought this action to obtain a judgment for the cancellation of said agreement, and that it shall cease to have any force or binding effect, and that the defendants be perpetually enjoined from claiming anything by virtue thereof, and for damages. A demurrer to the complaint was sustained, and the plaintiffs have appealed.

The relief sought by the plaintiffs is authorized by the terms of section 3412, Civ. Code, which provides that "a written instrument in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may upon his application be so adjudged, and ordered to be delivered up or cancelled." By the terms of the agreement between the plaintiffs and Gaden, the plaintiffs parted with the "sole and exclusive" right to sell and dispose of the Stott machines throughout the Pacific slope, and, so long as this agreement remained in force, the plaintiffs would have no right to enter this territory and dispose of any of their machines. The condition upon which this right was granted was that the grantee would make faithful efforts to introduce and sell the machines within the same territory. An agreement by the grantee with the proprietor of a rival machine, with the intention that the effect of such agreement should prevent the introduction and sale of the Stott machine within a portion of this territory, is such a violation of the agreement with the plaintiffs as to justify them in treating it as terminated. The clause in the instrument giving to the plaintiffs the right to terminate the agreement upon a violation of this provision does not prevent the plaintiffs from seeking its cancellation by a judicial determination. The claim by the defendants that, notwithstanding their violation, they possess all the rights conferred by the agreement, and dispute the right of the plaintiffs to terminate it, gives to the plaintiffs a reason for invoking judicial action. Whether this claim by the defendants is made by reason of their dispute of the facts alleged, or of the right of the plaintiffs notwithstanding these facts, does not appear, but the plaintiffs have the right to a judicial declaration that the agreement has been violated by the defendants, and a consequent judgment for the cancellation of the agreement. The threat of the defendants that they will endeavor to enjoin the plaintiffs from disposing of the machines within the specified territory constitutes a reasonable apprehension that the instrument may cause injury to the plaintiffs. If the defendants had consented to the termination of the agreement when the plaintiffs gave notice thereof, there would be no occasion for an action, but their repudiation of the right of the plaintiffs to terminate the agreement renders the action appropriate. Even if the plaintiffs could successfully defend against any suit by the defendants for an injunction, by showing a prior violation of the agreement by the defendants, such remedy is not as complete as is afforded by the present suit. The territory covered by the agreement embraces several states, and the attempt by the plaintiffs to introduce their machines throughout this territory would subject them to the necessity of defending a suit in each of these states, whereas the present action strikes at the basis of each of those suits, and in one controversy determines the rights of the parties for them all. Whether the plaintiffs are entitled to any damages will depend upon the proofs that may be made. If the allegations of their complaint are insufficient to entitle them to introduce such proofs, it does not impair its sufficiency to establish their right to the equitable relief, nor is it any objection to the complaint that a judgment for damages and for preventive relief is sought in the same action. The judgment is reversed, and the court below is directed to overrule the demurrer.

We concur: GAROUTTE, J.; VAN FLEET, J.

102 Cal. 606

In re IRVINE'S ESTATE. (No. 14,988.)

(Supreme Court of California. June 2, 1894.)

Review on Appeal—Weight of Evidence.

In an action against an administrator to recover a balance due on a note of decedent, alleged to have been fraudulently compromised by the administrator for less than the full amount, it appeared that $3,980 was the full amount due. Claimant testified she had received only $3,100, but could not remember the dates or amounts of the various payments. Witnesses by whom the money was paid testified that the full amount had been paid her, giving dates and amounts. A written release of the administrator, signed by claimant, in consideration of $3,730, acknowledged to have been received, and a receipt for $250 on account, were introduced. *Held*, that there was no such conflict of evidence as would prevent the court from setting a judgment for plaintiff aside.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Eudora V. Smith, in the matter of estate of William Irvine, deceased, for a balance due on a promissory note of deceased. There was judgment for petitioner, from which, and from an order denying a new trial, the administrator appeals. Reversed.

For opinion in department, see 33 Pac. 1128.

J. M. Seawell, J. B. Reinstein, and Geo. A. Rankin, for appellant. H. N. Clement and G. W. Haight, for respondent.

HARRISON, J. The decedent in his lifetime made a promissory note to Annie M. Bascom, for the sum of $3,600, and, to secure its payment, made a mortgage upon certain lands in San Francisco, standing of record in his name. This mortgage was not placed of record until after the death of the mortgagor, and subsequent to its execution he made an agreement for the conveyance of the land to one Connolly. The money for which the note was made belonged to Eudora V. Smith, the petitioner herein; but for personal reasons the note and mortgage were executed to her mother, Mrs. Bascom. A claim upon the note and mortgage was presented to the administrator of the decedent's estate, but was rejected, for the reason, as claimed by him, that there had been an agreement on the part of the petitioner for a reduction of the rate of interest, and also that there was an unadjusted claim against her in behalf of the estate for services as her attorney. No action was ever brought by her upon the claim after its rejection, nor did she ever present any other claim against the estate. Subsequent to the rejection of the claim, Connolly brought an action against the administrator for the performance of the aforesaid agreement of sale. In that action Mrs. Bascom was made a party defendant, and she, in her answer, alleged the execution of the note and mortgage; and it was adjudged therein that Connolly was entitled to a conveyance from the administrator, but that the mortgage of Mrs. Bascom was a first lien upon the land, and that the land be sold by the sheriff, and out of the proceeds she be paid the sum of $3,980. The property was not sold under this judgment, but out of the proceeds of a private sale of the property made by Connolly the amount of the judgment was turned over to the administrator of Irvine's estate, to be applied in its satisfaction, it being recognized as an obligation of that estate. In his final account the administrator credits himself with having paid this amount to the petitioner, and this account was settled and allowed by the court. December 21, 1888, the petitioner filed her petition in the matter of said estate for an order setting aside the order settling the account, setting forth therein that, by reason of certain false representations made to her, she had been induced to agree to a compromise of her claim against the estate, and that the administrator, instead of paying her the sum of $3,980, as claimed by him in his account, had paid her only $3,100, and that the balance of $880 had not been accounted for except to the extent of $250, which in his account he had, without right, charged as attorney's fees collected from her. These averments of the petitioner were denied by the administrator, and the matter was heard by the court, who found as facts that certain representations which were untrue in fact were made to the petitioner, and that she, believing them to be true, "was induced to compromise and settle, and did compromise and settle, her claim against the estate of said decedent, and agreed to accept in full payment thereof $500 less than the amount justly due and payable to her thereon;" and, as a conclusion of law, found that she was entitled to have paid to her out of the assets of said estate in the hands of the administrator the sum of $500, and for said purpose the order settling the final account should be set aside. A motion for a new trial was denied, and afterwards a decree was entered setting aside the order settling the account, and directing the payment to the petitioner of said sum of $500 out of the funds of said estate. From this order and decree an appeal has been taken.

The court does not find in direct terms that the petitioner did not receive from the administrator the full amount of her claim, but it is fairly to be inferred that such was intended to be its finding. The only evidence in support of such finding is that of the petitioner herself, and an examination of her testimony fails to support the conclusion of the court, her only statement to this effect being that she settled the claim for $3,100; that the way in which she remembered that she got only $3,100 was that she knew that she had loaned $3,600, and got only $3,100, and did not get any interest. She also testified that she did not remember in what sums this amount was paid, nor the dates at which she received it; that she never wrote down the amounts that she received and added them up, and was not able to state the different amounts that she had received, or by whom they were paid to her. Testimony was given on behalf of the administrator to the effect that the sum of $250 was agreed upon by the petitioner as the amount due from her to the estate for attorney's fees, and the court finds this to be the fact. There was also the testimony of the witnesses by whom the money was paid, that the full amount of the balance, viz. $3,730, had been paid to the petitioner, giving the different sums and the dates and form in which this amount had been paid to her. If there had been no other evidence, the finding of the court must have been sustained, as its conclusion upon conflicting testimony; but the testimony of the petitioner was contradicted by her own written statements made at the time of the payment, and which must be regarded as superior to her testimony given nearly six years later, dependent upon a memory acknowledged by herself to be defective.

There were introduced in evidence two written instruments executed by Mrs. Bascom, viz. a satisfaction of the judgment, in which was an acknowledgment that the sum of $3,980 had been paid to her by the administrator, and a release by her of the administrator from all claims, in which Mrs. Bascom also acknowledged that the sum of $3,730 had been paid to her by the administrator. Although the note and mortgage had been made in the name of Mrs. Bascom, the money belonged to Mrs. Smith, the petitioner herein, and the business in reference thereto with the administrator of the estate, and throughout the litigation, had been entirely transacted by Mrs. Smith, who had also procured these releases from Mrs. Bascom. There was also introduced in evidence a release of all claims against the administrator and his attorney, executed by Mrs. Smith, which she expressed therein was made by her in consideration of the sum of $3,730, that day paid by the administrator to Mrs. Bascom. The defective character of Mrs. Smith's memory was shown in many parts of her testimony. She testified with reference to the Connolly judgment: "I never heard of it until recently; never until I read it here. I didn't know anything about the judgment. If I had known that the court had ordered that judgment should be paid in full, I would not have presented strangers with $500 that I could not afford to lose." Yet there was introduced in evidence a written receipt for the sum of $250, signed by herself for Mrs. Bascom, on the day the judgment was entered, "on account of judgment in my favor, and against the estate of William Irvine, for the sum of $3,980, in the case of Connolly vs. Marye, as administrator, etc., in the superior court of the state of California, in and for the city and county of San Francisco." A similar recognition and knowledge of this judgment appear in the aforenamed satisfaction and release that were executed by Mrs. Bascom, and of which the petitioner had full knowledge at the time of their execution. The rule is well established that oral testimony in contradiction of the plain terms of a written instrument, or of written admissions, should be clear, full, and precise, and that the weight to be given to any such testimony diminishes with its distance from the date of the instrument which it purports to contradict or overcome. This contemporaneous evidence on the part of Mrs. Smith is so directly at variance with her oral testimony upon the same subject given so many years later, and is so corroborative of the testimony on the part of the administrator, that we think her oral testimony did not create a substantial conflict with that given on the part of the administrator, and that the above finding of the court was contrary to the evidence. The court did not itself accept the testimony of Mrs. Smith as satisfactory, since, as it was conceded that the sum of $3,980 was due upon the note and mortgage, and she testified that she only received $3,100, there was no testimony which could form the basis of a finding that $500 was the amount that had not been paid to her. The judgment and order are reversed.

We concur: BEATTY, C. J; FITZGERALD, J.; McFARLAND, J.

DE HAVEN, J. I concur. Upon a more careful consideration of this case, since its reargument, I am entirely satisfied that the conclusion reached in the foregoing opinion of Mr. Justice HARRISON is correct, and that there is not such a substantial conflict in the evidence as to justify this court in sustaining the findings of the superior court upon that ground.

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102 Cal. 672

BERTZ v. TURNER et al. (No. 15,307.)

(Supreme Court of California. June 9, 1894.)

DISSOLUTION OF ATTACHMENT—JOINDER OF PLAINTIFF IN INSOLVENCY PROCEEDINGS.

An attachment is not dissolved by the subsequent joinder of plaintiff in a proceeding to have the debtor declared an insolvent.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action in attachment by Jacob Bertz against James F. Turner and Alfred Clarke.

From an order denying a motion to dissolve the attachment, defendants appeal. Affirmed.

Oliver P. Evans, for appellants. Wilson & McCutchen, for respondent.

TEMPLE, C. This appeal is from an order refusing to dissolve an attachment. In the notice of the motion to dissolve it was stated: "Said motion will be made on the ground that plaintiff, Bertz, has united with others to declare Clarke insolvent, and that said Bertz cannot occupy the position of attaching creditor and petitioner in insolvency at the same time in regard to the same debt and same debtor. The motion will be made on the affidavit of Alfred Clarke, served and filed herewith." No other document or evidence was produced at the hearing, except the affidavit referred to. It states that Bertz brought his action September 26, 1891, and on said day caused an attachment to be issued against the property of defendant Alfred Clarke. That October 2, 1891, a petition was filed by C. W. Mott and others to obtain an adjudication of insolvency against Alfred Clarke, and Clarke was ordered to appear and answer said petition. That on October 29th the said Jacob Bertz obtained leave to unite, and did unite, his claim which is in suit in this action with said Mott and others in the insolvency proceedings, and said Bertz has ever since participated in said insolvency proceedings. That thereby the attachment levied was dissolved by operation of law.

This being the only showing, the court could not do otherwise than to refuse to dissolve the attachment. It does not appear that the writ of attachment has ever been levied, or what Bertz did in the way of participating in the insolvency proceedings, or that there has been an adjudication of insolvency. If the plaintiff had levied an attachment, and thereby obtained security for his debt, he could not prove his debt in the insolvency proceeding, except as provided in section 44 of the insolvent act. Whether it would prevent his joining with others in forcing a debtor into insolvency need not now be determined. The mere filing of such petition would not dissolve an attachment.

There was no showing on the hearing of the motion to the effect that the indebtedness due plaintiff was secured, nor that the note on which Clark was indorser was held only as security for other indebtedness, which was also otherwise secured, nor that there had been a previous motion to dissolve the attachment on other grounds, which motion had been denied. The bill of exceptions contains some papers which might show that such a motion had been previously made, but, as it is expressly stated that such papers were not read or considered on the hearing of the motion from which this appeal is taken, they cannot be considered here. Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

Appellant says he has another appeal pending here, and that this court will take judicial notice of its own records. For some purposes the court will do so, but an appellant cannot in that way, nor could he by uniting the two appeals, have his cause heard on evidence not produced at the hearing below. The order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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103 Cal. 27

PEOPLE'S HOME SAV. BANK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,734.)

(Supreme Court of California. June 11, 1894.)

BANKS—INSOLVENCY—APPOINTMENT OF RECEIVER.

Under the bank commissioners' act (St. 1877, p. 744), as amended by St. 1886-87, p. 90, authorizing the attorney general, upon receiving a report from the bank commissioners that it is unsafe for a certain bank to continue business, to bring an action to enjoin it from doing any further business, and authorizing the court, if, after a hearing, it deems it necessary, to issue the injunction, and to direct the commissioners to take such proceedings against it as may be decided upon by its creditors, the court has no power, on an ex parte hearing, to enjoin the bank from doing business, and appoint a receiver therefor.

In bank.

Petition by the People's Home Savings Bank for a writ of prohibition against the superior court of the city and county of San Francisco, restraining it from enforcing an injunction and order. Writ allowed.

Delmas & Shortridge, for petitioner. Jas. Alva Watt and Atty. Gen. Hart, for respondent.

BEATTY, C. J. On the 1st of May, 1894, the people of the state of California, upon information of the attorney general and upon complaint of the bank commissioners, commenced an action against the above-named petitioner (a corporation), and against the individuals composing its board of directors, by filing a complaint in the superior court, wherein it was alleged, among other things, that this petitioner, one of the defendants therein, was a corporation created and organized under the laws of the state of California for the purpose of accumulating the savings and funds of its stockholders, depositors, and others; that between the 14th and 27th of April, 1894, said bank commissioners made an examination of the affairs of said corporation, which disclosed the fact that it was insolvent, and that its board of directors had been guilty of various irregular practices and acts of fraud, by which the interests of its depositors and stockholders had been seriously prejudiced, all of which they at once reported to the attorney general, together with their opinion that it was unsafe for said corporation to transact business; that after receiving said report the attorney-general made an examination which confirmed all the statements of the bank commissioners. And said complaint then proceeded with formal allegations of the various matters specified in the commissioners' report, which, if true, undoubtedly made out a strong case of negligence, incompetence, mismanagement, and fraud upon the part of the directors of the bank, and very clearly demonstrated that the interests of the depositors and stockholders would be seriously jeopardized by their continuance in control of the bank. Wherefore, the plaintiff prayed: "(1) That the court appoint some competent person to act as temporary receiver during the pendency of this action, with full power and authority to take possession of all the stocks, bonds, mortgages, notes, securities, papers, vouchers, and property of the defendant, People's Home Savings Bank, and to safely keep and preserve the same, and the banking premises now occupied by said bank, until the further order of this court. (2) That the court enter a final decree and judgment for the relief hereinafter specified, and for the appointment of a permanent receiver to take possession of all the stocks, bonds, mortgages, notes, securities, papers, vouchers, and property of the defendant corporation, and to collect the assets and moneys due to said corporation defendant, and to carry out such orders in reference to the payment of the creditors as the court may from time to time direct. (3) That, upon the hearing of this case, this court order, adjudge, and decree that it is unsafe for the parties interested in the business of the corporation defendant that said corporation shall continue to transact business, and that it is unsafe for such corporation to transact business, and that such corporation, its officers and directors, and each of said directors, be enjoined and prohibited from transacting any further business, as far as said corporation shall be concerned, and that this court shall enjoin and prohibit the transaction of any further business by such corporation, and in the meantime, and until said cause shall be heard, and until the further order of this court, that such corporation defendant shall be enjoined and prohibited from transacting any further business, so far as said corporation shall be concerned, and that said corporation and directors, and each of them, shall be enjoined from the transaction of any further business of such corporation. (4) That the bank commissioners of the state of California be directed, upon the issuance of the foregoing injunction, to call together the creditors of the said corporation defendant herein, and, further, that said bank commissioners take such proceedings against said corporation thereafter as may be decided upon by the creditors of said corporation. And plaintiff further prays for such other and further relief as to the court shall seem meet and proper, and good equity require, and for costs of suit."

Immediately upon the filing of this complaint the judge of the superior court made two ex parte orders,—one for an injunction, and the other for a receiver,—as follows: "The plaintiff in the above-entitled cause having commenced an action in the superior court, in and for the city and county of San Francisco, against the above-named defendants, and having prayed for an injunction and restraining order against the said defendants, requiring them to refrain from certain acts in said complaint more particularly mentioned, on reading said complaint in said action, duly verified by the oath of W. H. Knight, C. H. Dunsmoor, and J. B. Fuller, members of the board of bank commissioners of the state of California, and it satisfactorily appearing to me, therefrom, that it is a proper case for an injunction, and that sufficient grounds exist therefor, and this being a case in which an undertaking is not required by law, it is therefore ordered by me, judge of said superior court, that, until further order in the premises, you, said defendants, and each of you, and all your counselors, attorneys, solicitors, agents, directors, and officers, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from the transaction of any further business whatsoever." "On reading the complaint in the above-entitled action, and upon motion of Wm. H. H. Hart, attorney general of the state of California, it is ordered that John F. Sheehan be, and is hereby, appointed temporary receiver to take possession of the assets of said defendant corporation, and he is hereby authorized, as such receiver, to take possession of all the stocks, bonds, mortgages, notes, securities, papers, and vouchers and property of said defendant corporation, and to safely keep and preserve the same until the further order of this court; and he is hereby authorized, as such receiver, to make collections of such sums due and becoming due to said defendant corporation as may be necessary for the preservation of its assets; said appointment of said receiver to continue until the further order of this court. And it is ordered that the said John F. Sheehan, before entering upon the discharge of his duties as such receiver, execute a bond in the sum of $50,000, conditioned for the faithful discharge of his duties as such receiver; the sureties to be approved by the judge of this court; said bond to be made payable to the state of California." On the same day upon which these orders were made, the receiver so appointed attempted to take possession of the banking premises, and all the books, papers, and property of the petitioner therein contained, and threatened petitioner and its directors with proceedings for contempt of court if they refused to yield possession. Petitioner, by its attorneys, thereupon called the attention of the superior court to what it claims was an excess of its jurisdiction in making such orders, but its motion to vacate was overruled, and thereupon they filed this petition here for a writ of prohibition, commanding said court and its receiver to desist and refrain from further proceedings upon said injunction and order. The respondent, the judge of the superior court, having filed his answer to the petition, admitting the facts above stated, and all interested parties having been heard, and the cause submitted, the sole question to be decided is whether the superior court exceeded its jurisdiction in making the orders above set forth. No objection is made to the form of the proceeding, and the two orders for an injunction and receiver have been treated as if they were one; each being supplementary to, and an essential part of, the other.

We think it clear that the superior court, in making these orders, exceeded its jurisdiction. The only authority for instituting the action is to be found in section 11 of the bank commissioners' act passed March 30, 1878 (St. 1877–78, p. 744), as amended March 10, 1887 (St. 1886–87, p. 90), and that section contains nothing to warrant these proceedings. By its provisions the attorney general is empowered, in his discretion, upon receiving a report from the bank commissioners that it is unsafe for a banking corporation to continue business, to commence an action against the corporation in the proper court to enjoin and prohibit it from transacting any further business; and the court in which the action is tried, if, after a hearing, it is of the opinion that the bank cannot safely continue business, must issue the injunction prayed for, and must then direct the commissioners to take such proceedings against the corporation as may be decided upon by its creditors. This is the whole extent of the power conferred upon the attorney general and the court by the statute, and the proceeding is purely statutory. The attorney general is authorized to proceed against the corporation alone, and for the sole purpose, in effect, of winding up its business. In other words, he represents the interest of the people in a matter of public concern. The state, which has granted to its creature the privilege of doing a banking business, by his intervention revokes that privilege for violation of the conditions, express and implied, upon which it was granted. It does not pretend to constitute itself the guardian of merely private rights of individual stockholders or creditors of the corporation, and has not empowered the attorney general, in its name, to maintain an action in their behalf against the directors of the corporation, for violation of their trust, as has been attempted in this case. His function, as agent of the state, is, as above stated, simply and solely to revoke the privilege granted by the state, of doing a banking business; and before the court can issue its injunction for that purpose the corporation is entitled to a hearing, and an opportunity to contest the allegations against it. And even after the injunction of the court is issued, as we have lately held in Long v. Superior Court, 36 Pac. 807, the corporation continues in existence for the purpose of liquidation, and, unless some further proceeding is instituted by or on behalf of its creditors or stockholders, will conduct such liquidation through its own officers and employes, subject only to the supervision of the bank commissioners, and their direction and control in certain specified particulars. The terms of the act are very clear and explicit to this effect, and the only argument advanced to justify the proceedings here in question, which clearly transcend the statute,, is that unless something is added by construction to the terms of the act, and a larger power given to the attorney general and the bank commissioners, the stockholders and depositors of a banking corporation will be left without any means of protection against such acts of mismanagement and fraudulent spoliation as are charged in this case. But this argument, even if well founded, would not justify us in interpolating into the statute something that the legislature has omitted. And, besides, the argument is, on its own premises, self-destructive, for, if the existence of a legal remedy could be inferred from the mere necessity of it, there must have been a remedy for such abuses before the bank commissioners' act was passed, for the necessity was as great then as now, and, if there was an equitable remedy then, the same remedy still remains, for the bank commissioners' act has not taken it away; and therefore the assumption upon which the argument is founded is wholly unwarranted. And again, if it is true that neither the courts nor the legislature had ever thought of devising any means of protecting the stockholders and depositors of a banking corporation against the mismanagement, waste, and spoliation of its funds prior to the act of 1878, upon what ground are we to conclude that the legislature then determined to provide a remedy, when no hint of such an intention is to be found in the terms of the statute? The most that can be said is that the law, in this respect, is no better since the statute than it was before. But it has never been held that creditors and stockholders of banking corporations have no remedy, independent of the bank commissioners' act, against the abuses here charged. We know of no case in which this court has held that they were without a remedy in a court of equity, and certainly nothing of the sort was decided in the only case to which we have been cited by counsel. French Bank Case, 53 Cal. 495. All that was decided in that case was that a court of equity has no jurisdiction, in a suit by a private person against the corporation alone, to appoint a receiver to wind up its business; the practical effect of such a decree being a dissolution of the corporation, a result which, it was held, could be accomplished only at the suit of the state. But that an action might be maintained against the directors of a corporation, in a proper case, was expressly conceded. We see no reason, therefore, to enlarge by construction the provisions of a statute which was never designed to put the protection of private interests under the exclusive care of the state, and we are compelled to hold that the ex parte orders of the superior court, above set out, were unauthorized and void, and that further proceedings thereunder should be prohibited. Let a peremptory writ of prohibition issue, as prayed for.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; FITZGERALD, J.

DE HAVEN, J., being disqualified, did not participate.

103 Cal. 7

LYNN v. SOUTHERN PAC. CO. (No. 15,341.)

(Supreme Court of California. June 11, 1894.)

CARRIERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

1. Where a passenger is thrown from the platform of an overcrowded excursion car by the swaying of the train in passing a curve at a rapid rate, the jury are justified in finding defendant guilty of negligence.

2. A passenger is justified in taking passage on a crowded excursion train where defendant does not warn persons not to do so; and, even though such warning was given, he was not affected by it if he did not hear it.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Mauritz E. Lynn against the Southern Pacific Company for personal injuries received while a passenger on defendant's railroad train, and caused by its negligence. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

W. H. L. Barnes, for appellant. Cope, Boyd, Fifield & Hoburg, for respondent.

GAROUTTE, J. This is an action to recover damages for injuries received by the plaintiff while a passenger upon the road of the defendant. The injuries were of a permanent character and very serious, and the verdict of $7,500 is not assailed as being excessive. The defendant appeals from the judgment and order denying a motion for a new trial. The record discloses no exceptions taken to the introduction or exclusion of testimony. Neither are there any exceptions taken to the charge of the court. A motion for a nonsuit was made and denied, and this appeal is now before us upon the question as to the sufficiency of the evidence to support the verdict of the jury. There being no exceptions to the charge of the court,—and it is possible no just exception could have been made thereto,—the law by which we are to be guided in considering the merits of this appeal is settled, and all investigation upon that point foreclosed; for the law of the case, as far as the decision of this court is concerned, is the law that guided the jury in its deliberations in the trial court.

The undisputed facts of the case may be stated as follows: Upon the 30th day of May, 1891, a legal holiday, the plaintiff was a passenger upon the defendant's train of cars traveling from San Francisco to Shell Mound Park, having purchased a return ticket. The train was an excursion train, there being a picnic at the aforesaid park. Late in the afternoon he boarded a train to return to the city, but, owing to the great number of people desirous of returning to the city at that time, he, in company with many others, were unable to secure room inside of the cars, and thereupon stood upon the platform. The exact cause of the accident is a disputed question, but in course of the return trip the plaintiff fell from the platform, and was badly injured.

That portion of the charge of the court which is material to the present investigation is as follows: "I instruct you, therefore, that if, from all the evidence given before you, you believe that the said train stopped at Shell Mound station, the plaintiff was justified in taking passage thereon, unless you also believe the defendant or its servants gave warning to persons there in waiting not to take passage thereon, and that such warning was understood, or ought to have been understood, by the plaintiff; and, if he took passage thereon without such warning given, he was rightfully a passenger on said train, and it was then the duty of the defendant to furnish him room and accommodations inside of the passenger car; and, further, if you believe that the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train. Keeping in mind what I have already said to you, I further instruct you that if, from all the facts and circumstances given in evidence before you, you find and believe that plaintiff was lawfully upon that train as a passenger, within the rules just stated to you, upon the return passage from Shell Mound, and that the defendant failed to furnish him room inside the car, by reason of its crowded condition, and that he was obliged to and did for that reason stand and ride upon the platform, and if you believe that, while he was so standing and riding on the platform, the defendant, by its servants, negligently and carelessly managed and ran its said train at such a rate of speed so that, by reason thereof, in passing over a curve in said railroad, * * * that the car upon the platform of which plaintiff was so standing was, by reason of such careless, negligent management of the train, and by such rate of speed, so swayed, shaken, jarred, and jolted that the plaintiff, without any fault or negligence on his part, but by or in consequence of the negligence of the defendant, as charged in the amended complaint, was thrown off from said car and the platform thereof to and on the ground, and thereby injured, your verdict will be for the plaintiff. I also instruct you that if a railroad company receives upon its cars more passengers than it can furnish accommodations for inside the cars, and for that reason some are compelled to stand and ride on the platform, it is the duty of the company to take that condition of things into account in the management of the train and the rate of speed with which it is run. It cannot act in disregard of the actual state of things which it permits or suffers. In that case, the obligation of the railroad company to passengers whom it receives upon crowded cars is that it will furnish such increased and more watchful and solicitous care, skill, and attention as the crowded condition of the cars require. If, therefore, the crowd of passengers applying for passage or crowding upon the cars is so great that it cannot be controlled by the train officers, and thereby overcrowds and overloads the train, it is the right of such officers to hold the train until they can secure the proper control of it; and as between the company and the passengers on board, to whom tickets have been sold for the trip, entitling them to travel thereon, it is the duty of the train officials to do so, and to furnish room inside to all such persons. If they, however, proceed upon the trip without doing so, it is their duty to use the utmost care and diligence of very cautious persons for the safe carriage of the passengers, having regard to the actual location upon the train which the latter are compelled to take. The omission to use such degree of care is negligence on the part of the company."

The verdict must be sustained upon all questions where a substantial conflict of evidence is presented by the record. Measured by this test, respondent's evidence must be taken as true; and it follows that this train was traveling at a very rapid rate of speed, and while so moving, owing to the fact that it was running upon a curved track or over cross tracks, or for both of these causes, a severe jar or jolt was occasioned, which caused respondent to fall from the platform, underneath the wheels of the car. In this regard the plaintiff testifies as follows: "The train on this occasion ran faster than it ever did before. It ran very fast. * * * It ran down to the mole very fast. In my experience it ran faster than it usually did going down there. It continued at that rate of speed up to the time I fell. * * * At the point where I was jolted off, the train was going unusually fast." The manner of the accident is thus described by him: "The way I experienced it, the car was kind of going half over off the track, and gave a sudden jolt, and the way in giving this jolt I lost my hold behind me of this iron rod I had hold of, and I felt myself going, and I fell off, and that was all I knew of it. One of the jolts was made near the switch there [pointing to the diagram]. Well, it seemed the wheels struck, and kind of threw the car half-way over like. That was the sensation I had, and I could hear everybody scream. It broke my hold. I don't remember what situation I went off in, or how I struck." The witness Miss Hilda Treanor says: "After the train left Shell Mound and came down to the Oakland mole, it was running very fast. I remember about the time Mr. Lynn fell off, or was thrown off, the train seemed to lurch a little bit. When he was thrown off, I heard an outcry among the ladies inside of the car. About that time I heard a great many exclamations of surprise; for instance, 'Gracious!' and 'My gracious!' and words meaning the same thing. The lurch of the train partly threw down the persons who were standing within the aisle of the car. It had the same effect upon them as it had upon me. It threw them down. I mean by that I would have fallen upon the floor but for the people standing around me. They went over on the seats against people who were sitting in the seats. As far as I can recollect, people were unbalanced, and I myself would have fallen on the floor had there not been somebody I fell against. As it was, I did not fall right over; and, as far as I noticed everybody standing in the aisle, the same thing happened to them." Captain William Treanor says: "The train seemed to be running extremely fast, as I thought, as it came down the Oakland mole. * * * The train gave a very heavy lurch, and knocked a number of people down who were standing in the aisles where I was. I was standing up, and the young lady just inside the door, and we both got knocked down and fell over. I was facing the forward end of the car, and both of us got knocked over to the right. The women screamed. Some of them said the car must have jumped the track. I cannot remember that the car slowed up prior to that time. * * * The train ran faster than I have been in the habit of feeling trains run. * * * I thought it ran faster than I had ever seen it run on that road. * * * But where I saw the lurch down on the mole, I could not positively define the point. It was running at an extraordinary fast rate of speed." The testimony of these witnesses is controlling upon these questions, and applying the law given by the trial court to the jury as to the great care which should be exercised by a common carrier where the cars were so heavily overloaded as in the present case, the jury were entirely justified in saying that the defendant was guilty of negligence in running its train at the rate of speed that this train was moving; especially in view of the defects in the track or roadbed, whatever they may have been, that caused the jar or jolt to the cars which, as we have seen, so greatly disturbed the passengers. The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligations to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars.

Was the plaintiff guilty of contributory negligence? In view of the instructions of the court, it is clear that he was not. In speaking as to the claim of the defendant that warning was given, the court instructed the jury: "If you believe the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train." The plaintiff testified in unequivocal terms that he did not hear or know of any warning given, and many other passengers testified to the same effect with reference to themselves. The evidence in this regard is sufficient to create a substantial conflict as to whether in fact the passengers were warned not to crowd the train, and that a second train would soon arrive; but, beyond the question of conflict of evidence, the plaintiff says he heard and knew of no such warning; and, under the law given to the jury which we have just quoted, he had a right under those circumstances to go upon the train; and, if there was no room within the car, he then had a right to stand and ride upon the platform; and, being so situated by the force of circumstances over which the defendant, as we have seen, had complete control, he was a lawful passenger, with all the rights of any other passenger, and entitled to the same care and consideration at the hands of the company. The fact that he was compelled to stand upon the platform, and was thus more unfortunate and more inconvenienced than his friends who were able to crowd within the car, is wholly immaterial. Their legal rights were the same. The duties and obligations of the defendant to them were the same.

It is claimed the verdict is contrary to law, in this: that the court charged the jury that if they found as a fact that other cars, reasonable in number and seating capacity, were produced by the defendant within a reasonable time, prior to or after the time at which plaintiff took his position on the car, and on which plaintiff might have safely ridden, and that plaintiff was apprised thereof, an eager desire on his part to take the overcrowded car in order to reach his destination was not a reasonable cause of necessity. The evidence covered by the instruction substantially stated above is not such as to make the question one of law. It may be said that the evidence is fairly conflicting, both as to the additional accommodations to be furnished and that the plaintiff was apprised thereof. Again, all presumptions are in favor of the verdict; and, if the court's charge includes instructions of law sufficient to support the verdict when applied to the evidence found in the record, then the verdict must be upheld, even though there be no sufficient evidence to support the verdict upon some other theory of the case covered by other instructions of the court. It follows that if the evidence, when considered in the light of the law we have quoted, is sufficient to support the verdict, then the verdict cannot be against law.

We also think the motion for a nonsuit was properly denied. Much that we have already said as to the sufficiency of the evidence to support the verdict is opposed to appellant's contention in this regard. As we have seen, the evidence established a want of proper care in the running of the train at a high rate of speed, and doubly so when we consider that defects in the track or other causes existed which caused the severe jolting and jarring of the cars. Neither was the plaintiff guilty of contributory negligence in riding upon the platform under the circumstances depicted by his evidence. The law given to the jury by the court upon this point is entirely sound. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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103 Cal. 35

KELLEY et al. v. PLOVER et al. (No. 15,401.)

(Supreme Court of California. June 12, 1894.)

APPEAL—RECORD—MECHANICS' LIENS.

1. An objection that the statement on motion for new trial was settled out of due time, and that respondent's bill of exceptions to the settlement on that account is omitted from the transcript, unless the record show the untimeliness of the settlement, can only be raised by suggesting diminution of the record, and moving for an order to certify the bill of exceptions.

2. In the notice of lien, a statement of the terms of payment as "cash on completion of contract" is sufficient.

3. Where subcontractors have guarantied the contractor's performance, his failure to perform and the guaranty must be specially pleaded to an action by the subcontractors to enforce their lien.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by George W. Kelley and others against Patrick Plover and others to enforce a mechanic's lien. Judgment for plaintiffs. Defendant Plover appeals. Affirmed.

Lloyd & Wood, for appellant. Vincent Neale, for respondents.

HAYNES, C. This action was brought by plaintiffs, as copartners, to enforce a lien for materials furnished by them to the contractors, Kirlan & Brady, for the repair of buildings owned by appellant, Plover. Plaintiffs had judgment, defendants' motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

Respondents insist that the appeal from the order denying a new trial should not be considered, because the statement on motion for a new trial was not settled in time, and that the transcript omits a bill of exceptions taken by respondents to the settlement of the statement upon that ground. The record, however, does not show that the statement was not prepared in time. If the transcript on appeal was defective in that regard, respondents should have suggested a diminution of the record, and obtained an order requiring the bill of exceptions to be certified to this court. Kirlan & Brady, the contractors, and several fictitious persons, were named as defendants, but were not served, and did not appear, and no disposition of the cause was made as to them. No objection was made in the court below to proceeding with the trial of the cause, and by section 579, Code Civ. Proc., the court was authorized to render judgment against the appellant without determining the liability of the other defendants.

The claim or notice of lien filed in the recorder's office contained the following: "The following is a statement of the terms, time given, and condition of said contract, to wit: 50 M. 1½ P. laths, $175 [stating each item of the claim]. Terms cash on completion of contract." Appellant contends that this statement does not comply with the statute, and cites Hooper v. Flood, 54 Cal. 219. There the statement was: "That the terms, time given, and conditions of said contract are and were cash;" and it was held that this statement was not a compliance with the statute; that the word "cash" did not express the terms, time given, and conditions of the contract. But here the word "cash" is followed by the words "on completion of the contract," so that the time and manner of payment are expressed; and it cannot be presumed, in the absence of allegation and proof, that these did not include all the conditions of the contract. In Tredinnick v. Mining Co., 72 Cal. 80, 13 Pac. 152, the statement was "that the terms of payment for said labor were cash as soon as said labor was performed." Held sufficient. In Blackman v. Marsicano, 61 Cal. 638, the words were, "Cash upon demand, in gold coin of the United States." The court distinguished the case from Hooper v. Flood, supra, and held the statement sufficient. See, also, Hills v. Ohlig, 63 Cal. 104, and Jewell v. McKay, 82 Cal., at pages 151, 152, 23 Pac. 139. The court did not err in admitting the notice in evidence.

The contract between the owner and Kirlan & Brady, below the signatures of the party, had written thereon the following: "We witness and secure the performance of this contract for the second party. Kelley, Hare & Co. pr. J. W. Hodgkin." The second parties to the contract were the contractors, Kirlan & Brady. The defendant gave evidence tending to prove that the contractors did not complete the work they agreed to do, and that the work performed was badly done, and claims that plaintiffs had guarantied the performance of the contract. No such defense was set up in the answer, nor was there any finding or request to find thereon, and, if there had been, it would have been outside of the issues. No other points are made by appellant. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 15

STEEN v. HENDY et al. (No. 15,313.)

(Supreme Court of California. June 11, 1894.)

JUDGMENT ROLL—REPORT OF REFEREE — EFFECT OF FORMER DECISION — USE OF TRUST FUNDS—PROFITS—COSTS—REVIEW.

1. The finding of a referee which Code Civ. Proc. § 670, provides shall be part of the judgment roll, is only his finding on the whole issue, which section 644 provides shall stand as the finding of the court; and, where he is not to report findings which shall be the basis of a judgment, his report is not part of the judgment roll.

2. Where a decision on appeal gave plaintiff an option to accept a modified judgment or have a new trial, and he elects to have a new trial, his rights will depend on the facts as shown on the new trial.

3. Where a person of large means and good credit, who can borrow all the money he needs at current rates, uses in his manufacturing business, which has been long established and is paying large profits, a comparatively small sum of money which he holds in trust to turn over to the beneficiary, such profits are not earned by the trust funds, and the beneficiary is only entitled to compound interest on his money.

4. Though, on a former appeal, it was decided that plaintiff might have compound interest on a trust fund to the time that the judgment appealed from was rendered, or might have a new trial to determine the profits that had been realized by defendant from the use of the trust fund, still, it having been found on a new trial that no profits were made thereon, or that it could not be determined what they were, plaintiff should have been allowed interest compounded, not to the time of the former judgment, but to that rendered on the new trial.

5. Costs in an equity case, being a matter of discretion, cannot be reviewed without a statement or bill of exceptions.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by E. T. Steen (substituted for J. W. Faulkner) against Joshua Hendy and the Joshua Hendy Machine Works. From the judgment, plaintiff appeals. Modified.

Clark E. K. Royce, for appellant. Cope, Boyd & Fifield, W. H. H. Hart, and Nowlin & Fassett, for respondents.

TEMPLE, C. This is an action for an accounting, and has been pending 17 years. This is the second appeal to this court, the first being reported in 80 Cal. 636, 22 Pac. 401, where a full statement of the facts may be found. Prior to the entry of the judgment which was before the court on the first appeal, the amount of money belonging to Steen which defendant Hendy had received was fixed by stipulation. On the sum so agreed upon, the court allowed interest at the rate of 1¼ per cent. per month, compounded monthly. The defendant appealed, complaining of this rate of interest. One ground upon which the rate was defended here was that Hendy held the money as trustee for Steen, and had wrongfully used the funds in his business, in which he had realized a profit greatly exceeding the rate of interest allowed. This court decided that the rate could not be allowed, and remanded the case, with leave to the plaintiff "to file a supplemental and amended complaint, charging the defendant with profits actually realized from the use of the trust fund, upon which the cause may be tried anew." Otherwise the direction was that, without a new trial, interest be computed on the balance due the defendant June 2, 1875, at the legal rate, till March 11, 1876, and credited to defendant, interest to be computed at legal rates on the sums collected by defendant from time to time between June 2, 1875, till the commencement of the action, and charged against the defendant; upon the balance then found, interest to be computed at legal rates, with annual rests, until the time of the first decree, from which time only simple interest shall be allowed. When the case reached the lower court, plaintiff filed a supplemental and amended complaint, as permitted by the order of this court. February 27, 1891, the trial court referred the case to E. B. Young, Esq., "to inquire what profits the defendants, or either of them, have actually realized by the use of the money or property of the plaintiff, or in which the plaintiff had an interest, since June 2, 1875, and to state any and all profits actually realized by such use, and report a statement of the same." The order then proceeds to specify at length, and with considerable particularity, what matters and questions the referee shall investigate and determine, and also directs him, at request of either party, to "make special findings upon any question of fact which may arise during the trial before him, and state and report any other matter touching the true state of the account between the parties." The referee had full power to take evidence, and was to return with his report all testimony and evidence and proceedings had and taken before him. August 17, 1892, the referee not having reported, the court made a second order of reference, as follows: "By agreement of parties hereto, it is ordered that the evidence taken before the Hon. W. T. Wallace be, and the same is hereby, submitted to E. B. Young, the referee heretofore appointed herein, for his consideration. It is further ordered that the said referee shall report findings of fact and conclusions of law herein, and a judgment thereon. It is further ordered that nothing in this order contained shall affect in any manner or way any order heretofore made in the above-entitled action. Done in open court, this 17th day of August, 1892. William T. Wallace, Judge." Since, by this last order, the referee was to report findings of fact, conclusions of law, and a judgment, it is difficult to discover any utility in requiring the referee to answer all the numerous questions propounded by the court and by counsel under the leave given in the first order of reference. However, if it had been doubtful before,—as I think it was not,—the second order makes it certain that under the first order of reference the referee was not expected to report findings of fact which should be the basis of a judgment. On the 5th of November, 1892, the referee filed two reports, both of which are printed in the transcript. One is entitled by the referee "Report of E. B. Young, Referee, under Order of Court, Filed Herein March 2, 1891." The first order was filed on the last-mentioned date. This report is a lengthy statement of the substance of the testimony, the reasons of the referee for certain conclusions, and why certain questions cannot be answered, and the answers of the referee to a great many questions propounded by the court and by counsel. It contains also arguments with citations of authorities, and in some cases refers to specified testimony, which presumably was filed with the report, but is not in the transcript for answers to certain questions. The other report contains formal findings of fact, conclusions of law, and a judgment.

This appeal is taken by the plaintiff upon the judgment roll alone. His principal points are based to some extent upon the conclusions of the referee, as shown in the report made under the first order of reference, and that report is constantly referred to for facts to sustain appellant's contention. Respondents contend that this report does not legally constitute a part of the record, and cannot be referred to for any purpose. On this proposition I think respondents' contention must be sustained. If the report of a referee is part of a judgment roll, it must be on the ground that it is a finding. Code Civ. Proc. § 670. We find from the Code that a reference may be had either to try an issue or to ascertain a fact necessary to enable the court to determine an action or proceeding (Id. § 638); and (in section 639) (1) to decide the whole issue or determine a specified part; (2) to take an account for the information of the court before or after judgment; (3) to determine a question of fact not arising from the pleadings; and (4) when necessary for the information of the court in a special proceeding. The finding of a referee upon the whole issue must stand as the finding of the court, and judgment may be entered thereon. Id. § 644. This must be the finding referred to in section 670. As the report made under the first order of reference is not such a finding, it does not constitute a part of the judgment roll.

Appellant, to sustain the proposition that the report is a part of the judgment roll, cites Thompson v. Patterson, 54 Cal. 542. That case was decided in department, and the opinion was written by Mr. Justice McKee. In that opinion he used the following language: "But errors 'shown and illustrated by the findings and report of a referee on its face' are part of the judgment roll of a case; for a referee appointed to try and determine a case is, quoad the trial of the case, in the place of the court, and his findings and report are the equivalent of the findings and decision of the court itself." "When a referee," says the court in Harris v. Railroad Co., 41 Cal. 393, "reports his decision in the whole case, his report stands as a special verdict." "The finding and report of a referee are therefore part of the judgment roll of a case." The court was evidently considering the case of a referee to try a case and report a judgment, in which case it is true the findings and decisions take the place of findings and decisions of the court, and such papers and no others constitute the judgment roll when the case is tried by a referee as would if the case were tried by the court. The ambiguous use of the word "report" is taken from Harris v. Railroad Co., where section 187 of the practice act was under consideration. In that section the word "report" is evidently used for "finding" or "decision." In section 670 of the present Code the word "finding" was substituted for "report." That case, therefore, is not authority for appellant, and this appeal must be considered upon the judgment roll alone.

Appellant contends that there is no finding upon certain issues. Conceding, however, that upon all those issues findings had been for the plaintiff, they could not affect the conclusion which it seems to me must be reached in the case. In addition to the facts found on the first trial, the court now finds that Hendy conducted the business in which he and plaintiff were jointly interested under the belief that Hendy was the sole owner of the goods, and that Steen only had the right to compensation for his services, which it was agreed should be one-half of the net profits; that prior to the 2d day of June, 1875, Hendy was the owner of a large amount of real and personal property, greatly in excess of the value of the property in which Steen was interested, and subsequently to that date became the owner of large amounts of real and personal property, and was successfully engaged in various business enterprises from which he made large profits, and others in which he made large losses; and that he used in his business and kept but one bank account, in which all moneys, including the fund in which Steen was interested, were deposited; also that "it is impossible in any manner or way to ascertain the actual profits realized by the said Joshua Hendy and the defendant corporation since the 2d day of June, 1875, from the use of his own money individually, or from the moneys received by him, the said Joshua Hendy, from the sales of property in which the said Steen and the said Hendy were jointly interested, as aforesaid, or from the use by the said Hendy and the said corporation of the moneys received by said Hendy of the moneys belonging to said Steen;" that June 23, 1891, Hendy paid plaintiff $10,308.53, which was the full sum of money received by Hendy for the use of plaintiff. The corporation defendant was organized by Hendy, and he practically owned all the stock, and had entire control and management of it. No notice need therefore be taken of it as an entity distinct from Hendy, further than to say that there is no foundation for appellant's charge that it was organized to confuse the accounts and prevent plaintiff from following his property, or that it did have any such effect. On the contrary, it was found, and must be taken as true, that Hendy did not suppose that the moneys were received or held by him as the trustee of Steen. The court, having found that the actual profits cannot be ascertained, gave the plaintiff interest in lieu of profits, calculated as directed by this court on the first appeal, but allowed only simple interest from the date of the first judgment. Appellant is not satisfied with this decree. He says the former judgment of this court gave him the option to accept a judgment for interest, or to claim actual profits; that he exercised this privilege by electing to take the actual profits, and therefore the decree entered is a denial of the relief which it was expressly decided on the former appeal that he was entitled to; that the difficulty in determining actual profits arises from the fault of defendant, who wrongfully mingled the funds; that, under such circumstances, the burden of separation should be placed on defendant. He says: "The plaintiff claims that he is entitled to take so much or all or any one or more pieces or parcels of property now held by the defendant, or either of them, purchased with the common fund, or any part thereof, as the defendants cannot show to be theirs." It is true, plaintiff was given an option either to accept a modification of the judgment, or to have a new trial, and he elected to have a new trial; and his rights must now be determined from the facts as shown upon the new trial. Upon the last trial an important fact was established which was not found upon the first trial, to wit, that it is impossible to ascertain the actual profits, either upon the money held in trust, or upon the fund with which such money was mingled. So far as this new fact can affect the determination of the case, the former decision is not controlling.

Appellant gives certain figures showing an increase in the value of Hendy's assets, which he claims should be taken as profits; but no such figures appear in the findings, nor can we say, in the absence of a statement, that there was any evidence from which any such conclusion could be reached. On the contrary, the finding is that such profits cannot be ascertained. All presumptions are in favor of the correctness of these findings, in the absence of the statement. We may suppose, as the respondent contends the facts were shown to be, that the defendant had for years been conducting a large business, in which he had invested a capital in comparison to which the trust fund was insignificant; that in this business he was making large profits in the manufacture and sale of machinery, invented and patented by himself; that it was shown that the profits came mostly from the sale of patented articles; that Hendy had good credit, and could have procured all the money he needed at current rates; and that the comparatively small sum of trust money used was not essential to the business, and did not add materially to the profits. Now, if these facts were shown, admitting, as it does not appear from the findings was the case, that such profits can be determined, is it a profit which in any sense was earned by the use of the trust fund? Lord Brougham, in Docker v. Somes, 2 Mylne & K. 655, answers this question. He says such gains are not profits, but the earnings "of skillful labor, very highly paid, and no reasonable person would ever dream of charging a trustee whose skill, thus bestowed, had so enormously augmented the value of capital, as if he had only obtained from it a profit." The English cases hold that profits earned because of the good will of a business cannot be shared by a beneficiary under such circumstances, and that allowances should also be made for the amount earned by the business management of the members of a firm in whose business trust money has been wrongfully used; not as compensation for managing the fund, but because the profits are taken, not as a right in the beneficiary, but pursuant to a principle of the public policy, which is to take from the trustee all advantage which he has gained through the misappropriation of the trust money. See Brown v. De Tastet, Jac. Ch. 284; Crawshay v. Collins, 2 Russ. 325; Featherstonhaugh v. Turner, 25 Beav. 382; Willett v. Blanford, 1 Hare, 253. Trusts are as various as human affairs, and these rules might not hold in all cases; as, for instance, where the trustee is required to invest the fund for his beneficiary, or where the money was invested in a single venture or constituted the trading capital. Often, as here, the trustee is under no obligation to earn a profit for the beneficiary, and the wrong done to him consists in not paying the money, and in risking it in his business. Here the position of a trustee is very similar to a debtor who neglects paying his debt. Yet, although the beneficiary is not injured by such use of the money, and there has not even been a wrongful delay in payment, the law intercepts the profits, and gives them to the beneficiary, in obedience to the policy which, that trustees may not be tempted to use trust money for their own advantage, provides that, though he may lose, he shall never gain, by such misuse of the funds. In this case it is to me quite obvious that the profits, conceding that they have been thus made, were not earned by the use of the trust fund, and that Hendy did not reap any greater advantage from the use of the money than has been allowed to plaintiff. I think no case can be found, where the circumstances are at all similar, in which a more favorable judgment has been given.

Nor do I think it was through Hendy's fault that the profits cannot be ascertained. in any other sense than that it was through his fault that the money was used by him at all. The amount of the trust fund was agreed upon since this suit was brought, and has been paid over. It cannot be claimed that Hendy has taken any pains to confuse the accounts so as to prevent inquiry or obstruct investigation. The money was already blended with his by the very nature of the original contract. Hendy could not separate the funds from his, or even determine the amount of it. This could only be done by settlement, through agreement or litigation. Much the larger portion of the proceeds of the property in which Steen was interested confessedly belonged to Hendy. The articles were sold one by one, and to determine Steen's portion of the proceeds of each article, as respondents justly observe, requires the determination of a quantum meruit,—a determination which could not be made by Hendy. Now, Steen was only interested in the net profit, one-half of which also belonged to Hendy. It is not reasonable to require Hendy to keep all this capital idle because Steen had a small interest in it, which Hendy could not ascertain until their relative rights should be agreed upon or determined by litigation. Because the parties, after several years of litigation, agreed upon Steen's share, appellant now seeks to have the court regard it as though it had once been a distinct trust fund in Hendy's hands. The money never had any earmarks, and therefore none have been lost through Hendy's fault. Nor is this going against the conclusion reached on the former appeal. It was there simply held that Hendy held the money in a fiduciary capacity, and must account for all profit made from it or pay compound interest. It now appears that, though the money has been used by Hendy, no profits have been made which can justly be said to be profits made by the use of the trust fund. I think it also appears pretty conclusively that the judgment takes from Hendy all possible advantage he could have gained through the use of the trust money. Steen gets all that justly belongs to him, and the rule of public policy applicable to the matter is fully vindicated.

I think, however, the court erred in providing that compound interest should be allowed only until the entry of the first judgment. The rule for casting interest indicated in the former judgment of this court was upon the hypothesis that there would be no new trial or new judgment. It provided for a modification of the existing judgment. Of course, then, the court would not provide for compounding interest after the entry of the judgment, for the Code determines the interest which judgments shall bear. Since that judgment was set aside, however, the date of its entry becomes an immaterial circumstance. Interest should have been compounded to the date of the present judgment, but a new trial will not be required. The case being in equity, the allowance of cost was a matter within the discretion of the court. Without a statement or bill of exceptions, that discretion cannot be reviewed here. I think the case should be remanded, with directions to the trial court to modify the decree by allowing compound interest up to the entry of judgment, and that in other respects the judgment be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to the trial court to modify the decree by allowing compound interest up to the entry of the judgment, and in all other respects the judgment is affirmed.

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103 Cal. 62

BUCKMAN et al. v. CUNEO. (No. 15,287.)

(Supreme Court of California. June 12, 1894.)

Lien of Street Assessment — Extension of Time for Completion of Work — Recording Engineer's Certificate.

1. Under Act March 18, 1885, § 6, providing that the street superintendent shall fix a time for completion of work under any contract made with him, which may be extended from time to time, an extension may be granted before a previous extension has taken effect, to begin at the expiration of such previous extension.

2. By act of March 14, 1889, the recording of the engineer's certificate of work done in grading a street is necessary to make an assessment therefor a lien. *Held*, that failure to record a diagram drawn on the back of such certificate, referred to therein, and a necessary part thereof, is fatal to the lien

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by A. E. Buckman and others against Joseph Cuneo to foreclose the lien of a street assessment. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. J. P. Langhorne, for respondent.

FITZGERALD, J. Action to foreclose an alleged street assessment lien upon the defendant's lot. Defendant had judgment, and plaintiffs appeal therefrom, and from the order denying their motion for a new trial. The facts necessary to be stated with reference to the points upon which this decision must rest are as follows: On March 7, 1890, the board of supervisors of the city and county of San Francisco, in pursuance of the act of March 18, 1885, and the act amendatory thereof approved March 14, 1889, passed a resolution of intention, declaring "that Jones street, from the southerly line of Chestnut street to Montgomery avenue, be graded to the official line of grade." On August 13, 1890, the superintendent of streets contracted with one C. D. Vincent to do the work, the contract providing that the work should be completed within 90 days from the date thereof. After five extensions of time had been granted for the performance of the contract, the first four of them for 90 days and the last for 30 days, the work, except that part of it shown by the engineer's certificate, was completed about the 16th of November, 1891, at which time the assessment was issued therefor, whereby plaintiff's lot was assessed, as alleged in the complaint. It further appears that as the work progressed the city engineer made certificates from time to time in relation to its performance, the last of which is in the words and figures following, to wit: "No. 552. San Francisco, Oct. 29, 1891. I certify I have examined the work of grading Jones street from Francisco to Montgomery avenue, and find work to official lines and grades, except per line as shown on back of this certificate. Emb. 6,760 cubic yards. $40.00. A. E. Buckman, Contractor. C. S. Tilton, City Engineer." On the back of this certificate was a diagram made by the city engineer, showing the easterly and westerly lines of Jones street between Francisco street and Montgomery avenue, and showing that the embankment and filling necessary to complete the grading of Jones street between the streets referred to had not been filled and graded up to the easterly line of Jones street, as required by the terms of the contract, by reason of the projection of a house into the easterly side of Jones street, and beyond its easterly official line westwardly to a depth of 2 feet and of the length of 20 feet. The engineer's certificate referred to was recorded, but the diagram made by him on the back thereof was not recorded. Afterwards a warrant was issued by the superintendent, to which was attached the assessment, diagram, and the foregoing engineer's certificate, which were delivered by him to the assignees of the original contractor, who thereupon went upon the said lot of defendant, which it appears was assessed to an unknown owner, and publicly demanded payment of the sums of money so assessed by the superintendent thereon for said work. Neither the whole nor any part of the sums so demanded was paid, and thereafter, and within 30 days from the date thereof, the warrant was returned to the superintendent of streets with a verified return of one of the assignees indorsed thereon, setting forth the nature and character of the demand, and that the sums so demanded were unpaid. This return was duly recorded by the superintendent of streets on March 9, 1891, and thereafter, on March 12, 1892, the complaint in this action was filed.

The first question presented for consideration involves the power of the board of supervisors to grant an extension of time for the performance of the contract when the extension next preceding it had not commenced to operate. The language of section 6 of the act of March 18, 1885, upon which this question arises, is that the street superintendent "shall fix the time for the commencement which shall not be more than fifteen days from the date of the contract and for the completion of the work under all contracts entered into by him, which work shall be prosecuted with diligence from day to day thereafter to completion, and he may extend the time so fixed from time to time under the direction of the city council." In McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885, the court, in considering this section with reference to who had the power to grant extensions, held that the board of supervisors only had such authority, and that the certificate of the street superintendent was merely evidence of that fact. But that statute, as to the question under consideration, has never been construed by this court. It is claimed by respondent that the construction given to this section by the court below holding that the board of supervisors had no power to grant an extension of time under the circumstances was in accordance with the terms and intent of the statute. To this construction we cannot agree, for we think it clear that the power of the board of supervisors to grant extensions of time for the performance of such a contract is not limited by the provisions of the statute, either as to the number or time of such extensions, and that it is within its power to grant an additional extension before an extension previously granted has taken effect. Any number of extensions, and for any period, may be granted at any time by the board or council before the expiration of the contract, provided, always, that the work up to the time of the making of the application is shown to have been prosecuted with diligence in accordance with the requirements of the statute. And, in the absence of a showing to the contrary, it will be presumed that the action of the board or council in granting such extension was based on a proper showing, and such extension begins to operate from the expiration of the previous extension, and not from the time that it was granted.

The remaining question to be disposed of relates to the failure to record in the office of the superintendent of streets that part of the engineer's certificate indorsed or drawn on the back thereof as heretofore shown. By the act approved March 18, 1885, it was only necessary in order to create a lien such as is sought to be enforced in this action to record the warrant, assessment, and diagram. But by the act of March 14, 1889, the recording of the engineer's certificate was made an additional and necessary prerequisite to the creation of a lien thereunder. Nor does the creation of such a lien depend upon whether the owner of the lot had notice of any of these proceedings, but upon the recording of the warrant, assessment, diagram, and engineer's certificate. And, if they were recorded as provided by the terms of the statute, then a valid lien was created upon the defendant's lot; otherwise, not. The diagram drawn on the back of the engineer's certificate, and referred to in the exception noted on the face thereof, shows, as before stated, the projection of a house into Jones street, and that that street had not been graded to the official easterly line thereof. The question then is, was this diagram a material part of the certificate? If it was, then it should have been recorded in order to create a lien under the statute. The certificate as recorded does not show, as the statute requires, how or to what extent the work was performed under the contract; but, as the diagram drawn on the back thereof does show in what particular respect the work had not been performed, it follows that the diagram was a material part of the certificate, and should have been recorded, and, as it was not, no valid lien attached to the defendant's property. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

4 Cal. Unrep. 655

GREEN v. BARNEY. (No. 15,321.)

(Supreme Court of California. June 12, 1894.)

VENDOR AND PURCHASER—RESCISSION BY VENDOR —TENDER.

1. B., having defendant's contract to sell him certain land, died, leaving a balance overdue and unpaid. The contract had not then been rescinded, but defendant made no claim against B.'s estate. Plaintiff, B.'s successor in interest, told defendant that she could not complete the purchase, and suggested a division of the land. Defendant refused, but offered to sell her the land, without counting B.'s pay-

ments, for a price considerably more than the balance due on the contract. Plaintiff said she would rather keep to the old contract, but was told there was no old contract to keep to. Later, plaintiff wrote defendant that she was now able and willing to pay the amount due, and requested an account, which was furnished, with a letter from defendant's attorney to the effect that defendant did not recognize plaintiff's right to the information. *Held*, that defendant had rescinded.

2. Civ. Code, § 1496, provides that, unless an offer of performance be accepted, the thing to be delivered need not be actually produced. Section 1501 declares that all objections to the mode of an offer which could be stated at the time to the person making the offer, and could be then obviated by him, are waived unless then stated. *Held* that, in case of an offer to pay money, actual production of it is waived unless demanded at the time.

3. A vendor who, after receiving money on the contract, rescinds it for the vendee's breach, has the burden to show, as against the vendee's claim for return of the money, what damages he has sustained by the breach.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by A. H. Green against Mary E. Barney for money had and received. Judgment for defendant. Plaintiff appeals. Reversed.

M. Cooney, for appellant. Blake, Williams & Harrison, for respondent.

VANCLIEF, C. On January 1, 1886, a written agreement was executed by and between the defendant and E. H. Bray, whereby the former agreed to sell and the latter to purchase a lot of land (60 acres) situated in Contra Costa county, at the price of $3,750, of which price $200 were paid on the date of the agreement, and $550 were to be paid January 1, 1887, and the remainder ($3,000) on or before January 1, 1889; deferred installments to bear interest at 8 per cent. per annum. It was further agreed that time should be of the essence of the contract, and that the $200 paid should be forfeited in the event of Bray's failure to pay the deferred installments according to the agreement. One Blackmar being in possession of the land under a cropping lease, it was further agreed that Bray should have the benefit of the landlord's share of the crop on the land at date of the agreement, but that the proceeds of the sale thereof should be applied on said deferred installments, and that possession of the land should be given to Bray upon the surrender thereof by Blackmar. Bray died September 14, 1889, having paid only $1,825 on the contract, but the contract had not been rescinded before his death. The plaintiff, having succeeded to all the rights and interest of Bray in the contract, of which there is no question, brought this action to recover the said sum of $1,825 paid by Bray in his lifetime. The cause having been tried by the court without a jury, and findings of fact having been waived, the judgment of the court was in favor of the defendant, from which, and from an order denying her motion for a new trial, the plaintiff has appealed.

As the appeal from the judgment was not taken within one year from the entry thereof, it should be dismissed. On the appeal from the order denying a new trial, which was properly taken, the appellant contends that material implied findings of fact, on which the judgment necessarily rests, are not justified by the evidence. If the contract had not been rescinded before the commencement of the action, or if, in case it had been rescinded, by reason of a breach thereof by plaintiff, on account of which defendant suffered damages in a sum equal to the amount of the payments made by Bray, then the judgment in favor of defendant was right; otherwise it was wrong, and should be reversed. Therefore, the judgment for defendant implies that the court must have found either that the contract had not been rescinded, or that the rescission thereof was owing to a default of the plaintiff, whereby defendant suffered damages in a sum equal to, and sufficient to cancel, the payments made by Bray. Phelps v. Brown, 95 Cal. 572, 30 Pac. 774, and cases there cited. I think the evidence, without substantial conflict, shows that the contract was abandoned by defendant after the death of Bray, on account of the default of the plaintiff in failing to pay the remainder of the purchase money; that such abandonment was acquiesced in by plaintiff before the commencement of this action, whereby a rescission of the contract was consummated; and that the evidence does not justify a finding that, by reason of plaintiff's default, the defendant sustained damages in a sum equal to, and sufficient to cancel, the payments made by Bray, to wit, $1,825.

1. The undisputed evidence as to the abandonment and rescission of the contract is substantially as follows: Soon after the death of Bray, the plaintiff signified her inability to complete the purchase, and requested an equitable division of the land on the basis of the purchase money paid by Bray, to which defendant did not assent; but defendant proposed to sell the land to plaintiff at the price of $50 per acre, independent of, and without accounting for, the payments made by Bray, which offer was not accepted by plaintiff. It should be noted that this proposal to sell the land to plaintiff at a price exceeding the amount due on the contract by $1,070 is inconsistent with the claim that defendant considered the contract in force. On the 15th day of August, 1890, plaintiff addressed a letter to defendant, saying that she "was now ready, willing, and able to pay the actual amount due," and requesting information as to the payments made by Mr. Bray in his lifetime, and of the actual amount due on the contract. Defend-

ant requested her attorney to answer this letter, which he did by letter dated August 18, 1890, saying: "While Mrs. Barney does not wish to be understood as recognizing any right on your part to the information you ask for, she has no objection to giving it." This letter inclosed a copy of the contract, with a statement of payments made by Mr. Bray, but did not state that any amount was due, nor express a willingness on the part of the defendant to accept any further payment on the contract. The only further communication between the parties after this letter was a letter from plaintiff to defendant, dated August 21, 1890, demanding payment by defendant of the sum of $1,825, paid by Bray, with interest. At an interview between plaintiff and defendant early in August, 1890, in the presence of defendant's son, who had acted for her in the matter, the defendant proposed to give plaintiff an option to purchase the land within a specified period at $50 per acre. In declining this proposal, plaintiff said she "would rather adhere to the old contract." To this the son in the presence of his mother, replied: "There must be some misunderstanding concerning the contract. There is no old contract for you to adhere to." To this statement of her son the defendant said nothing. The defendant testified that she understood plaintiff's letter to her, of August 15, 1890, as an "unequivocal declaration that she [plaintiff] was able and willing and intended to pay for this land pursuant to the contract;" and also testified that she (defendant) was in possession of the land, but did not say when she took possession. The plaintiff, however, testified that defendant "has always been in the possession of that land," and this testimony was not disputed. As to whether plaintiff verbally offered to pay the remainder of the purchase money prior to the offer made by the letter of August 15, 1890, the testimony of plaintiff and defendant is conflicting, but there is no evidence in conflict with that above stated. The objection that plaintiff's written offer to pay was ineffectual because the money offered was not actually produced, is not tenable. The defendant had an opportunity to object to the sufficiency of the offer on the ground that the money was not produced, and, had she done so, the plaintiff could have obviated the objection; and, since defendant failed to object on any ground, she thereby waived the objection here made. Civ. Code, §§ 1496, 1501. Her denial of plaintiff's right to the information asked in the letter of August 15th, without which plaintiff was unable to compute the amount due on the contract, plainly indicated not only that the payment of that amount was not desired, but that defendant repudiated the contract, and, as the letter was carefully drawn by defendant's attorney, it cannot be otherwise understood. Perhaps it may not be irrelevant, under this head, to observe that, although it was expressly admitted at the trial that the estate of Bray had been fully administered and distributed before the commencement of this action, there was no evidence that defendant made or presented any claim whatever against the estate.

2. Assuming that the court may have found, as it should, that the contract was abandoned and rescinded after the death of Bray, it remains to be determined whether the evidence justifies a finding that the damage to defendant in consequence of the breach of the contract by plaintiff equaled and canceled the payments made by Bray. In view of the contingency that the court should find that the contract had been rescinded, the defendant alleged in her answer that by reason of the breach of the contract she had suffered damages in the sum of $2,023, but specified no particular damage except that she had lost the crop on the land at the time of the sale, which she avers was of the value of $700. At the trial, however, the defendant called and examined several witnesses as to the value of the land, the effect of whose testimony was that the market value of the land would average at least $45 per acre from January 1, 1889, until the time of the trial, and consequently that the whole (60 acres) was of the market value of $2,700, which is only $350 less than the contract price, exclusive of the crop, which defendant values at $700. Conceding that defendant was entitled to recover as damages, the difference between the contract price and the depreciated market value of the land, and also $700 for the crop, amounting to $1,050 still plaintiff would be entitled to judgment for the difference between this amount and the $1,825 paid on the contract, which is $775. It is not intended, however, to estimate or find the amount of damages to which the defendant was entitled according to the evidence, but only to decide, as matter of law, that the evidence does not substantially tend to prove that defendant was damaged to the extent of $1,825, as must have been found by the trial court; in other words, that the damages found are excessive, and not warranted by the evidence. The question of damages, as well as that of rescission of the contract, will be open to additional evidence on a new trial. All that is conclusively decided on this appeal is that the evidence contained in the statement on motion for new trial is insufficient to justify a finding either that the contract was in force at the time the action was commenced, or that the damages suffered by defendant were sufficient to cancel the payments admitted to have been made by Bray. No question as to what is the proper rule by which to measure the damages is involved in this appeal. I think the appeal from the judgment should be dismissed, and that the order denying a new trial should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the appeal from the judgment be dismissed, and that the order denying a new trial be reversed, and the cause remanded for a new trial.

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103 Cal. 43

BLISS v. SNEATH. (No. 15,434.)

(Supreme Court of California. June 12, 1894.)

COMPLAINT—SUFFICIENCY — SPECIAL DEMURRER—SET-OFF.

1. The objection that the complaint in an action for rent fails to sufficiently aver demand and nonpayment can only be taken by special demurrer.

2. Where a husband sues as the agent of his wife, defendant may set up as a defense any claim which he might have set up against the wife had she sued.

3. Defendant may set up as defense to such action a claim against plaintiff's wife for one-half of the value of a fence between the lands of defendant and those of plaintiff's wife, built by defendant, for the value of one-half of which the statute makes her liable.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by George D. Bliss against R. G. Sneath. From a judgment for plaintiff, defendant appeals. Reversed.

Garret W. McEnerney and Bradley, Stanly & Hayes, for appellant. Byron Waters, for respondent.

TEMPLE, C. This is an appeal from a judgment for plaintiff upon the pleadings. The action is for rent alleged to be due upon an indenture of lease. It is contended that the complaint does not sufficiently aver demand and nonpayment. The allegation is: "That the plaintiff has demanded the payment of said sum, but to pay the same, or any part thereof, the defendant refused, and still refuses." A general demurrer was interposed, which apparently was never passed upon, but was waived by answering. The objection not having been taken by special demurrer, the pleading must now be held sufficient. Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094. The defendant answered, admitting the demand of plaintiff, but setting up, as a partial defense, a claim against plaintiff's wife. The answer avers that, in all the transactions set forth in the complaint, plaintiff acted solely and wholly as the agent of Martha S. Bliss, his wife; that the present action is prosecuted by him as agent of said Martha S. Bliss, and for her sole and exclusive use, benefit, and behalf. The answer then proceeds to aver a demand against said Martha S. Bliss, which existed at the time the action was commenced, and asks that such demand be set off against and deducted from the claim of plaintiff, and admits plaintiff's right to take judgment for the excess of plaintiff's demand over and above his claim against Martha S. Bliss. On motion, plaintiff obtained judgment for the full amount of his demand without trial.

The sufficiency of the allegations in the answer must be tested by the same rule applied to the complaint. If the allegations in the answer would be sufficient in a complaint to sustain a judgment, they are sufficient here. Judged by this rule, the allegation is sufficient to show that plaintiff is suing merely as the agent of his wife. The defense is not really a counterclaim. That is a demand which may be the basis of a judgment against the plaintiff. Here the matter pleaded is purely defensive to the demand sued on. "Where the agent sues in his own name," says Mr. Evans (Evans, Ag. 387), "the defendant may avail himself of all defenses which would be good at law and in equity,"—"(a) as against the agent, who is the plaintiff on the record, or (b) as against the principal, for whose use the action is brought." Mechem, Ag. § 762. It is said, however, that, even admitting this principle, it cannot apply here, because the defense set up is a debt created or arising from a statutory liability, and is not, therefore, a cause of action arising upon a contract. The defense consists of a claim against plaintiff's principal for one-half the value of a division fence between the lands of defendant and those of Mrs. Bliss. They are coterminous owners, and defendant built a fence on the line between their lands. Mrs. Bliss afterwards inclosed her land, using this fence as a part of her inclosure; whereupon, under the provisions of section 841 of the Civil Code, she became indebted to him for one-half the value thereof. The section referred to is one of many Code provisions relating to the rights and duties of property holders, and the liability arising from the conditions mentioned cannot justly be said to be a statutory liability. The liability arises from the fact that plaintiff's principal made use of a fence built by the defendant under circumstances which create the liability. She has been benefited, and the law says she must pay for it. Here are all the elements of an implied contract. The obligation to pay legal interest could be claimed, with much greater plausibility, to be a statutory liability, and therefore not a contract liability. The fact that the Civil Code has changed some common-law rules by which the rights and obligations of persons were ascertained does not make the new or changed obligations any less obligations arising from implied contracts than were the different obligations fixed by the common law. "There are also cases in which the law will imply a contract to pay money from the fact of there being already a legal obligation to pay it, although the transaction in its origin was entirely unconnected with contract, and there has been no promise in fact." 1 Chit. Cont. p. 86. On all such obligations an action in form ex contractu would lie, and I have no doubt the demand would be a proper defense, by way of set-off, had the action been brought in the name of Mrs. Bliss. It is equally so here. I think the judgment should be reversed and a new trial had.

We concur: HAYNES, C.; SEARLS, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment is reversed and a new trial ordered.

DE HAVEN, J. I concur in the judgment. Assuming the matters alleged in the answer to be true, it was error to give a judgment in favor of plaintiff for the full amount demanded in the complaint.

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4 Cal. Unrep. 671

In re KENNEDY'S ESTATE. (No. 15,415.)

(Supreme Court of California. June 12, 1894.)

EVIDENCE—BOOK OF REGISTERED LETTERS—COMPETENCY.

1. On an issue whether petitioner was testatrix's illegitimate daughter, the exclusion of evidence that testatrix had never mentioned having any daughter was not prejudicial where petitioner not only made no claim that testatrix had ever recognized her as her daughter, but produced evidence that she had not.

2. Petitioner introduced evidence tending to show that she received at Buffalo a letter signed C. K. (testatrix's name), containing a railroad ticket and $5. It was shown that the address of C. K. was at 616½ N. street, and that at about that time she borrowed $5 to send, as she said, to her sister at Buffalo. *Held*, that petitioner might introduce from the book of registered letters of the San Francisco post office an entry reciting the receipt of a letter from C. K., 616½ N. street, addressed to M. R. (petitioner), Buffalo.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Petition by Mary Rogers, setting out that she was the daughter of Catherine Kennedy, deceased, and asking for such share in the estate as if deceased had died intestate. From a judgment for petitioner, and an order denying a new trial, J. T. McCormick, executor of the will of J. E. Tomlinson, devisee under the will of Catherine Kennedy, appeals. Affirmed.

Eugene N. Deuprey, for appellant. M. J. Platshek, M. S. Eisner, and F. S. Stratton, for respondent.

SEARLS, C. Catherine Kennedy died testate at the city and county of San Francisco, April 13, 1887, leaving estate of the value of about $12,000. She was thrice married, and left surviving her one son by her second marriage, named John E. Tomlinson. By her last will she devised all of her estate to the said son, John E. Tomlinson, except three small legacies of $100 each, bequeathed to Sarah McCloskey, John E. McCormick, and Rosa Malone, respectively, and naming James McCloskey as executor. The will was admitted to probate, McCloskey appointed executor thereof, and such proceedings were had in relation thereto that on the 11th day of December, 1889, a petition was filed by the executor praying a distribution of the estate as in the will provided. On the 23d day of December, 1889, Mary Rogers made and filed her petition and opposition in the cause, in which, among other things, she set out that she was the daughter of Catherine Kennedy, deceased; that, by an omission not appearing to be intentional, deceased wholly failed to provide for petitioner in her last will; that she is entitled to a like share or interest in the estate as though deceased had died intestate,—and prayed that one-half of said estate be distributed to her. Thereafter, on the 23d day of December, 1891, the matter of the petition of Mary Rogers to participate in the distribution of the estate of said Catherine Kennedy, deceased, came on to be heard. A trial by jury was waived by the parties. The contest was between said Mary Rogers and J. T. McCormick, the executor of the last will of J. E. Tomlinson, deceased, who had before that time departed this life. The question in litigation was as to the maternity of the said Mary Rogers. The decision was in favor of the respondent, said Mary Rogers, who was found to be the illegitimate daughter of Catherine Kennedy, the testator, and one-half of the estate was distributed to her. The appeal is from the decision, and from an order denying a new trial to said McCormick, executor of the last will of said Tomlinson, deceased.

At the trial, counsel for appellant asked Kate Smith, a niece of Catherine Kennedy, deceased, who was a witness on his behalf, the following question: "Did you ever hear of any other child than J. E. Tomlinson?" Questions of like import were also asked of Mary Matthews and Mary McCormick, to all of which questions objections were made by counsel for petitioner, upon the ground that the testimony was incompetent, irrelevant, and immaterial. The objections were sustained by the court, and exceptions taken. J. T. McCormick was also called as a witness on the part of appellant, to whom the following questions were put: "At any time did Mrs. Kennedy, in speaking of the incidents of her youth, speak of any daughter of hers, legitimate or illegitimate? A. No. Q. Whom, if any, did you know or observe as the members of the family of Catherine Kennedy during her lifetime? A. The only person that I was acquainted with was John Edward Tomlinson." These answers were, on motion of respondent's counsel, stricken out upon like grounds. These rulings are severally assigned as errors. The theory of appellant is that the question of pedigree and relationship was the main issue in the case, and that the testimony of the witnesses above specified contradicted the claim of the illegitimate

Mary Rogers, and hence was proper evidence under the Code of Civil Procedure, section 1852, and subdivision 11 of section 1870. Section 1852, Code Civ. Proc., is as follows: "The declaration, act or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Subdivision 4 of section 1870 provides as follows: "The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person," etc., may be proven. And by the eleventh subdivision oı the same section it is provided that common reputation existing previous to the controversy respecting pedigree, among other things, may be proven. That the acts and declarations of the deceased, Catherine Kennedy, in respect to the relationship of Mary Rogers to her, in a proper case, and where the question is in issue, are admissible, is beyond dispute. The evident object of the inquiry in the present case was, as is shown by the evidence stricken out, as well as by the testimony of other witnesses, who testified without objection, to show that the deceased never spoke of the petitioner as a daughter, and that she was not reputed to be a child of the deceased woman or a member of her family.

Now, the whole theory of the case, as made by the affirmative testimony of the respondent here, was that there never was any recognition of the relationship by her deceased mother, but that, on the contrary, it was studiously concealed from the world. According to that theory, the respondent was born in Ireland; that her mother came to America a few years later, leaving her with her aunts, who still later, but in the early childhood of respondent, brought her to America and settled with her near Buffalo, N. Y., where she remained until over 40 years of age; that her mother, whom she scarcely saw in America, went to New Orleans, where she settled and was twice married, having two sons, one of whom died, and removed to San Francisco, and married Kennedy, who also died; that deceased learned the address of respondent in Buffalo, N. Y., and wrote to her there in 1886, inviting her to come to California, inclosing a passage ticket for the trip and $5 in cash; that in the letter she addressed her as her daughter, and signed herself as her mother, but cautioned her that she "must not call her mother when she did come, because of her son, who did not know of the existence of this child of hers; that her son was a violent and a drinking man, and would be very angry and make trouble if he knew of this illegitimate child;" that when she reached San Francisco her mother met her at the ferry, and, upon becoming known to each other, one of the first cautions of the mother was not to let it be known that she was a daughter; that she was introduced as a niece, remained with her mother not exceeding four or five days, and, finding the place uncongenial, went out to service, and never returned more than a few times to her mother's home. There is no claim whatever of recognition, but, as before stated, affirmative evidence that there was none. In the face of this showing, it is hard to see how the case of appellant would have been made stronger had the negative evidence been admitted. If we concede that striking out the testimony introduced and the exclusion of that offered was technically erroneous, it must be said that the appellant was not injured thereby. The testimony of the witnesses Eisner and Platshek was properly admitted, not as evidence to the main issue, but to contradict and impeach the testimony of the witness James McCloskey as to his statements previously made. It was of trifling importance, but, being admissible, constituted no error. The respondent, having introduced evidence tending to show that she received at Buffalo, N. Y., a letter from San Francisco, signed by Catherine Kennedy, containing a railroad ticket and $5 in cash, was permitted, against the objection of appellant's counsel, to introduce in evidence from the book of registered letters of Station B, San Francisco post office, the following: "No. 1,637. Received March 16, 1886, of Catherine Kennedy, 616½ Natoma street, addressed to Mary Rogers, Buffalo, New York." There was evidence that the address of Catherine Kennedy was at 616½ Natoma street, and that at about that date she procured from James McCloskey $5 to send, as she said, in a letter to her sister at Buffalo, N. Y. The testimony was proper as affording some evidence that the registered letter came from the deceased, Mrs. Kennedy. The identity of name and address was evidence of identity of person.

The only remaining question relates to the sufficiency of the evidence to support the finding that the respondent, Mary Rogers, was the illegitimate daughter of Catherine Kennedy. That the testimony of the respondent, coupled with that of Caroline F. Judd and Mary H. Huntley, supported as it is in a few minor particulars by other testimony, is sufficient, if true, to support the finding, cannot be seriously doubted. Knowing the incentives in such a case to simulate facts and to concoct statements at variance with truth, I have examined with care all of the testimony in the case, only to come to the conclusion that the statements of the respondent as a witness are indicative of a disposition to give utterance to the truth, and that when the whole evidence upon both sides is scanned, and its intrinsic merits compared, the conclusion is fairly deducible, not only that there was sufficient evidence to uphold the findings, but that the preponderance of evidence was and is with the respondent. The order and decision appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and decision appealed from are affirmed.

(103 Cal. 46)

FARNG v. KEEFER et al. (No. 15,322.)

(Supreme Court of California. June 12, 1894.)

ACTION ON CONTRACT—EVIDENCE — CONTRACT OF THIRD PERSON.

Plaintiff alleged an agreement entered into between him and defendant, whereby plaintiff was to furnish certain laborers at a certain price, etc., and produced a written contract of defendant, reciting that plaintiff had contracted with a third person to supply laborers for certain work, referring specially to said contract, and promising, as part consideration thereof, to pay plaintiff certain costs of transportation. He also produced the contract with a third person referred to, and evidence that defendant at the same time orally promised to pay for the labor, and did in fact pay all that was paid. *Held*, that the third person's contract was admissible to explain defendant's contract, and was not the basis of the judgment against defendant for the balance due for the labor, the court having found as a fact that he did make the oral agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Chew Farng against W. A. Keefer and others on contract. Judgment for plaintiff, against defendant Keefer, who appeals. Affirmed.

Eugene N. Deuprey, for appellant. Roger Johnson, for respondent.

VANCLIEF, C. This action was brought against appellant and others to recover the price of labor of a gang of Chinamen alleged to have been furnished by the plaintiff to defendants under an agreement. The plaintiff had judgment against the defendant Keefer alone for $1,330.93, and costs, who appeals therefrom, and from an order denying his motion for a new trial.

It is contended here by counsel for appellant that while the complaint counts upon a certain written contract, to which neither of the defendants was a party, the plaintiff was permitted, against the objection of defendants, to prove and to recover upon a distinct contract between different parties. But this contention is founded upon a misconception of the complaint, in which no written agreement is alleged, the allegation being that "an agreement was entered into between plaintiff and defendants, whereby plaintiff undertook to furnish certain Chinese laborers to work upon the construction and widening of a certain water ditch, * * * for which defendants agreed to pay plaintiff the sum of one dollar and ten cents per day for each laborer so furnished and employed." It appears that Keefer was interested in the construction of the ditch, he being a stockholder of the corporation which owned the ditch, and the owner of a gravel mine to be worked by water from the ditch; that prior to September, 1891, he entered into an agreement with Mrs. S. R. Owen to the effect that he would convey to her one-half of the gravel mine, in consideration whereof she was to furnish the Chinese laborers to widen and repair the ditch. Through his negotiations with the plaintiff, a written agreement was drawn up in duplicate between Mrs. Owen and plaintiff, to the effect that plaintiff would furnish the Chinese laborers to repair the ditch, and that she would pay for their labor at the rate above stated. This agreement was signed in duplicate by both parties to it, but whether at the same time or place is uncertain; and as to whether it was ever delivered as an executed contract the evidence is conflicting. Mrs. Owen testified that she signed the agreement on September 3, 1891; yet one of the copies is dated October 10th. Before the Chinese laborers were employed and sent to the ditch, the agreement between Mrs. Owen and Keefer was rescinded; and on October 10, 1891, a written agreement was executed between the plaintiff and Keefer, as follows: "This agreement, made this 10th day of October, 1891, between W. A. Keefer, party of the first part, and Chew Farng, party of the second part, both of San Francisco, California, witnesseth, that whereas, Chew Farng has this day entered into a contract with Mrs. S. R. Owen to supply Chinese laborers to work upon a certain water ditch in the county of Calaveras, which more particularly appears from said contract dated 10th October, 1891, which is hereby specially referred to: Now, therefore, in consideration of and as a part of said contract, said Keefer agrees to pay to said Farng one-half of the cost of transporting all the provisions which may be sent up to feed said laborers from Valley Springs to the camp of said laborers, except that portion of said provisions which Mrs. Owen has by her said contract agreed to transport. He further agrees to provide transportation from said camp to San Francisco, California, for all of said laborers after the completion of their said work, except such, if any there be, who shall be discharged from said employment for sufficient cause. Said Farng agrees to send the first gang of said laborers up to the work as soon as they can be gotten together, and within twenty days from this date, and that he will notify said Keefer by or on Wednesday, the 14th of October, 1891, when to have transportation provided for said laborers from Stockton, California, to said work; and, if said Farng fails to have said gang of laborers at Stockton at the time he appoints, then he shall pay to said Keefer any damages he may sustain by reason of his having provided for their transportation on said day appointed. A. W. Keefer, Chew Farng." It was in connection with and for the purpose of explaining this agreement that the agreement between Mrs. Owen and the plaintiff was admitted, and for this purpose it was admissible. It does not appear that the judgment was based upon the contract with Mrs. Owen. The evidence strongly tends to prove, and the court found, that, in addition to his written agreement to pay for the transportation of the Chinamen, Keefer verbally promised to pay for all their labor, and there is no question that he did pay all that had been paid before suit, to wit $2,051.40, without objection. The findings support the judgment, and there is no sufficient specification of any particular in which it is claimed that the findings are not justified by the evidence, either in the statement on motion for a new trial or in the brief for appellant. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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103 Cal. 50

MERGUIRE v. O'DONNELL. (No. 15,072.)

(Supreme Court of California. June 12, 1894.)

DECEIT—SPECIAL DAMAGES—INSTRUCTIONS.

1. When the evidence conflicts, the jury's verdict is conclusive.

2. In an action for deceit, in selling plaintiff glandered horses, special damages are recoverable for medical treatment of the horses, and for the value of the stable, which plaintiff had to burn, to prevent contagion.

3. The doctrine of caveat emptor should not be charged where the gravamen of the action is deceit, and breach of express warranty.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. H. Merguire against Thomas O'Donnell for deceit. Judgment for plaintiff. Defendant appeals. Affirmed.

F. B. Ogden, for appellant. F. A. Hornblower, for respondent.

SEARLS, C. This is an action to recover damages for deceit and fraudulent representations in the sale by defendant to plaintiff of three horses. Plaintiff had judgment for $650, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

About the 1st of June, 1890, plaintiff purchased from the defendant, at East Oakland, three horses, for $400; paying $100 down, and the residue to be paid the following day, upon delivery of the horses in San Francisco. Defendant called upon plaintiff the following morning, in advance of the arrival of the horses, and received the residue of the purchase price. Almost immediately upon the arrival of the horses, and within an hour, they were found to be ailing, and discharging from the nose. The disease with which they were afflicted proved to be glanders. One of them was condemned by the public authorities, and killed in a short time, and the others shared the same fate a few months later. Plaintiff, after the death of the first horse, offered to return the others, and demanded a rescision of the contract, and return of his money, which was refused by the defendant. The complaint charged defendant with falsely and fraudulently representing to plaintiff that the horses were well and sound; that the plaintiff believed these statements to be true, and, relying upon them, was induced to purchase; and that defendant well knew the statement to be false, etc. The cause was tried by a jury, and the main controversy was as to these representations and knowledge by defendant of the condition of the animals. There was testimony on the part of plaintiff tending to show that defendant knew the condition of the horses, instructed his employe to keep their noses clean when plaintiff and his brother came to examine them, which was done, and that he represented to plaintiff that "they were all sound, except one horse, who had a blind eye," and at another time, during the negotiation, when asked if there was anything the matter with them (the horses), he said, "No, except that one had a defect in the eye." On the other hand, there was a denial of all these representations by defendant, and of all knowledge on his part of any ailment or disease in the horses. A number of other witnesses on the part of defendant testified that the horses showed no signs of glanders up to the time of sale. In the face of this conflict of evidence, we must regard the verdict of the jury as conclusive upon the facts.

The jury rendered a verdict in favor of plaintiff for $650. This, it is claimed by appellant, was excessive. There was testimony tending to show that plaintiff expended about $100 in surgical treatment of the horses, and that he destroyed the stable in which the diseased horses had been kept, and burned the materials, which, owing to the highly contagious character of the disease, was shown to be reasonably proper. This stable was shown to have been worth $200. As plaintiff was entitled to recover, if at all, the purchase price of the horses, which was $400, we cannot say the added $250 thereto was excessive, in view of the fact that the several special causes of damage were pleaded.

The instructions asked by the defendant, and refused by the court, were objectionable, for various reasons,—the first, because, while it correctly enunciated the law as to the doctrine of caveat emptor, in the absence of fraud or of a warranty, still it was inapplicable to the case at bar, in which the gravamen of the charge was (1) fraud on the part of the defendant, whereby plaintiff was prevented from discovering the diseased condition of the horses; (2) an express warranty of soundness of the horses by the defendant; and (3) because so much of the instruction as was applicable was subsequently given. Like-observations apply to the refusal of the court to give the other instructions asked. The court, upon its own motion, instructed the jury upon the issues made in the case, and, so far as we observe, there was no error therein; and, as no objection was made or exception taken to such instructions, they are not the subject of review. The necessity for the destruction of plaintiff's stable, by reason of the virus of the glandered horses, is alleged in the complaint, and, not being denied by the answer, was an admitted fact in the case. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 69

CITY AND COUNTY OF SAN FRANCISCO v. ANDERSON. (No. 15,290.)

(Supreme Court of California. June 12, 1894.)

TAXABLE PROPERTY — SEAT IN STOCK EXCHANGE.

A seat in a stock exchange, which is a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates, is not taxable property.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the city and county of San Francisco against Charles E. Anderson. Judgment for plaintiff. Defendant appeals. Reversed.

Jarboe & Jarboe and Edward R. Taylor, for appellant. J. E. O'Donnell, for respondent.

McFARLAND, J. The only question in this case is whether or not a "seat in the San Francisco Stock and Exchange Board" is taxable property, and in our opinion it is not. What such a "seat" is sufficiently appears in the opinion of this court in Lowenberg v. Greenebaum, 99 Cal. 162, 33 Pac. 794. In that case we held that a seat in said board being merely "a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates," was not property that would pass by a sale under a common writ of execution; and, following the views there expressed, we hold that it has no such qualities as make it assessable and taxable as property. It is a mere right to belong to a certain association, with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said "seat." It is too impalpable to go into any category of taxable property. Respondent cites Clute v. Loveland, 68 Cal. 254, 9 Pac. 133, but that case went upon the theory that the seat of a member of the said stock board represented his interest in the property of said board and in the property of a certain corporation called the "Company of Associated Stockholders," with which said stock board had certain relations. Now, the alleged taxes for which this suit was brought were for the fiscal year 1889, and the stipulated facts show that for said year "all the real and personal property, owned by, or in the possession, or under the control" of, said San Francisco Stock and Exchange Board and of said Company of Associated Stockholders, was duly assessed to said board and said company, and that all taxes levied to pay the assessments were by said board and said company fully paid. Therefore, under the theory of the said case invoked by respondent, the attempt to tax said seat, in addition to the taxes levied upon all the property of said stock board and said corporation, was clearly an attempt at double taxation, and void, within the principle of the case of Burke v. Badlam, 57 Cal. 594. The judgment and order denying appellant's motion for a new trial are reversed.

We concur: DE HAVEN, J.; FITZGERALD, J.

103 Cal. 75

DOWLING v. CONNIFF. (No. 15,361.)

(Supreme Court of California. June 13, 1894.)

STREET ASSESSMENTS — WAIVER OF ERRORS — APPEAL TO SUPERVISORS — CONSTITUTIONALITY OF ACT.

1. St. 1889, p. 157, providing for levying and collecting assessments for work upon streets, and, by section 8, that the warrant, assessment, certificate, diagram, and affidavit of demand and nonpayment shall be held prima facie evidence of the regularity of the assessment, embraces but one subject, within Const. art. 4, § 24.

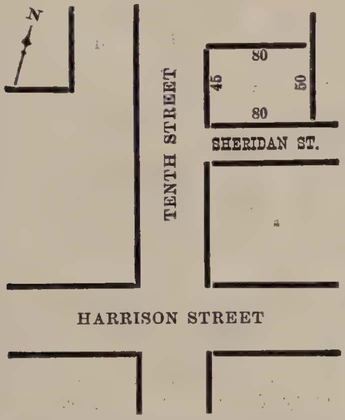
2. Where a lot is properly assessable for the paving of a street crossing as being within a quarter block cornering on the crossing (Act March 14, 1889, § 5, subd. 3), an assessment thereon for such purpose is not void because it erroneously includes a sum assessed on the lot's frontage on a small subdivision street, and the error, if not corrected by an appeal to the board of supervisors, is waived.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by J. J. Dowling against Michael Conniff. From a judgment for plaintiff, and order denying his motion for a new trial, defendant appeals. Affirmed.

Horace W. Philbrook, for appellant. Parker & Eells, for respondent.

VANCLIEF, C. Action to enforce payment of an assessment for work done on a crossing of two main streets (Tenth and Harrison) in the city of San Francisco. The work to be done, and which was done by plaintiff, was described in the resolution of intention as follows: "That the roadway of the crossing of Tenth and Harrison streets be paved with basalt blocks (except that portion required by law to be kept in order by the railroad company having tracks thereon), and that granite cross-walks be laid thereon." The plaintiff on the trial offered as evidence his warrant, the diagram of the lots assessed, and his affidavit of demand and nonpayment, all in due form; whereupon the defendant objected to the diagram, assessment, and the warrant, on the ground that the assessment is void because it appears thereby that the work was done on a crossing of main streets, and that defendant was not only assessed for that portion of his lot which fronts (45 feet) on Tenth street, but was also assessed for 80 feet of the same lot fronting on Sheridan street, which is a small subdivision street in the quarter block northeast from said crossing of main streets and terminating in Tenth street; whereas, it is claimed, defendant was liable to be assessed for only the frontage of his lot (45 feet) on Tenth street. The following portion of the diagram, on which defendant's lot is numbered 45, will sufficiently illustrate the grounds of the objection:



The court overruled the objection, and defendant excepted. After reading these documents, the plaintiff rested, and the defendant offered no evidence. The judgment was in favor of plaintiff, enforcing his lien for $49.30, with interest and costs. From this judgment, and from an order denying his motion for a new trial, the defendant appeals.

1. It is not distinctly claimed here, however, that the court erred in admitting these documents in evidence, but it is contended by appellant that, being admitted, their effect as evidence was to show that the attempted assessment was entirely void, for the reasons above stated as grounds of objection to the evidence. While I think it must be admitted that defendant's lot was assessable for work done on the crossing of main streets only in proportion to its frontage on such main streets, within one of the quarter blocks cornering on the crossing (section 5, subd. 3, Act March 14, 1889; St. 1889, p. 163), and that the assessment of it for a greater proportion was error, I do not think the assessment in question was void. It appears that, in making the assessment in this case, Sheridan street (35 feet in width) was regarded as a lot fronting on Tenth street; that its frontage (35 feet) on Tenth street was distributed among, and assessed to, all the lots fronting on Sheridan street, in proportion to their frontage thereon; and, as defendant's lot had a frontage of 80 feet on Sheridan street, $6.50 was added to the assessment thereon on this account. It seems that this mode of apportioning the assessment was supposed to be required by the seventh subdivision of section 5 of the act above cited; but this, I have no doubt, was a mistake, which added to the assessment on defendant's lot about $5.60 more than its proper proportion of the whole assessment. Yet, since defendant's lot had a frontage of 45 feet on Tenth street within a quarter block cornering on the crossing improved, it was lawfully assessable for the work on that crossing; and, inasmuch as an assessment of it for such work was fully authorized, the mistake of the superintendent of streets in assessing it for a sum exceeding its proper proportion was merely an error in the exercise of unquestionable power, which error might have been corrected by an appeal to the board of supervisors; and the failure to take such appeal operated as a waiver of the error. Section 11, Act March 18, 1885 (St. 1885, p. 147); Himmelmann v. Hoadley, 44 Cal. 276; Frick v. Morford, 87 Cal. 576, 25 Pac. 764; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Perine v. Erzgraber, 36 Pac. 585. The case of Diggins v. Brown, 76 Cal. 318, 18 Pac. 373, cited by appellant, has not been followed, and seems inconsistent with the later cases above cited.

2. Appellant further contends that section 8 of the amendatory act of March 14, 1889 (St. 1889, p. 168), providing that the warrant, assessment, etc., "shall be held prima facie evidence of the regularity and correctness of the assessment * * * and like evidence of the right of plaintiff to recover in the action," is in violation of section 24, art. 4, of the constitution. But this point is fully answered in the cases of McDonald v. Conniff and Perine v. Erzgraber, supra. The plaintiff properly recovered on such prima facie evidence, as the defendant introduced no evidence whatever.

3. The constitutional question raised by appellant in his reply brief, as to whether or not, in case of an appeal to the board of supervisors, the judgment of the board is final, is not involved, since there was no such appeal in this case. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 37

GROPPENGIESSER v. LAKE. (No. 15,338.)

(Supreme Court of California. June 12, 1894.)

CONTRACT OF PURCHASE—RESCISSION—FRAUDULENT REPRESENTATIONS.

Though defendant believed that his representations as to land, by which he induced plaintiff to make a purchase, were true, and though he told plaintiff that he had never seen the land, and part of the representations consisted of the report of an employe, still, they having been materially false, plaintiff is entitled to a rescission.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Oswald Groppengiesser against Frederick W. Lake. Judgment for plaintiff. Defendant appeals. Affirmed.

F. D. Brandon, for appellant. F. J. Castelhun, for respondent.

TEMPLE, C. This action was brought to rescind a contract for the purchase of land because of alleged fraudulent representations on the part of the vendor, relying upon which, plaintiff made the contract, and to recover money paid under the contract. The court found all the allegations of the complaint true, and all the statements in the answer and cross complaint untrue.

Defendant's motion for a new trial having been denied, he appeals from the judgment and order. He contends that a misrepresentation, to justify rescission, must relate to matter which induced the party to contract, and concerning which the purchaser had not equal means of information; that the parties here were entire strangers, and plaintiff was told that defendant had no personal knowledge in regard to the property, and, furthermore, defendant submitted to him all the information he himself had. The evidence is, however, conflicting upon this question. Plaintiff, according to his testimony, was a cook at San Jose. He saw the advertisement of defendant, who is a real-estate agent, and called upon him, to inquire. Defendant showed him a book describing different tracts which he had to sell. From these descriptions he selected a tract of 80 acres in El Dorado, which in the book was marked six dollars per acre. Defendant then said that was his best piece of land, and, although it was marked six dollars per acre, he could not sell it for less than ten. He said the land was mostly level, slightly rolling, and about 2½ acres in it, possibly, could not be used, because it was ravines,—was bad. Defendant handed him some photographs of portions of the land, and said the wood was all over the land like that shown in the picture; also, that there was a ditch on the section, from which water could be easily brought to it. The photographs were in evidence, but are not produced here. He also handed plaintiff a report made to defendant by an employe, in which the tract is particularly described. Of course, the defendant is responsible for the statements in this report. It says that the land can be easily irrigated; that it slopes gradually south and southwest; that the natural vegetation is oak, and some small pine and elder and light brush that is easily cleared, or that it furnishes good browse for stock. Some snow falls, but, as in all places where the fall of snow is light, it does more benefit than harm. Excellent fruit is raised throughout the locality. Everything grows to perfection. This ought to be as attractive a residence as Auburn or Placerville. The soil is a deep red color, and very similar to the soil in the best orchards and vineyards in these foothills. Some mining was done in the vicinity, and some prospecting had been done on the land. This land will make an excellent home for any one. There seems to be a good demand for wood, at about six dollars per cord, and the wood on this land is worthy of consideration. There was also a plat showing description, with roads, ravines, etc. This survey and plat is not brought here. Plaintiff also testified: "The transaction was all finished on the same day when I first saw him, and at the same interview. There was just one interview, and that finished the entire transaction." Thinks that was November 19, 1890. The transaction was in San Francisco, and the land in El Dorado county. Plaintiff first saw the land in July, 1891. He found that the land had very little wood on it,—mostly underbrush; was mostly bedrock on the surface, and quite hilly; the hills were very steep, and not more than two or three acres of level land. Other witnesses testified for plaintiff, —one, that the land is rough with some steep hills and bedrock at the surface, in parts. Only from 12 to 15 acres could be cultivated. It was also shown that there was no water on the land, and that it would cost $500 to take water from the ditch to it. The defendant naturally gave a very different account of the transaction. I notice in it, however, but one new material circumstance which is not inconsistent with the testimony of plaintiff; that is, that he told plaintiff at the first interview, that he (defendant) had never seen the land. This statement, being uncontradicted, may be taken as true.

Upon these facts, is defendant entitled to a new trial? That the representations were as to material matters, such as were calculated and were plainly intended to induce the plaintiff to purchase the land, there can be no doubt. Neither can there be any doubt that the representations did induce the plaintiff to enter into the contract, and that defendant then knew that plaintiff relied solely upon his statements. Even upon defendant's own testimony this is so. The representations, according to plaintiff's testimony, were positive assertions as to matters which are not mere matters of opinion. He was told in effect, that nearly all the land could be used, except two or three acres, which, on account of ravines, would be useless; that it was suitable for a fruit ranch, and was wooded all over, as shown in the photographs. As those are not brought here, the presumption must be that they would tend, so far as possible, to support the judgment and order. These statements, there was testimony tending to show, were not true. But it is said the defendant informed plaintiff that he had never seen the land himself, and therefore plaintiff knew that he was only relating what he had heard from others. But there was a great show of care on the part of defendant to ascertain the facts. His employes had personally examined it, had surveyed it, and photographed portions of it; had even sent him some of the soil. Defendant does not say that he told plaintiff that his entire knowledge in reference to the tract was derived from the documents shown him. If he had so stated, the effect would have been only to limit the representations to what appeared from these papers. It does not matter that defendant did not know that what he stated was untrue, or that he believed it to be true. According to the testimony, his statements constituted all the knowledge possessed by plaintiff as to the subject-matter of the sale. As they were untrue in material respects, the plaintiff, acting promptly, may rescind. Civ. Code, § 1572; Alvarez v. Brannan, 7 Cal. 503; Bank v. Hiatt, 58 Cal. 234. See, also, 2 Pom. Eq. Jur. § 887.

As to the statement of plaintiff's counsel at the trial, that plaintiff did not charge defendant with actual fraud, I cannot see how defendant was misled by it. It was not an admission to be used in the place of evidence, and it does not appear that defendant was prevented by it from producing any evidence that he might have produced. The complaint charges no fraud, except actual fraud, and there was no testimony tending to prove fraud of any other character. Plaintiff cannot be understood as waiving his right to rescind. The phrase, "actual fraud," has been loosely used by judges and law writers, and the attorneys probably had not the Code definition in mind. What was meant probably was that they did not claim that defendant knew that he was stating an untruth. It is actual fraud, all the same, if he stated as true that which he did not know to be so, intending that plaintiff should act upon it, and then entered into the contract, knowing that plaintiff did so in reliance upon his statements, plaintiff not having other means of knowledge. Independently of the rule that this court will not disturb the findings of fact when there is material conflict, a motion for a new trial is addressed to the sound discretion of the trial court, and that discretion will not be interfered with unless this court can see that there has been an abuse of it. We cannot say so here. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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102 Cal. 433

WOLFF v. WOLFF. (Nos. 15,327, 15,389.)

(Supreme Court of California. June 13, 1894.)

Dissenting opinion. For majority opinion, see 36 Pac. 767.

BEATTY, C. J. The court having denied a rehearing of this cause, I take the occasion to say that I have never concurred in the affirmance of that part of the decree of the superior court awarding alimony. The amount of alimony awarded is based upon a finding of fact directly opposed to the stipulation of the parties that the answer of defendant was true as to the value of his property and business. In my opinion, the answer, on a fair construction of its language, makes a sharp issue upon this point.

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103 Cal. 79

FRASER v. SAN FRANCISCO BRIDGE CO. (No. 15,118.)

(Supreme Court of California. June 13, 1894.)

ACTS OF CORPORATE OFFICERS — RATIFICATION — INJURIES TO EMPLOYE — PAYMENT FOR MEDICAL SERVICES.

1. Plaintiff and W., at request of defendant's president, rendered medical services to an employe of defendant, who had been injured, while in its service, without fault on defendant's part. Defendant paid W., and offered plaintiff $250, which he refused. *Held* that, though the president had no authority to employ physicians for it, defendant was under a moral obligation to pay for their services, and that by paying W., and offering to pay plaintiff, it ratified the contract.

2. The agreement by defendant's president was to pay the reasonable value of the services, reserving, however, "the right to determine what is reasonable." *Held*, that plaintiff could recover only the $250 offered by defendant.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by E. J. Fraser against the San Francisco Bridge Company to recover for medical services. Judgment for plaintiff, and defendant appeals. Reversed.

R. Percy Wright, for appellant. Joseph M. Nougues, for respondent.

PER CURIAM. The plaintiff brought this action to recover the sum of $1,000, alleged to be due him for medical services rendered to one John Howden at the request of the defendant. The answer denied that the services were rendered at the request of defendant, or that defendant was in any way liable therefor. The plaintiff recovered a judgment for the sum of $616, from which, and from an order refusing a new trial, the defendant appeals.

It appears from the record that on the 19th of May, 1890, the defendant was engaged in the erection of a bridge in Sonoma county, and John Howden was the foreman in charge of the work. On that day, Howden fell from the bridge, and received serious injuries, which caused his death on the 23d of July following. It is not claimed, however, that the fall resulted from any carelessness or fault on the part of the defendant, or its other employes. On the next day after the injuries were received, Howden was taken to his home, in San Francisco; and thereupon, at the request of his wife, the plaintiff, Dr. Fraser, who had been his family physician for several years, visited him, and took charge of the case. Thereafter, the plaintiff visited him twice every day till he died, remaining about an hour and a quarter on each visit. On May 27th, Dr. Wooster was called in consultation, and it was determined that some of the spinal processes had been fractured, and that a surgical operation was necessary to remove a piece of broken bone which was pressing on the spinal cord. Before performing the operation, the plaintiff telephoned to the office of the defendant, asking if Mr. McMullen, the president of the company, could meet Dr. Wooster and himself at Mr. Howden's house at five o'clock in the afternoon of that day. Mr. McMullen responded that he did not know whether he would be able to meet them or not, but if he could not he would send a representative of the company. At the time named, Mr. H. S. Wood, an engineer in the employ of the company, met the doctors at Howden's house, saying that he came to represent the company. Dr. Wooster then stated to Mr. Wood that considerable attention would be required in Howden's case, and that he did not feel like going on with the case without some written obligation from the company. Thereupon, Mr. Wood wrote and signed the following agreement, and delivered it to Dr. Wooster and the plaintiff:

"May 27, 1890. The San Francisco Bridge Company, a corporation under the laws of the state of California, hereby agree to pay all reasonable charges of Dr. David Wooster and Dr. E. J. Fraser in the case of John Howden, injured May, 1890. San Francisco Bridge Company, per H. S. Wood, Engineer." Some time the next day, Wood informed McMullen what he had done, and thereupon the latter wrote and forwarded to each of the said doctors a letter reading as follows: "San Francisco, Cal., May 29, 1890. Dr. E. J. Fraser, 112 Kearney Street, City—Dear Sir: I wish to have our position in connection with paying for the medical services of Mr. John Howden correctly understood. Our position in the premises is this: We are under no obligation whatever to pay for said services; but out of regard for Mr. Howden, and in order that he may have proper medical attendance, we, of our own will, are willing to pay a reasonable compensation for said services, but we reserve to ourselves the right to determine what is reasonable. We are willing to pay what would be a reasonable charge against a man in Mr. Howden's circumstances, but, because we are a corporation, we are not willing to pay any fancy charges, as on former occasions we have been obliged to do, by reason of not having a definite understanding. We understand that our Mr. Wood agreed to pay all reasonable charges of yourself and Dr. Wooster in the premises. Mr. Wood has no authority, and cannot oblige the company in any way, but we are willing to guaranty the payment of a moderate fee, such as a man in Mr. Howden's circumstances financially could be expected to pay for such service. If a fee of this character is all that you anticipate, there will be no trouble. Yours, truly, San Francisco Bridge Company, by J. McMullen, President." Dr. Wooster presented to the defendant a bill for his services, and, on a compromise, was allowed and paid $200 therefor. The plaintiff presented his bill, and was offered by defendant, in payment thereof, $250; but he refused to accept that sum, and thereupon commenced this action. At the trial the plaintiff detailed very particularly the services performed by him, and stated: "After the operation there was a good deal of attendance necessary. As there was no nurse provided, I had to do the double duty of nurse and physician." The plaintiff also proved by several physicians whom he called as witnesses that, in view of the services detailed as having been performed by him, $10 for each visit was a reasonable charge. The court instructed the jury that the paper signed by Mr. Wood did not bind the defendant, because it appeared that he had no authority to make such an agreement on its behalf, and it should therefore be disregarded. The court further instructed the jury, in effect, that the letter written by McMullen constituted a binding obligation on the part of the defendant to pay the reasonable charges of the doctors, and it said: "The only question, then, which I submit to you, is what, under the circumstances, is a reasonable fee? And you are to determine that under all the evidence before you. Now, what is reasonable, gentlemen, is to be your guide. * * * What would be a reasonable compensation for services rendered to such a man as Mr. Howden, in Mr. Howden's circumstances financially?"

1. In support of the appeal, it is contended that McMullen, as president of the bridge company, had no authority or right to make

any contract on behalf of the company to pay for medical services rendered Mr. Howden, and hence that his letter of May 29th imposed no legal obligation upon the company to pay any charges for such services, whether reasonable or unreasonable in amount. It is true that the defendant was in no way responsible for the injuries received by Howden, and it might, therefore, have refused to assist or care for him in any way. But he had been a faithful servant of defendant, and was injured while performing his duties as such. He was also a poor man, and needed attention and care, which he had no means to procure. Under such circumstances, there would seem to have been some moral obligation resting on the defendant to furnish to him such assistance and care as were necessary to relieve his sufferings, and, if possible, save his life. This obligation is shown to have been recognized from the start, and should be held to constitute a sufficient consideration for the legal obligation expressed in the letter referred to; and when the defendant paid Dr. Wooster $200 for his services, and offered to pay the plaintiff $250 for his services, it recognized, approved, and confirmed the authority of its president to write the letter, and make the contract therein expressed. The defendant ought not now, therefore, after the services have been rendered in reliance on the letter, to be permitted to repudiate it, and deny all liability thereunder.

2. The only other question which need be considered is, to what extent did the letter obligate the defendant to pay for the services rendered by the plaintiff? The agreement signed by Wood was "to pay all reasonable charges" of the doctors; but the letter expressly repudiated that agreement, and, in effect, said that the company would not be bound to pay such charges as might be thought or proved by others to be reasonable, but only such as it might deem reasonable. The words are, "We reserve to ourselves the right to determine what is reasonable." This was a reservation which the company, under the circumstances shown, had a right to make; and we see nothing in the other parts of the letter, when it is read as a whole, to modify or change its effect. This being so, the plaintiff was entitled to recover only the amount offered him by the defendant, and not the sum awarded him by the jury. The judgment and order must therefore be reversed, and the cause remanded, and it is so ordered.

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103 Cal. 85

ALLEN v. POCKWITZ. (No. 15,028.)

(Supreme Court of California. June 13, 1894.)

VENDOR AND PURCHASER—THE CONTRACT — CONSTRUCTION—ACCEPTANCE OF TITLE BY ATTORNEY.

A contract stated the terms of sale of land to A. as follows: "21 days are allowed to examine title and consummate sale. * * * Title to be examined and accepted by A.'s attorney. Abstract to be run down to date. * * * If the sale is not consummated in accordance with foregoing conditions, the deposit to be forfeited." *Held* that, unless A.'s attorney accepted the title, A. was not bound to consummate the sale, and could recover back money deposited on the sale.

Department 2. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by John De Witt Allen against Louis Pockwitz to recover back certain money paid by plaintiff to defendant on a contract of purchase of real estate, in which there was a judgment for plaintiff. From an order granting a new trial on motion of defendant, plaintiff appeals. Reversed.

Smith, Wright & Pomeroy, for appellant. Reinstein & Eisner, for respondent.

PER CURIAM. On June 21, 1889, the plaintiff, personally, and defendant, through the agency of David Stern & Son, real-estate brokers, executed the following written instrument: "San Francisco, June 21, 1889. Received from John De Witt Allen the sum of one thousand ($1,000) dollars, being deposit on account of thirty-five thousand ($35,000) dollars, U. S. gold coin, the purchase price of the property this day sold to him, situated in the city and county of San Francisco, state of California, and described as follows, to wit: Lot and improvements situated on the northeast corner of Van Ness and Ash avenues, 58 feet on Van Ness avenue by 100 feet on Ash avenue. Terms of sale: 21 days are allowed to examine title and consummate sale. At the termination of said time, the balance of said purchase money is due and payable upon tender of the deed of the property sold. Title to be examined and accepted or rejected by J. De Witt Allen's attorney. Abstract to be run down to date. $150 to be allowed for attorney's fees. Mortgage to be released, and to be free and clear from all incumbrances. Taxes to be paid to July 1, 1889. If the sale is not consummated in accordance with the foregoing conditions, the deposit to be forfeited. David Stern & Son, Agents. Agreed to. John De W. Allen." The plaintiff submitted the abstract of the record title to his attorney, Sidney V. Smith, who was then a reputable attorney at law, and practicing as such in San Francisco, for examination, and to be accepted or rejected by him according to the above agreement. He rejected the title as to an undivided one-third part of the lot, for reasons stated by him in writing and duly communicated to defendant and to David Stern & Son. Thereupon plaintiff demanded a return of the $1,000 deposited, which in the meantime had been delivered to defendant. The defendant refused to return the deposit, tendered to plaintiff a deed for the lot, and demanded the balance of the purchase money, claiming that the title was perfect, notwithstanding it had been rejected by plaintiff's attorney. Thereupon plaintiff brought this action to recover the deposit of $1,000, with interest. The judgment was in favor of the plaintiff; but, on motion of the defendant, a new trial was granted, and this appeal by plaintiff is from the order granting a new trial.

It is not claimed that the written agreement was for an unconditional sale, but the parties disagree as to what were intended to be the conditions upon which plaintiff would be bound to "consummate the sale," by payment of the balance of the purchase money. The appellant contends that one of the conditions of his obligation to consummate the sale was that his attorney should accept and not reject the record title, while the respondent contends that the only conditions intended were that the title should appear to be a good marketable title, and that defendant should tender a sufficient deed to convey such title. They also disagree as to whether or not defendants' title was in fact a good marketable title; but, in our view of the case, this question becomes immaterial, and upon it we express no opinion.

Our understanding and construction of the agreement is that, unless plaintiff's attorney accepted and did not reject the title, the plaintiff was not bound to consummate the sale. This, if not fully expressed, is fairly inferable from the language of the contract; otherwise no meaning nor purpose whatever can be attributed to a considerable portion of that language. For what purpose were 21 days allowed for examination of title and consummation of sale? Of what importance was an "abstract of title run down to date?" Why was the "title to be examined" by plaintiff's attorney, rather than by defendant's attorney? Was neither the acceptance nor rejection of the title by plaintiff's attorney to be of any consequence whatever? The language of the contract relating to the examination, acceptance, and rejection of the title, considered in connection with the subject-matter, will reasonably and justly bear the construction we have given it; and, since no other rational meaning, purpose, or consequence of that language can be imagined, that construction should be accepted. It was but a reasonable and prudent precaution on the part of the plaintiff to insist upon the condition that the title should be passed and accepted by his own attorney, contrary to whose opinion and advice he was unwilling to invest $35,000 in a city lot. Had the condition been simply that the title should be good and marketable, the plaintiff might have been compelled to accept it, and to pay for the lot, as the result of a tedious and expensive lawsuit, the judgment in which, as to the title, would not have been conclusive against any adverse claimant who was not a party to the suit. Neither of the three cases cited by the counsel for respondent is in point. In Winter v. Stock, 29 Cal. 408, the vendor warranted "an indisputable and satisfactory title, or no sale." In Montgomery v. Land Bureau, 94 Cal. 284, 29 Pac. 640, the title was warranted to be "perfect." The case of Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, was an action for specific performance of a contract of sale which provided that the title was to be "first class." In each of these cases the title was rejected by the attorney for the vendee; but in each the court held that the material question was whether or not the title was good and marketable, and not whether it was acceptable to the vendee's attorney. But in the case at bar, according to our construction of the contract, the only warranty or representation as to the quality of the title was that it should be acceptable to plaintiff's attorney. Therefore, the question whether or not the title was, in fact, a good marketable title, is not involved, as it was in the cases cited by counsel for respondent; and since it appears that plaintiff's attorney rejected the title, and it is not even suggested that the rejection was not the result of a sufficient examination and an honest opinion, the order granting a new trial should be reversed; and it is so ordered.

103 Cal. 71

PIERCE v. WILLIS et al. (No. 15,279.)

(Supreme Court of California. June 13, 1894.)

NEW TRIAL—WHEN GRANTED—ERRONEOUS FINDINGS—MATTERS OF LAW OR FACT—SUIT TO ENFORCE MECHANIC'S LIEN.

1. In an action to enforce a mechanic's lien, a specification on plaintiffs' motion for a new trial that they consider themselves "aggrieved by the finding 'that the liens of the plaintiffs, and each of them, were not filed within the time required by law,'" this being an extract from the conclusion of law, cannot be considered an attack on the findings of fact so as to authorize the grant of a new trial for error therein.

2. Where, in an action to enforce a mechanic's lien, there are findings as to the time of abandonment of the contract by the original contractor and the time of completion of the building by a subsequent contractor, and the undenied allegations of the complaint show the time of filing the lien, the question whether the lien was filed within the statutory time is to be determined from such facts, and error in finding that it was so filed is not ground for granting a new trial.

Commissioners' decision. Department 2. Appeal from superior court of city and county of San Francisco; William T. Wallace, Judge.

Action by David T. Pierce against A. A. Willis and others. Judgment for plaintiff, and defendants appeal. Reversed.

W. S. Goodfellow, for appellants. Morrison & Foerster, Constantine E. A. Foerster, and Parker & Eells, for respondent.

TEMPLE, C. This is an appeal from an order granting a new trial to plaintiff. Five actions brought to foreclose mechanics' liens were consolidated and tried under the above title. Upon the trial, the truth of all the allegations of the complaint were admitted except as to attorney's fees. The contract under which the work was contracted to be done was read in evidence, and from it and the admissions the court found, in substance, that the contract which is annexed to the findings was duly filed in the recorder's office of the city and county of San Francisco, but that "no plans, drawings, or specifications were at any time filed with said contract, or at all, nor were any plans, drawings, or specifications ever at any time annexed to said instrument;" that defendant Willis, who had contracted to construct said building with defendant Birkholm, abandoned the building and contract June 12, 1889, and failed to complete the same, and more than 30 days before the filing of plaintiff's claims of lien, or any of them, ceased from labor upon said unfinished and uncompleted contract, nor was labor ever resumed thereon by him or any person representing him; but defendant Birkholm, within 30 days after Willis had abandoned the contract, commenced work upon the building, and completed the same on the 20th day of August, 1889. As conclusion of law, the court found that the liens were not filed in time, and that plaintiffs take nothing by their action, and defendant Birkholm recover his costs. Among the allegations of the complaint is one that the building was fully completed on the 20th day of August, 1889, and another that the notice of lien was filed September 18, 1889. Plaintiff moved for a new trial, stating in his notice of intention all the statutory grounds. The statement contains the contract and the admissions. The only specifications of error are as follows: "Plaintiffs specify the following particulars in which the decision of the court in this cause was against law: The findings show that the contract entered into between defendant Birkholm and defendant Willis provided for the construction of a structure of which the only description is as follows: A 'two-story dwelling-house and shed;' and said structure was to be built 'in conformity with the plans, drawings, and specifications for the same made by Chas. S. Shaner, the authorized architect employed by the owner; and which are signed by the parties hereto;' * * * and that 'the specifications and drawings are intended to co-operate so that any work exhibited in the drawings, and not mentioned in the specifications, or vice versa, are to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together.' And said findings furthermore show that the said plans, drawings, and specifications so referred to in said contract were never filed in the office of the county recorder of the city and county of San Francisco. Said findings also show that the only description in said instrument of the property upon which said building was to be constructed was as follows: 'A lot of land situate in the city of San Francisco, county of San Francisco, state of California, and described as follows: "The south side of Twentieth street, between Dolores and Guerrero streets.'" It therefore appears from said findings that no contract between the said Birkholm and the said Willis, neither any memorandum of such, was ever filed in the office of the said county recorder, from which it follows that the alleged contract was void; and, it appearing that plaintiff's liens were filed within less than thirty days from and after the completion of said building by Birkholm, they were therefore filed within the time required by law; and the decision of the court that plaintiff's liens, and each of them, were not filed within the time required by law, and that plaintiffs are entitled to take nothing by their action against the said defendant Birkholm, and that the said defendant Birkholm is entitled to judgment for his costs, is therefore against law."

Appellants contend that the order granting a new trial should be reversed, because the court was not authorized to grant a new trial, upon the ground that the conclusions from the facts found are against law; that is, that the judgment is not supported by the findings of fact. Brison v. Brison, 90 Cal. 323, 27 Pac. 186. Respondent's counsel admit the rule, but contend that in their motion for a new trial they do attack the findings. They say: "We consider ourselves aggrieved by the finding 'that the liens of the plaintiffs and each of them, were not filed within the time required by law.'" This is an extract from the conclusion of law, and in the specifications of error it is stated argumentatively that the conclusion is shown by the facts found to be against law. The entire conclusion of law is set forth in the specifications as the decision which is against law. There can be no claim that the conclusion of law is really a finding of fact. It simply indicates the judgment to be entered, and it is expressly stated that it is a conclusion from the preceding findings of fact. The preceding findings show when the contract was abandoned, when the building was completed, and the undenied allegation in the complaint shows when the liens were filed. These are all the facts upon which plaintiff based his contention that the decision was against law. There is no other material fact which could be found in his favor if a new trial were had. If the court can change the conclusion from the above facts—that the liens were not filed in time—into a finding of fact, still it would be a fact to be determined solely from the above facts, all of which are admitted and found. The order must be reversed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

103 Cal. 53

TREANOR v. HOUGHTON et al. (No. 15,320.)

(Supreme Court of California. June 12, 1894.)

STREET ASSESSMENT — ACTION TO RECOVER — PLEADING—AIDER BY VERDICT—SEPARATE CONTRACTS FOR IMPROVEMENT—VALIDITY.

1. In an action to enforce an assessment for street repairs, the failure of the complaint to show that the contract under which the work was done fixed the time for the commencement and completion of the work, as re-

quired by Act March 18, 1885, § 6, is cured by a finding that the contract did so fix the time for commencing and completing the work.

2. In an action to recover an assessment for street repairs, an allegation in the complaint that the "commissioner of streets made, in the manner and form required by law, an assessment upon the lots and lands fronting thereon, each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expenses of the work, sufficiently shows a compliance with section 7, Act March 18, 1885, which provides that the assessment for the entire work shall be at a uniform rate upon all the property fronting on the improvement.

3. Under Act March 18, 1885, which provides for a single contract for street improvements, under a given resolution of intention, a resolution ordering work to be done, and an award of a contract thereunder, and providing no method by which separate assessments can be made, or separate warrants issued by street superintendents to different contractors, the council has no power to award separate contracts for such improvements, and assessments made under such contracts will be void.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Thomas Treanor, a street contractor, against S. O. Houghton and another, to recover $132.80 assessed upon the lot of defendants for street improvements. Judgment for plaintiff, and defendants appeal. Reversed.

N. H. Castle, for appellants. C. T. Bird, for respondent.

SEARLS, C. This is an action by a street contractor to recover $132.80 assessed upon the lot of defendants for its pro rata of the cost of improving Julian street, in the city of San Jose, under proceedings had by virtue of the act of March 18, 1885 (St. 1885, p. 147). Plaintiff had judgment, from which defendant appeals. The cause comes up on the judgment roll, without a statement or bill of exceptions.

The city of San Jose is, and at all the times hereinafter mentioned was, a municipal corporation. Julian street, at the several dates hereinafter mentioned, was, and is, an open, located public street in said city of San Jose, with duly-established width and grade. On the 12th day of March, 1888, the mayor and common council of the city of San Jose passed and approved a resolution declaring its intention "to order that portion of Julian street, between First street and the eastern city limits, to be improved to the official grade, said improvement to consist of excavating, grading, curbing, guttering and graveling the roadway, the gravel to be screened." The whole question, on this appeal, relates to the sufficiency of the complaint, in stating facts sufficient to constitute a cause of action. We need not state the proceedings in full, as detailed in the complaint, but only such omissions and statements as are relied upon by appellant as cause for reversal. There was no demurrer or other objection interposed to the complaint, and the objections to its sufficiency are urged here for the first time. The cause was tried by the court, and the findings are full and explicit upon all the material issues, and no objections are made thereto. Hence, it follows that all errors and omissions which are cured by verdict are waived.

Changing, for convenience of examination, the order of appellant's objections to the complaint, and we will say it is objected that the complaint fails to allege that the contract fixed the time for the commencement and completion of the work, which it is claimed, is fatal to the validity of the complaint. Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228, and Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310, are relied upon in support of this proposition. Libbey v. Elsworth was a case in which the contract was not entered into within 15 days after notice of the award as required by section 5 of the act of March 18, 1885 (St. 1885, p. 147); and, no cause for the delay being averred, a demurrer was sustained by the court below, and this action was sustained upon appeal. The complaint was also said to be defective, in that it failed to show that the contract entered into between the superintendent of streets and the assignor of the plaintiff fixed any time for the commencement or completion of the work therein provided for, which, it was held, was a fatal error. In Washburn v. Lyons, supra, it was held that the omission, in a like contract, to fix the time for the commencement and completion of the work to be done thereunder, in accordance with section 6 of the act of March 18, 1885, above referred to, was fatal on demurrer. In this case the street to be improved was divided into six sections, as will be hereafter noticed, and separate contracts let for the several sections. The contracts were awarded August 13, 1888, and entered into August 25, 1888,—less than 15 days after the award. The complaint does not, in express terms, aver the time specified in the contract for the commencement and completion of the work under the contract. It avers that all the work ordered to be done under the resolution "was and has been completed pursuant to said contracts and said plans and specifications, within the time given by said commissioner of streets in said contracts, with materials complying with the specifications, * * * under the direction and to the satisfaction of said commissioner of streets, and was and has been duly accepted by him." Beyond this quotation, I find no averment in the complaint referring to the matter under consideration. The court finds, as a fact, that each of the contracts provided that the work should commence on or before August 28, 1888, and should be completed on or before November 28, 1888. That the omission in the complaint would have been fatal, in the face of a special demurrer, is settled by the cases quoted supra, and by many others to which we might refer. The question, however, is, can appellant, after verdict, raise the question here for the first time? Chitty, in his work on Pleading (at page 705 of volume 1) lays down the rule as follows: "The second mode by which defects in pleading may be, in some cases, aided, is by intendment after verdict. The doctrine upon this subject is founded upon the common law, and is independent of any statutory enactments. The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict. The expression, 'cured by verdict,' signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial." The difficulty experienced, in many cases of this character, is to determine whether or not the omitted fact or facts were proven at the trial. In the present instance, we are met with no difficulty of this character. The cause having been tried by the court, and the facts found, it appears affirmatively by the record that what was omitted in the complaint was supplied without objection at the trial. The defective statement of the complaint, wherein it was averred that the work and improvements were completed pursuant to the contracts, "within the time given by said commissioner of streets in said contracts," was but an inferential statement that the contracts specified the time within which the work was to be done, but was, in the language of the common law, an allegation that is "holpen by verdict." The defendant having gone to trial upon such imperfect statement without objection, and it having been cured by the findings, which we must suppose were supported by testimony, he cannot now successfully raise the question of the sufficiency of the complaint in that respect.

It is further urged that there is no allegation in the complaint that the assessment for the entire work was at a uniform rate upon all the property fronting on the improvement. The allegation of the complaint is that the "commissioner of streets made, in the manner and form required by law, an assessment upon the lots and lands fronting thereon; each lot or portion of a lot being separately assessed in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work." This is in compliance with the requirements of the seventh section of the statute of 1885, quoted supra, and is sufficient. There are some exceptions in the statute to the general rule in regard to assessments, but if defendant's case came within them, or any of them, it devolved upon him to make it known by objection to the assessment as made, by an appeal to the city council, under section 11 of the act. Perine v. Forbush, 97 Cal. 305, 32 Pac. 226. Not having done so, the objection, if any, was waived.

It is further objected that it does not appear that any contract was let for doing the work as a whole, as proposed by the resolution and notice of intention, but, on the contrary, the street was divided into six sections, numbered from 1 to 6, inclusive, and each section let separately. Dougherty v. Hitchcock, 35 Cal. 512; City of Stockton v. Whitmore, 50 Cal. 554; Richardson v. Heydenfeldt, 46 Cal. 68; and People v. Clark, 47 Cal. 456,—are cited in support of the contention that the method adopted by the city council was invalid. The record clearly sustains the allegation that the resolution of intention was for the improvement as a unit, and that six several contracts were entered into for the performance of as many sections or portions of the work. The question arises, had the board the power to thus let separate contracts? In Dougherty v. Hitchcock the board of supervisors adopted a resolution of intention to grade Clay street from Taylor to Jones, and from Jones to Leavenworth, etc., and subsequently ordered the work to be done. Bidders were notified to put in separate bids for each block, and for a crossing. The board awarded a contract for the whole work, under which award the superintendent of streets entered into a contract for grading one block only, and this court held (1) that the resolution of intention, and its publication, constituted the sole authority of the board to proceed in the statutory mode to order said work to be done, and that thereby no authority was conferred to act upon any other or different work; (2) that the work designated in the resolution of intention constituted one distinct and entire subject-matter; (3) that the resolution of award constituted the sole authority to the superintendent of streets, who acted ministerially only in making the contract under it, and that, as the contract varied from the award, it was unauthorized and void; (4) that without a valid contract there can be no valid assessment upon property to pay for street improvements. City of Stockton v. Whitmore, 50 Cal. 554, supra, and Richardson v. Heydenfeldt, are to like effect,—not as to the facts, but in principle. The distinction between those cases and this, if any, consists in the fact that there only a portion of the work was completed, while here it was, under the several contracts, all consummated. The contention of respondent is that the fact that part of the work was performed by one, and part by another, person, could not deprive appellant of any right, or injure him in any respect, as his lot is only required to pay its just proportion of the cost, assessed in the manner provided by statute. The precise question for determination goes to the power of the officers to act in the manner indicated. Possibly, those officers might most advantageously have let a private contract to some responsible contractor to do the work indicated, without any preliminary action whatever, and, upon its completion, designated, without an assessment, the sum of money justly due from each property owner on the street in payment of the expense, and that by such a course the whole expense would have been less than under the statutory method, and hence, in a certain sense, no injustice would be done. The statute has defined the powers which may be exercised by city councils in the matter of the improvement of streets in municipalities. Under the dictate of the statute, each successive step by the board, looking to street improvements, is a condition precedent, essential to the validity of the next succeeding one in the series. The range of the district to be included in a single improvement, and the character of the work to be performed therein, within the specifications of the statute, are left to the judgment of the board. The resolution of intention must, however, define alike the limits of the district, and the nature of the work to be done. The entire work thus described becomes a unit,—a single enterprise,—upon which the power of the board, subject to the rights of the property owners, is thereafter to be exercised. The statute, in all its subsequent provisions, deals with it as a unit,—as a single improvement. It gives to "the owners of one-half or more of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, the right to object in writing, and thereby to stay proceedings for six months, unless in the meantime a petition of a majority of such property owners shall ask that it be done." Section 3, Act 1885 (St. 1885, p. 148). By section 5 of the act, when bids have been received, and the contract has been awarded to the lowest responsible bidder, the owners of the major part of the frontage on lots and streets where the work is to be done may, within 10 days, without having made any bid or proposal, "elect to take said work, and enter into a written contract to do the whole work at the price at which the same has been awarded." The statute provides for a single assessment to be levied upon all the frontage upon the work; for a single warrant, which, with the assessment, is to be delivered to the contractor. Other illustrations drawn from the statute might be indulged, for the purpose of showing what is believed to be its evident intent, viz. to unify each improvement specified in the resolution of intention, to constitute it a unit for future action, in order that those who are called upon to bear the burden of the improvement may intelligently judge whether or not, taken as a whole, it will be for their interests to have such improvement consummated. In such cases it may well be that the consummation of a part of the improvement only would bring little or no benefit to owners of adjacent property, while, if completed as a whole, it would greatly enhance the value of their property and add to their convenience and comfort. Yet it must often follow that if a given improvement is to be segregated, and separate contracts let, a portion of the work will not be completed. Non constat that any bidders will apply for some of the subdivisions, or, if let, that the contracts will all be completed. The statute of 1885, which was intended to furnish a full and complete mode of procedure, makes no provision to meet any such cases. What the law, in such cases, requires to be done, is in part for the protection of the taxpayers, and is mandatory, and cannot be regarded as directory only. Clark v. Crane, 5 Mich. 154; Marsh v. Chesnut, 14 Ill. 223.

From a review of the statute, the conclusion is reached that, as its affirmative provisions are all made applicable to a single contract for street improvement, under a given resolution of intention, resolution ordering work to be done, and award of a contract thereunder, and as the statute is silent as to any method by which separate assessments can be made, or separate warrants issued by the street superintendent to different contractors, the city council has no power to award separate contracts, in such a case, for the performance of a single improvement. Not having the power to award separate contracts, their acts in the premises were void, and conferred no authority upon the superintendent of streets to enter into the contracts, or to levy an assessment upon property with a view to payment on account of improvements made under and by virtue thereof. The case presented is not one of irregularity or error in the exercise of a power conferred, which is cured by a failure to appeal to the council as provided by the statute, but one in which the council acted without and in excess of its power, and hence the act was void. The judgment appealed from should be reversed, and the cause remanded to the court below for such action as may be in accord with this opinion.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. The judgment appealed from is reversed, and the cause is remanded to the court below for such action as may be in accord with this opinion.

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103 Cal. 246

WETMORE v. BARRETT et al. (No. 15,282.)

(Supreme Court of California. June 26, 1894.)

GAMBLING CONTRACTS — STOCK PURCHASED ON MARGINS—ACTION TO RECOVER MONEY LOST.

1. Money paid a broker as margins on stock purchased by him with his own money for a customer, and retained as security until sold, may be recovered. 26 Pac. 883, followed.

2. Assessments paid by a broker on stock purchased for a customer, who put up only a margin, the stock being held as security, cannot be set off in an action by the customer to recover such margins.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by W. N. Wetmore against Emmett P. Barrett and others to recover money lost in stock speculations. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

W. T. Baggett, for appellants. Roger Johnson, for respondent.

PER CURIAM. This action was brought to recover moneys paid to brokers in consideration of purchases of mining stock on margins. Most of the points raised are precisely those which were considered in Cashman v. Root, 89 Cal. 373, 26 Pac. 883. As we are entirely satisfied with the conclusion there reached, it is not necessary to go over the matter again. Defendants had printed the terms and conditions upon which they were doing business, and required plaintiff's agent to agree to them. Those printed terms show that the transactions upon which the money was paid were purchases of stock on margins, within Cashman v. Root. During the time defendants held the stock as security they paid certain assessments which they now insist should be deducted from the amount recovered. The answer contains no claim for a set-off, nor is there a plea of payment or counterclaim. No such credit seems to have been asked for in the trial court. Had there been such a plea, however, the contention could not have been sustained. There was no request made by plaintiff for the payment; and, as the transaction was void, defendants did not hold the stocks, upon which the assessments were paid, for plaintiff, or as security for a debt due from him. The law will not, therefore, imply a request to pay nor a promise to repay. So far as the statement shows any indebtedness arising more than two years before the action was commenced, it also shows that such indebtedness was based upon similar transactions to those after that period. We cannot presume that any part of the moneys recovered were paid upon any such transactions. No specification as to the insufficiency of the evidence suggests such point. The judgment and order are affirmed.

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4 Cal. Unrep. 687

JOHNSON v. GREENBERG et al. (No. 15,375.)

(Supreme Court of California. June 26, 1894.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Where there is a substantial conflict in the testimony, with sufficient proof to sustain them, the findings of the trial court will not be set aside.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by C. B. Johnson to enjoin Edwin F. O'Neal, as sheriff, from executing a deed to one of defendants, B. Schwartz, and to enjoin defendants Meyer Greenberg and B. Schwartz from further proceedings in the case of defendant Greenberg against defendant California Bituminous Rock Company. Judgment for defendants, and plaintiff appeals. Affirmed.

T. C. Van Ness (Wilcoxon & Bouldin, of counsel), for appellant. Reinstein & Eisner, Graves & Graves, and E. P. Cole, for respondents.

PER CURIAM. This action was brought to enjoin the defendant Edwin F. O'Neal, as sheriff of the county of San Luis Obispo, from executing or delivering to defendant B. Schwartz a deed to certain land situated in said county of San Luis Obispo, the property of defendant the California Bituminous Rock Company (a corporation), which lands were sold by said sheriff under an execution issued upon a judgment in favor of defendant Meyer Greenberg against California Bituminous Rock Company, and also to enjoin defendants Greenberg and Schwartz from further proceedings in the action upon which said judgment was rendered. The theory of the amended complaint may be briefly stated as follows: The plaintiff and defendants L. M. Warden and Meyer Greenberg were the owners of the certain lands described in the complaint, the title of which, by common consent, stood in the name of Greenberg, but who held in trust for his co-owners, the plaintiff being the beneficiary as to one-fourth thereof. The corporation defendant was organized by them, and the land conveyed to such corporation. There were 1,250 shares of the capital stock of the corporation, of which stock, plaintiff, defendants Warden, Greenberg, and Underhill each held 300 shares, and defendants Graves 50 shares. On January 17, 1891, defendant Greenberg brought suit against the corporation to recover $8,155.15 for money advanced by him and paid out for the corporation, and on the 7th of March, 1891, obtained judgment. The land in question was sold on the 11th of April, 1891, under an execution issued on such judgment, and purchased by defendant B. Schwartz for the sum of about $8,155.15. The complainant avers that the corporation defendant was not indebted to Greenberg in the sum of $8,155.15, or any other sum of money, at the commencement of the suit, and that the action and the sale of the property was a fraudulent scheme on the part of defendants Greenberg and Warden to defraud plaintiff and the other defendants of the property, and that the purchase thereof by Schwartz was for the benefit of Greenberg, and to procure the title for him, and that, thereafter, Greenberg and Warden were to become the owners thereof, to the exclusion of plaintiff and the other defendants; that plaintiff knew nothing of the suit until within a month prior to the commencement of this action; and that the land is of the value of $50,000. The answer denies all the allegations charging fraud; avers that the defendant corporation was justly indebted to Greenberg; that his claim was a bona fide claim and demand, as plaintiff, who was a director of the corporation, well knew, and that he was well aware of the pendency of Greenberg's action against the corporation within one month after it was brought; and that the value of the land is not in excess of $10,000. The written findings fully negative all allegations of fraud, and, in addition thereto, it is found that all the allegations of the answer are true, except that as to the value of the land, which is found to be $15,000.

Upon the close of the testimony, counsel for the plaintiff asked leave of the court to amend his complaint so as to charge, in substance, that the amount sued for by Greenberg, as due him on account of advances made for the corporation, and in payment of the unpaid balance of the purchase price of the land, was not in fact due him, but that he, the said Greenberg, had in fact borrowed the sum of $8,155.15 from Schwartz for and on behalf of the corporation defendant, and with the money so borrowed for the corporation had paid off and discharged the obligations of the corporation, all of which was known to defendant Schwartz before and at the time of the sheriff's sale, etc. The court permitted the amendment on condition that the case be opened, and defendants permitted to introduce such further proofs as they might desire. The complaint was amended accordingly, whereupon defendants introduced further testimony.

Formal objections are made to each of the 12 findings of the court, upon the ground that the evidence is insufficient to sustain them. The only question, however, in the case, worthy of consideration, is as to whether the money loaned by defendant Schwartz was so loaned to Greenberg on his own account, or through him to the defendant corporation. Greenberg was secretary of the corporation, and a son-in-law of defendant Schwartz. That he procured from Schwartz the sum of $8,155.15, or thereabouts, is well established. The deposition of Schwartz was read in evidence and he was also called as a witness on behalf of plaintiff. His testimony was not at all clear or convincing but may be fairly interpreted as showing that he supposed he was advancing the money to the defendant corporation, or to obtain a mortgage or some lien against the corporation, or to purchase notes of the corporation; and portions of his testimony go to show that he thought he was loaning the money to the corporation defendant. The language used by the witnesss indicates that he is a German, who speaks our language indifferently; and the testimony, taken as a whole, shows that his understanding of English is imperfect. He advanced this money, as he thinks, in March or April, 1891. On the other hand, it was conclusively proven that plaintiff and defendants Warden and Greenberg, in 1887, gave their joint and several note to Jack and Goldtree for $2,937.50, with interest, being for a part of the original purchase price of the land; that the corporation defendant assumed to pay, but did not pay, the note; that Warden and Greenberg paid it by a new note made by them for $3,191.12, with interest, etc.; that the corporation defendant, engaged in mining and selling bituminous rock from the land in question, met with losses, and that defendants Warden and Greenberg borrowed other moneys at the request of and for the corporation, for which they gave their notes, until in 1890, when the aggregate of the indebtedness of the company for which they were responsible was $8,000, for which they and one H. Crocker gave their joint and several note for said sum of $8,000, at 30 days, with interest. Crocker paid the note off at maturity and brought suit against Greenberg and Warden. On the 9th day of January, 1891, Greenberg paid the demand in suit by an overdraft on the First National Bank of San Luis Obispo for $8,155.15, promising the bank to come to San Francisco, and borrow from Schwartz the money to meet such overdraft. On January 17th he brought this suit, and subsequently procured the money from Schwartz, and paid the overdraft with it. As Greenberg procured judgment March 7, 1891, it may well be that the fact that Greenberg had a lien upon the property was an idea prevalent in the mind of Schwartz when he testified, and which will account for many of the statements that he thought the property good for the investment, etc. But waiving all explanation of his testimony, and the fact still remains that there was a substantial conflict in the testimony, with sufficient proof to sustain each and every finding of the court. The judgment and order appealed from are affirmed.

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103 Cal. 94

MORRISON v. STONE et al. (No. 15,408.)

(Supreme Court of California. June 13, 1894.)

ADOPTION OF SPECIAL VERDICT—FINDINGS—HARMLESS ERROR.

1. A special verdict, adopted as the basis of a judgment, is equivalent to findings by the court.

2. Failure to find upon a fact in issue is harmless error, when a finding in favor of appellant thereon would not affect the judgment.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. H. Levy, Judge.

Action by George H. Morrison against N. J. Stone and others to recover damages for a conspiracy. From a judgment for defendants, plaintiff appeals. Affirmed.

Pierson & Mitchell, for appellant. Reddy, Campbell & Metson, for respondents.

HAYNES, C. This action was brought by Morrison, a stockholder in the History Company, a corporation, on behalf of himself and of all other stockholders in said corporation who should join him in the action, against N. J. Stone, J. L. Hebert, Elizabeth C. Latham, administratrix of the estate of A. S. Latham, and said History Company. The complaint charges a conspiracy between Stone, Hebert, and Latham, all of whom were connected with said History Company (Stone being vice president), to injure that corporation by organizing another, known as the Pacific Publishing Company, and that, after the formation of the last-named corporation, Stone assumed to sell and transfer to it the stock of eastern subscription books belonging to the History Company, together with the agency and good will thereof, whereby the History Company had been deprived of a large portion of its stock in trade, had lost valuable agencies, was crippled in its business, and had been compelled to suspend payment of dividends, to the damage of the History Company in the sum of $50,000. The prayer is for damages and for an accounting. The answers of the several individual defendants put in issue all the material allegations of the complaint, including the facts upon which the plaintiff assumed the right to bring the action in his own name. The case was tried before a jury upon nine special issues properly submitted to it, to all of which the jury returned answers in favor of the defendants, and also therewith returned a general verdict in their favor. The defendants moved for judgment thereon, and their motion was granted; and the plaintiff excepted, and brings this appeal upon the judgment roll and a bill of exceptions.

The only ground upon which appellant contends for reversal is that findings were not waived, and that none were filed. It is said by respondents that this is an action at law for damages, and that the general verdict covers all the issues, and that findings are not required, while appellant insists that it is an equitable action. Without deciding that question, we will assume that the action is of equitable cognizance, since there could be no possible ground of reversal if the action is at law. Where a special verdict of a jury is adopted by the court, it takes the place of, and is equivalent to, findings by the court. Warring v. Freear, 64 Cal. 56, 28 Pac. 115. Nor is it necessary that the word "adopt" be used, in order to show an adoption of the findings made by a jury upon special issues. Goldman v. Rogers, 85 Cal. 578, 24 Pac. 782. That the special verdict was adopted by the court, we think, is sufficiently clear. Upon the hearing of defendants' motion for judgment an order was made "that judgment be entered in accordance with the verdict of the jury rendered herein;" and all the special issues submitted to the jury, with their answers or findings thereon, were incorporated in the judgment, together with the general verdict. Indeed, it is not even suggested by counsel for appellant that the special findings by the jury were not adopted, nor is it contended that the special verdict does not cover all the issues. Whether it does or not is immaterial, since the findings made by the jury are decisive of the case, and no others were necessary. Among other things, the jury found that the demand of the plaintiff upon the History Company to bring this action, and its refusal to do so, were simulated, and not in good faith. These findings negative the right of the plaintiff to maintain the action. Bacon v. Irvine, 70 Cal. 225, 11 Pac. 646; Hawes v. Oakland, 104 U. S. 460, 461; Mor. Corp. §§ 240, 241. The material facts, involving the merits of the action, were also found in favor of the defendants. We can discover no fact in issue upon which a finding is not made, which, if found in favor of appellant, would affect the judgment; and a failure to find thereon, if erroneous, is not prejudicial. Diefendorff v. Hopkins, 95 Cal. 347, 348, 28 Pac. 265, and 30 Pac. 549, and cases cited. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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103 Cal. 121

BRODER et al. v. SUPERIOR COURT OF MONO COUNTY. (No. 15,513.)

(Supreme Court of California. June 15, 1894.)

MANDAMUS TO JUDGE.

When a retiring judge filed conclusions of law and fact, and directed the counsel to prepare an interlocutory judgment for the purpose of an accounting between the parties, a mandamus will not be granted to compel his successor to enter judgment on such findings, as until final judgment the trial court is not concluded by any of its orders, and its judicial discretion cannot be directed by mandamus.

In bank.

Application for a writ of mandate by R. C. Broder and others against the superior court of Mono county (W. H. Virden, Judge). Denied.

Rich. S. Miner, for petitioners. P. Reddy and W. H. Metson, for respondent.

HARRISON, J. In Broder v. Conklin, 98 Cal. 360, 33 Pac. 211, the order of the superior court of Mono county, setting aside a judgment that had been entered on the judgment book of that court in pursuance of certain findings of fact and conclusions of law previously filed therein, was affirmed; and after the remittitur had been filed in the court below the petitioners herein made a motion before that court that a judgment and decree be entered in the cause upon said findings of fact and conclusions of law. This motion was denied by the superior court, and the petitioners have made application to this court for a writ of mandate directing the respondent to render and enter a judgment in accordance with and upon said findings of fact and conclusions of law.

A judgment is the final determination of the rights of the parties in an action, and, when the action is tried by the court, cannot be entered until after a decision of the cause has been rendered. Hence, a writ of mandate will not be granted to compel a court to enter a judgment in a cause until after the court has tried the cause, and rendered its decision. So long as any judicial act remains to be performed before the decision can be made, the cause has not been tried, and a judgment cannot be entered. While the cause remains undetermined the court before which it is pending cannot be compelled to try it in any particular mode, or to make any special order for the mode in which it is to be tried. The action of the court is to be reviewed upon appeal, but cannot be controlled or supervised by a previous direction of this court. While the cause remains undecided the trial court is not concluded by any ruling or order that it may have made during the trial, or by any conclusion which it may have reached upon a controverted question of fact. It may change its ruling whereby evidence has been excluded or received, and allow such evidence, and make a ruling with reference thereto according to its subsequent view; it may set aside the submission of the cause, and allow additional evidence upon one or all of the issues in the case, even if it has indicated or formulated its conclusion upon the evidence already received; it may set aside an order of reference to try an issue, and try the issue itself; or it may vacate any other interlocutory order made in the progress of the trial. Until all the issues in the case have been decided, and the decision filed with the clerk, the cause remains in the breast of the judge, and during that time cannot be controlled or directed by any supervisory court. In Broder v. Conklin, supra, we said: "It sufficiently appears in the present case that, at the time when Judge Rooney filed his findings of fact and certain conclusions of law, he did not himself consider that the action had been fully tried. His conclusion that the plaintiffs were entitled to judgment was qualified by the next clause, in which he directed counsel to prepare an interlocutory judgment for the purpose of directing a referee to take an account between the parties. It is manifest from this direction that the character and extent of the judgment was not to be determined by him until after such account had been taken." As the rights of the parties to this action cannot be finally determined, and a corresponding judgment rendered, until after an account has been taken, and as the trial court cannot be compelled to enter an interlocutory order or judgment for the reference and an accounting, it follows that the cause has not been fully tried, and that the mode of trial and the decision yet to be made are to be determined in the discretion of the trial court. After the aforesaid findings were filed the court still retained the power to set aside its direction to counsel to prepare an interlocutory judgment directing a reference, and to take such steps with reference to completing the trial as it might deem expedient, or most in accordance with the interests of the parties before it. The order of May 13th, that the cause be placed upon the calendar to be set for trial, was an exercise of its judicial discretion, and is not to be set aside or superseded by a direction from this court to act in a different manner. The application for the writ is denied.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

103 Cal. 153

WARREN v. McGILL. (No. 15,404.)

(Supreme Court of California. June 18, 1894.)

CLAIMS AGAINST DECEDENT'S ESTATE—COMPETENCY OF WITNESS—INTEREST.

1. Under a statute requiring creditors, when they file their claims against a decedent's estate, to file an affidavit stating that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the "affiant" (Code Civ. Proc. § 1494), an affidavit, filed by the claimant, which recites to the knowledge of the "claimant," is sufficient. Davis v. Browning, 27 Pac. 937, 91 Cal. 603, followed.

2. In an action against an executor for a debt due from his decedent, the fact that a prior claim for a less amount was filed by the claimant and disallowed does not estop her from asserting her rights under the later claim, where she testified, without being contradicted, that the first claim, which she never saw, was largely incorrect.

3. The fact that plaintiff's witness also has a case of the same kind pending does not disqualify him from testifying.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Mrs. M. J. Warren against H. M. McGill, executor of Thomas Hovenden. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Henry M. McGill, for appellant. H. C. Firebaugh, for respondent.

BELCHER, C. Action to recover money due from an estate. The complaint avers, in substance, that Thomas Hovenden was indebted to the plaintiff in the sum of $6,828.06, and died leaving a will, in which the defendant, McGill, was named as executor; that the will was admitted to probate, and letters testamentary were issued to defendant, who duly qualified, and entered upon the discharge of his duties as executor; that notice to creditors to present their claims was published, and thereafter within the time prescribed the claim of plaintiff, a copy of which is attached to the complaint, verified by the oath of the claimant, was duly presented to the defendant, as such executor, for allowance, and was by him rejected. The answer denies the indebtedness, denies that the claim on which the action is founded was duly presented to defendant for allowance, and avers that no claim for the alleged indebtedness was ever presented to defendant, as such executor, "in manner or form as required by the statute of this state in such case made and provided." The case was tried by the court, and the findings were, in effect, that the plaintiff was entitled to judgment for the sum of $4,116.65 and costs of suit, to be paid in due course of administration. Judgment was accordingly so entered, from which, and from an order denying a new trial, the defendant appeals.

1. The point that the evidence was insufficient to justify the findings cannot be sustained. Much of the evidence introduced by the plaintiff is omitted from the record, but enough is set out to support the decision. It is true there was some conflict in the evidence, and some inconsistencies were shown, but those were matters for solution by the trial court, and its action cannot be disturbed on appeal.

2. The point that the claim was not duly presented in manner or form as required by statute is rested upon the fact that the affidavit attached to the claim stated "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant;" and it is argued that the affidavit was fatally defective, because the words found in the statute (section 1494, Code Civ. Proc.), "to the knowledge of the affiant," were not used. This point is without merit. It appears from the affidavit that the same person was "claimant" and "affiant," and the use of one word rather than the other was, therefore, wholly immaterial. See Davis v. Browning, 91 Cal. 603, 27 Pac. 1031, where the same point was raised, and decided against the contention of appellant here.

3. The point that the plaintiff is estopped from asserting any rights under the claim sued upon is based upon the fact that, prior to its presentation, another claim, verified by her, and showing the indebtedness to be of a less amount, was presented to defendant for allowance. No such defense is set up or suggested in the answer, and, in our opinion, it is untenable. It is true that a prior claim was made out and sent to defendant, but it was never approved by him, and, as shown by plaintiff's uncontradicted testimony, it was never read to or seen by her, and was largely incorrect. Under these circumstances the doctrine of estoppel cannot be invoked.

4. Certain errors of law are specified in the statement, but they are simply referred to in appellant's points and authorities, without any argument, and may be briefly disposed of. The first error specified is that the court erred in overruling defendant's objection to the introduction in evidence of plaintiff's account book. The objection was: "That the entries in said book were in several instances without date and unintelligible; and, further, that a mere inspection of said book shows that all the entries therein, purporting to cover a period of several months, had been written at the same time, and were evidently incorrect, and had been made at a very recent date." There is nothing in the record showing that this objection was based on any valid ground. No part of the contents of the book or of the evidence in relation to it is set out, and it must therefore be presumed that the ruling of the court was correct. The second error specified is that the court erred in overruling defendant's objection to the competency of plaintiff's witness David Dalzell, and permitting him to testify. The objection was that the witness was incompetent because he had a suit pending against defendant of the same character as this, and "was personally interested in sustaining the alleged claim of plaintiff against defendant." There was nothing in this objection. The interest of the witness in the result did not at all affect his competency to testify. At most it could be considered only in determining what weight should be given to his testimony. The third error specified is that the court erred in overruling defendant's motion for a nonsuit. The ground of the motion was that no claim for the money sued for had been presented, and there was no evidence to justify or sustain the demand. But the defendant expressly admitted that the claim was presented to and rejected by him, and there was, as we have seen, evidence sufficient to justify and sustain the demand. The ruling of the court was therefore without error. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DALZELL v. McGILL. (No. 15,405.)

(Supreme Court of California. June 26, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by David Dalzell against H. M. McGill, executor of Thomas Hovendon. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Henry M. McGill, for appellant. H. C. Firebaugh, for respondent.

PER CURIAM. This case is in all material respects, except as to the amount involved, the same as that of Warren v. McGill (No. 15,404, filed June 18, 1894), 37 Pac. 144. The cases were tried about the same time, and it was stipulated that the testimony given in the Warren Case, where applicable, might be considered as evidence in this. Upon the authority of the decision in the case referred to, the judgment and order appealed from in this case are affirmed.

103 Cal. 252

STEVENS v. SAN FRANCISCO & N. P. R. CO. (No. 15,468.)

(Supreme Court of California. June 26, 1894.)

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY FOR COSTS—STATUTES CONSTRUED.

Under Code Civ. Proc. § 1509, providing that administrators shall be individually liable for costs adjudged against them, and section 1031, providing that costs may be recovered in an action prosecuted or defended by an administrator, but such costs must, by the judgment, be chargeable only upon the estate represented, an administrator is personally liable for costs, unless charged by the judgment upon the estate represented.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Stevens against the San Francisco & North Pacific Railroad Company. There was a judgment for defendant, and from an order denying a motion for execution against plaintiff, personally, for costs, defendant appeals. Order reversed.

Charles F. Hanlon, for appellant. Henry E. Highton, for respondent.

PER CURIAM. By the final judgment entered in this case, it was "ordered, adjudged, and decreed that Catherine Stevens, administratrix of the estate of Joseph Stevens, deceased, plaintiff, do take nothing by this her said action against the San Francisco & North Pacific Railroad Company, a corporation, defendant, but that judgment be, and the same is hereby, entered herein in favor of said defendant for its costs and disbursements incurred herein," taxed at $640.75. Subsequently, the defendant demanded of the clerk of the court that he issue an execution on the judgment against the plaintiff personally. The clerk refused to comply with this demand upon the ground that he had no power or authority to do so. Thereupon the defendant applied to the court for an order directing the clerk to issue such an execution. The court denied the motion, and the defendant appeals from the order. The Code of Civil Procedure contains the following provisions:

"Sec. 1031. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action or defense."

"Sec. 1509. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause."

Here the judgment was against the plaintiff, as administratrix, for costs, but such costs were not by the judgment made chargeable only upon the estate, as they might have been under the section of the Code first above quoted. If they had been made so chargeable, the judgment would have contained the following or equivalent words: "And it is further ordered that said costs be, and the same are hereby, made payable out of the estate of said Joseph Stevens, deceased." This being so, the plaintiff, under the section of the Code last above quoted, was individually liable for the costs, and the defendant was entitled to the execution asked for. We see no necessary conflict in the two sections referred to. When properly construed, each may have full force and effect. The case of Hicox v. Graham, 6 Cal. 169, is in point, and there is nothing in Reay v. Butler, 99 Cal. 477, 33 Pac. 1134, in conflict with what has been said. The order appealed from must be reversed, and it is so ordered.

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103 Cal. 251

TOULOUSE et al. v. PARE et al. (No. 15,339.)

(Supreme Court of California. June 26, 1894.)

REVIEW ON APPEAL—ASSIGNMENT OF ERRORS—NONSUIT—FINDINGS.

1. Where an order granting a nonsuit is not assigned as ground for a new trial, no action prior to the nonsuit will be reviewed.

2. A nonsuit may be granted after the evidence on both sides is closed.

3. Where a nonsuit is granted, findings are unnecessary.

Department 2. Appeal from superior court, city and county of San Francisco; W. C. Van Fleet, Judge.

Action by Bernard Toulouse and others against Antoine S. Paré and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal.

Wheaton, Kallock & Kierce, for appellants. John L. Boone, for respondents.

McFARLAND, J. This is an appeal by plaintiffs from a judgment in favor of defendants, and from an order denying plaintiffs' motion for a new trial.

After the evidence on both sides was in, the court granted a nonsuit. Before the nonsuit was granted, appellants made a demand for findings, which was refused; and afterwards they took an exception, which perhaps included both the failure of the court to make findings, and the nonsuit. But the order of the court granting a nonsuit is nowhere assigned as error, and therefore it cannot be assailed. "When a nonsuit is granted, and the plaintiff makes a statement for a new trial, in the specifications of errors why a new trial should be granted he must insert the alleged error of granting a nonsuit."

McCreery v. Everding, 44 Cal. 284. "The question presented on a motion for a nonsuit is a question of law, and in the statement on new trial the decision of the motion should be specifically an error of law." Donahue v. Gallavan, 43 Cal. 573.

As the order granting the nonsuit is not assigned as error, no action of the court prior to the nonsuit need be examined. We may say, however, that a nonsuit can be properly granted after the evidence on both sides is closed (Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736), and that findings are not required in a case of nonsuit (Reynolds v. Brumagim, 54 Cal. 254; Mining Co. v. Gilson, 47 Cal. 601). Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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103 Cal. 163

BENSON v. SHOTWELL. (No. 15,186.)

(Supreme Court of California. June 19, 1894.)

REVIEW ON SECOND APPEAL—MODIFICATION OF CONTRACT—EVIDENCE.

1. Where, on a second appeal, the facts disclosed by the record are in substance the same as on the former, the propositions of law arising therefrom will not be reconsidered.

2. Defendant wrote to plaintiff, who had contracted to sell him certain land, with good title, requesting him to bring him a certain deed, which was not on record, that he might examine it, and have it recorded. Plaintiff brought the deed, but did not show it to defendant, and stated that he considered the original deed better than a record of it, and would give it to defendant on delivery of the property. *Held*, that it was, in substance, a refusal to submit it for examination, or allow defendant to have the deed recorded.

3. The provision of a written contract cannot be altered by any unexecuted oral agreement between the parties. Civ. Code, § 1698.

4. A waiver of the conditions of a contract cannot be predicated on conduct of which the other party had no knowledge.

5. The motives of a party to a contract, in requiring a strict compliance with the conditions precedent to his liability, are immaterial.

6. Exceptions to the admissibility of evidence which is afterwards stricken out cannot be considered on appeal.

7. Testimony of a witness at a former trial is admissible when at the time he is out of the jurisdiction of the court.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John Benson against J. M. Shotwell to determine adverse claims to land. There was a judgment for plaintiff, and defendant appeals. Reversed.

For former appeal, see 87 Cal. 49, 25 Pac. 249.

A. N. Drown, for appellant. Edward J. Pringle, Henry C. McPike, and Pringle, Hayne & Boyd, for respondent.

VAN FLEET, J. This is the second appeal in this case. The first appeal was from a judgment in favor of plaintiff, which was reversed, and the cause was remanded for a new trial. 87 Cal. 49, 25 Pac. 249. On the second trial the plaintiff again recovered judgment, and the defendant appeals from the judgment and an order denying his motion for a new trial.

The facts are sufficiently stated in the opinion of the court on the former appeal. On that appeal it was determined, as matter of law, that, by the terms of the contract in question, defendant was entitled to a good paper title of record, and was not bound to accept a title resting on matters dehors the record; that the title tendered by plaintiff was not such as was required by the contract; that defendant was entitled to receive an actual possessio pedis of the whole lot, and was not bound to accept a constructive possession by attornment of tenants; and that the attempted delivery of possession did not meet the requirements of the contract. The facts disclosed by the record on this appeal are in substance the same as those which were before the court on the former appeal; and the propositions of law there decided are therefore the law of this case, and we are not at liberty to reconsider them. It is true that nothing that was said in that opinion as to the facts could bind the court below upon the second trial, nor be conclusive now, since the rule of the law of the case has no application to questions of fact. But the evidence on the last trial appears to us to be without any material conflict, and indeed without any conflict whatever, nor can there be any question as to the inferences to be drawn from it, and it discloses a state of facts precisely the same as that on which the former decision was based. The legal effect of those facts was determined by that decision, and the case must now be determined accordingly.

The argument of respondent is practically confined to a restatement of the points discussed on the former appeal, and does not disclose any material particular in which the evidence differs from that on the former trial. Some points are suggested, as to which it is claimed that the evidence is now different. Some of them are as to matters entirely immaterial; and, as to the others, we fail to discover any such difference. Respondent contends that the evidence does not now show that plaintiff "refused" to submit his deed for examination, or to permit it to be recorded correctly. But the evidence, viewed most favorably to plaintiff, shows now, as it showed then, that, five days before the expiration of the time limited in the contract, defendant wrote to plaintiff, saying, "If you have the deed in your possession among the papers relating to the lot, please let me have it, to show Mr. Drown, and, if necessary, have it re-recorded;" that plaintiff called on defendant, with the deed in his hand, and stated what it was, but did not open it, or show it to defendant; that defendant asked him why he did not record it, and his reply was that he considered the original deed better than any record, but that he would give it to defendant, with the rest of the papers, on the delivery of the property; and that he thereupon took the deed away, did not record it, and had no further communication with defendant on the subject. On cross-examination, plaintiff admitted that he never proposed to do anything with the deed, beyond delivering it to defendant when he should take the property. In view of the request contained in defendant's letter, plaintiff's conduct must be considered as amounting to a refusal to submit the deed for examination by counsel, or to have it recorded; and his testimony that he did not "decline" to put it on record, or to allow defendant to do so, is a mere conclusion, to which no weight can be attached.

With regard to the attempted delivery of possession, respondent claims that the evidence now shows that the persons supposed to be in occupation at the time who were not found, nor their names ascertained, turned out afterwards to be mere licensees or servants of known tenants, and who had no possession to deliver, and also that the apparent adverse occupation by Mrs. Klumpke was afterwards discovered not to be adverse. It is not necessary to review the evidence on these points, though we fail to discover any substantial divergence from the former testimony. It is sufficient to say that on September 22d, when the only attempt at delivery was made, no delivery was effected. None of the tenants vacated; and Mrs. Klumpke, by her tenant, remained in the actual possession of the strip in the rear. At no time did plaintiff tender to defendant the actual, present possession of the lot described in the contract. Defendant, having on the day of the maturity of the contract tendered full performance on his part, was not bound to repeat his offer, and no tender was thereafter made by plaintiff. Indeed, though time was not originally of the essence of the contract, it was made so by the demand of defendant, and the failure of plaintiff to comply with it, and a subsequent tender by plaintiff would have been unavailing.

Respondent also claims that the proof shows a waiver by defendant of the delivery of actual possession. The evidence relied on for this purpose was before the court on the former appeal, but it is contended that, as the allegation of waiver was inserted in the pleadings since the former trial, the question is now open. We see nothing in the facts relied on from which any waiver can be inferred. They do not indicate any intention on defendant's part to waive anything. They consist solely of transactions with third parties. Plaintiff is not shown to have known of them, or to have acted upon them; defendant received no consideration for any waiver; and, lastly, the provisions of the written contract could not be altered by an unexecuted oral agreement, if one had been made. Civ. Code, § 1698.

The court below found that the grounds upon which defendant based his refusal to take the lot were but pretenses,—were excuses for retiring from the bargain,—and were not made in good faith. We fail to find the slightest evidence to support that finding, or to impugn defendant's entire good faith. But, if the fact were as found, it would be immaterial. Defendant was entitled to insist strictly on the contract, and his motives for doing so cannot be inquired into.

The findings as to the controverted matters are therefore unsupported by the evidence, and respondent, indeed, admits that some of them are so. A new trial must therefore be granted.

It is not necessary to notice all the assignments of error in law. The certificate of acknowledgment to the deed from Agard to Perrie was sufficient, and the existence of an erasure not shown, otherwise than by defendant's objection. The testimony of Moxley as to conversations with Hansen was stricken out, and the exception to its admission, therefore, cannot be considered. The testimony of Christie showed that the witness Aspden was out of the jurisdiction of the court, and the testimony of the latter, taken on the former trial, was admissible. Hicks v. Lovell, 64 Cal. 22, 27 Pac. 942. The other assignments do not require notice. The judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

I concur: HARRISON, J.

GAROUTTE, J. I concur in the judgment, and what is said by Mr. Justice VAN FLEET. If Benson had repudiated his contract entered into with Shotwell for the sale of this land, then Shotwell would have been entitled to recover from Benson the amount of money he had paid thereunder, less the actual damage sustained by Benson by reason of any breach of the contract committed by Shotwell. Shively v. Water Co., 99 Cal. 260, 33 Pac. 848, and cases there cited. Benson's conduct in bringing this action was in effect a repudiation of any rights of Shotwell under the contract. It was as substantial and effectual a repudiation as we can imagine. It necessarily follows that defendant in this action is at least entitled to recover the money he has paid to plaintiff under the contract, less the damage suffered by reason of any breach thereof; and to this extent the questions as to whether plaintiff had a good title to the land, or was able to give defendant actual possession thereof, or made a good and valid tender of the deed, are entirely immaterial as I view the case, and the decisions of this court bearing upon the principles here involved. This is the first case coming before us where a vendor has attempted to quiet his title under the circumstances here presented, and I am clear that he can be entitled to such relief only upon the return of the money he has received from the vendee. This would seem to be sound equity, for the vendor has no right to both land and money.

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103 Cal. 236

BOWEN v. WENDT. (No. 15,295.)

(Supreme Court of California. June 26, 1894.)

ENJOINING NUISANCE—RIGHT BY PRESCRIPTION.

A prescriptive right to use a stream in a manner amounting to a public nuisance cannot be acquired so as to be a defense to an action by a private party especially injured thereby to enjoin the maintenance of the same.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by J. J. Bowen against G. Wendt. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Kennedy and Morehouse & Tuttle, for appellant. Frs. E. Spencer (D. W. Burchard, of counsel), for respondent.

PER CURIAM. Plaintiff is the owner of certain land and premises, containing 25 acres, more or less, situate in the county of Santa Clara, through which a stream known as "Coyote Creek" runs, and upon said land and near said stream the plaintiff has his dwelling-house. Plaintiff uses his land for grazing cattle and other domestic animals, and the waters of said stream are useful and necessary for the watering of plaintiff's stock. Defendant maintains a slaughterhouse upon or near the stream, above plaintiff's premises, from which the offal, etc., is turned into said Coyote creek, pollutes the waters thereof so that they are unfit for domestic use and unfit for cattle, and the odors therefrom are injurious to health, etc. Plaintiff avers a nuisance, and that he is specially injured thereby beyond the general injury to others, etc. Defendant, in addition to general denials, sets up in his answer facts tending to establish a prescriptive right to use the stream as a place of deposit for the offal from his slaughterhouse. The cause was tried by the court without the intervention of a jury, and written findings waived. Plaintiff had a decree enjoining defendant from depositing the blood, offal, etc., from his slaughterhouse in the stream, which decree recites that for more than two years next before the commencement of the action the defendant had been guilty of maintaining and committing a public nuisance by polluting the waters of Coyote creek by, etc., and that said nuisance has been specially injurious to the plaintiff, etc. The evidence was sufficient to show that the acts of the defendant constituted a public nuisance, and that the plaintiff was specially injured thereby. He might, therefore, maintain the action. Civ. Code, § 3493; Payne v. McKinely, 54 Cal. 532; Code Civ. Proc. § 731. "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." Civ. Code, § 3490; People v. Gold Run, etc., Min. Co., 66 Cal. 152, 4 Pac. 1152; Hoadley v. San Francisco, 50 Cal. 275. A prescriptive right cannot be maintained against a public nuisance where the action is brought by a private party who has suffered special injury in consequence thereof. Woodruff v. Mining Co., 9 Sawy. 513--517, 18 Fed. 753; Mills v. Hall, 9 Wend. 315. The judgment and order appealed from are affirmed.

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103 Cal. 258

LIVINGSTON v. KODIAC PACKING CO. (No. 15,180.)

(Supreme Court of California. June 26, 1894.)

WHO ARE FELLOW SERVANTS.

The mate of a ship engaged in carrying freight and passengers between distant points is a fellow servant of a man employed in the steward's department to wait on the officers' table.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Robert F. Livingston against the Kodiac Packing Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Daniel Titus and J. B. L. Brandt, for appellant. Pierson & Mitchell, for respondent.

PER CURIAM. Action to recover damages for a personal injury alleged to have been suffered by plaintiff in consequence of negligence of defendant. Trial by jury. Verdict in favor of plaintiff, assessing damages at $12,500, on which judgment was rendered. Appeal by defendant from the judgment and from an order denying a new trial.

In October, 1891, the defendant was owner of the steamship Haytien Republic, then engaged in carrying passengers and freight from San Francisco to various Northern Pacific ports in British Columbia, Oregon, and Washington, and thence back to San Francisco; and for that purpose was supplied by defendant with the ordinary complement of officers, sailors, and servants. G. W. Brown was captain, George W. David mate, and the plaintiff a servant in the steward's department, whose principal duty it was to serve as waiter at the officers' table, but also to perform such other services as ordered by the steward. At the time of the accident in which plaintiff was injured—October 22, 1891—the ship was moored at the wharf in Departure Bay, where it was taking in a cargo or partial cargo of coal. The shippers of the coal were moving it to the ship, and dumping it into a hatchway by means and appliances of their own, which consisted of a tramway or bridge extending from the coal bunkers on the wharf to the hatchway on the ship. Upon this bridge was laid a railroad track for small coal cars. No part of the bridge rested upon the ship. That end of it from which the coal was dumped into the hatchway was supended by chains attached to trestlework and machinery on the wharf, by which it could be raised or lowered so as to adapt it to the varying height of the ship's deck, the part thus raised and lowered being attached to the main part on the wharf by hinges. The hatchway being used at the time of the accident is about 4½ feet square, and the end of the bridge extended nearly to the middle of it. The width of the bridge being about 5½ feet, the sides of it projected about 6 inches beyond the sides of the hatchway. Mr. David, the mate, was superintending the receiving of the coal and the "trimming" of it in the hold of the ship, but had nothing to do with it until it was dumped from the cars into the hatchway. About 5:30 o'clock p. m. the steward ordered plaintiff to call the officers to dinner, and he went upon deck and to the captain's room for that purpose, but, not finding the captain on the ship, he was ordered to go and look for him upon the wharf. Going from the ship to the wharf, he passed over the railroad bridge then being used by the coal shippers, and returned to the ship the same way. In returning he stepped down from the side of the bridge to the deck at a point about five feet from the end of the bridge, then moved two steps in a direction parallel with the side of the bridge and towards the end of it which projected over the hatchway, and in attempting to make another step "twisted" his ankle, and fell headforemost into the hatchway, from which he was taken in an unconscious condition. As to this, plaintiff testified: "I stepped down off the bridge onto the deck, and made one or two steps. My right ankle twisted, and I fell. I don't remember anything after that." On cross-examination, being asked where he got off the tramway down on the deck, he answered: "Well, it was about halfway between the hatchway and the side of the ship before I touched the deck. There was coal on the deck. Ques. How many feet would that be from the hatchway? Ans. Well, I couldn't say, for I would not be sure of it. Where I got off was about halfway between the hatchway and the bulwarks; perhaps three feet from the bulwarks. It was about three feet from the point where I reached the deck to the port side of the hatchway. Ques. What did you do with yourself after you got off? Ans. Well, to my recollection, I had about two steps, and after that I don't recollect anything." The port side of the ship was to the wharf, and only about two feet from it, and the upper deck was about on a level with the wharf. Plaintiff further testified that in stepping from the bridge to the deck he landed safely on his feet without hurting himself.

It appears that it was the duty of the mate, Mr. David, to place gang planks from the ship to the wharf, and to guard the open hatchways while taking in cargo, so far as it was practicable to do so; and the only negligence charged by respondent is that the mate failed to perform those duties, it being claimed that the plaintiff was compelled to pass over the bridge, because no gang plank was in place; and also that he would not have fallen into the hatchway if it had been guarded in the usual way by chains or ropes supported by stanchions.

The appellant answers: (1) That a gang plank was in place at the times plaintiff passed to the wharf and returned to the ship; (2) that he might have safely stepped from the ship to the wharf and back without a plank, as the distance was only about two feet; (3) that it was impracticable to guard the small hatchway in use at the time, as the necessary stanchions for that purpose could not have been put in place, for the reason that one side and two corners of the hatchway were covered by the bridge; and (4) that the defendant was guilty of contributory negligence. Although the evidence, as read from the transcript, seems to preponderate in favor of defendant upon nearly all these issues, yet we think there is enough in favor of plaintiff to create a substantial conflict, and therefore pass to a consideration of the only other point made by appellant, which is that the mate, David, and the plaintiff were fellow servants "employed by the same employer in the same general business." We think this point is well taken, and should be sustained. There is no question that the only negligence complained of was that of the mate, David, nor that plaintiff and the mate were employed by the same employer. Nor is it claimed that there was any negligence on the part of the defendant in selecting or employing David as such mate. Nor is it now questionable in this state that a difference in the grades of service does not destroy nor affect the relation of fellow servants of the same employer, provided only that they are employed "in the same general business." In this case the respondent denies that plaintiff, the waiter, and David, the mate, were employed in the same general business; and whether or not they were so is the only question debated under this head. It is agreed that the general business in which the defendant was engaged was that of carrying passengers and freight by a steamship from port to port so distant from each other as to require several days to make a passage either way, and also requiring probably 20 employés for different grades of necessary service, including captain's mates, engineers, pilots, sailors, stewards, cooks, waiters, and firemen. In view of the necessity of furnishing meals to passengers, as well as to employés, are not the services of stewards, cooks, and dining-room waiters an essential part of the general business of carrying passengers and freight from San Francisco to ports in British Columbia and the states of Washington and Oregon by steamship? We think it clear that they are, and that it follows from section 1970 of the Civil Code, as construed in numerous cases, that the defendant is not bound to indemnify the plaintiff for injuries suffered in consequence of the negligence of the mate, David. McLean v. Mining Co., 51 Cal. 255; Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. 437; Congrave v. Railroad Co., 88 Cal. 360, 26 Pac. 175; Daves v. Railroad Co., 98 Cal. 19, 32 Pac. 708. The judgment and order are reversed, and the cause remanded for a new trial.

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103 Cal. 255

WILSON v. STUMP. (No. 14,992.)

(Supreme Court of California. June 26, 1894.)

REWARD—ACTION TO RECOVER.

1. A complaint in an action to recover a reward offered for the production of a letter, which, after alleging the offer, alleges that plaintiff, "in consideration of said offer, promise, and agreement on the part of defendant," produced the letter, sufficiently shows that plaintiff knew the reward had been offered, and produced the letter in reliance on defendant's promise.

2. Where the complaint shows that the letter was produced within five days after the reward was offered for it, the fact that the reward had been revoked is a matter of defense, as it will be presumed that the offer continued for such length of time.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Russell J. Wilson against Irwin C. Stump. There was a judgment for plaintiff, and defendant appeals. Affirmed.

James A. Waymire, for appellant. Stanley, Stoney & Hayes and Arthur Rogers, for respondent.

VANCLIEF, C. The complaint in this action shows that in October, 1890, the defendant was desirous of obtaining a certain letter said to have been written by Henry H. Markham, the alleged contents of which were in dispute. That on or about the 24th day of October, 1890, the defendant proclaimed and asserted that he was desirous of obtaining a genuine letter written by said Markham of the alleged character and contents, and that he would pay a reward of $1,000 for the production to him of such genuine letter containing the disputed matter. "That, in consideration of said offer, promise, and agreement on the part of the defendant, this plaintiff did, on the 29th day of October, 1890, produce to and left in the personal custody of the defendant, for the period of twenty-four hours, the said genuine letter, so as aforesaid written by said H. H. Markham, and did then and there demand from the defendant the payment to him of said offered reward or compensation of $1,000; but, notwithstanding such production and delivery of such genuine letter, defendant did then refuse and ever since has and still does refuse to pay to plaintiff said sum of $1,000, or any part thereof." The defendant demurred "on the ground that said complaint does not state facts sufficient to constitute a cause of action, in this, to wit, that it does not show a sufficient consideration, or any consideration, for the agreement therein alleged." The court overruled the demurrer, and rendered judgment in favor of plaintiff for the sum demanded by default of defendant in failing to answer. The defendant brings this appeal from the judgment upon the judgment roll, and contends that the court erred in overruling the demurrer.

It is true that the alleged offer and promise to pay the reward was only a proposal or conditional promise on the part of the defendant, and not a consummated contract; but if, in reliance upon that offer, the plaintiff accepted the proposal, and performed the service for which the reward was offered, before the offer was revoked, a valid contract was thereby consummated. Ryer v. Stockwell, 14 Cal. 134. Nor is this controverted by appellant's counsel, but he contends that the complaint does not show that plaintiff knew the reward had been offered, or that plaintiff performed the service in reliance upon the promise of defendant. I think, however, the language of the complaint clearly implies all this, and is quite sufficient to stand the test of general demurrer. These alleged deficiencies are not specified in the demurrer, the only specification (if it may be called such) being that the complaint does not show any consideration for the alleged contract, while the points made here are much more specific, and not necessarily suggested by the demurrer. But the allegation of the complaint is "that in consideration of said offer, promise, and agreement on the part of the defendant" the plaintiff produced the letter, etc., and "then demanded" the reward; and this means that the offer of the defendant was the cause which moved plaintiff to perform (Webst. Dict. "Consideration"), and implies that he knew, before he performed, that the offer had been made.

It is further objected that the complaint does not show that the offer had not been revoked before the performance. The complaint shows that the offer was made October 24th, and that within five days thereafter, in reliance upon it, the plaintiff performed the service requested. Prima facie, this shows a complete contract and performance on the part of the plaintiff. The offer was not limited in time, and the presumption is that it was open on the fifth day after it was made, nothing to the contrary appearing. The revocation of it, if it had been revoked, was matter of defense. Hewitt v. Anderson, 56 Cal. 476, cited by appellant, is not in point. In that case the court, upon a trial, found as a fact "that none of the acts of the plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof." I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 239

HOUGHTON v. TRUMBO et al. (No. 15,518.)

(Supreme Court of California. June 26, 1894.)

Review on Appeal—Bill of Exceptions—Matters not Apparent of Record—Waiver.

1. A bill of exceptions filed by, and certified to as that of, one of the defendants, cannot be considered on an appeal by another defendant, as such other defendant may have waived all such points.

2. The fact that a judgment assumes a partnership between the parties, inconsistent with allegations in the complaint, is not ground for reversal, in the absence of a history of the trial, so as to enable the court to see what objections were interposed by defendant, or what defenses and points were made or waived.

3. A judgment will not be reversed, on the ground that the findings are not sufficiently full, where the parties especially waived further findings.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Herbert R. Houghton against Isaac Trumbo and R. P. Thomas. From a judgment for plaintiff, defendant Thomas appeals. Affirmed.

H. D. Talcott, for appellant. Thos. V. Cator and Pierson & Mitchell, for respondent.

McFARLAND, J. This may be described, generally, as an action for an accounting between plaintiff and defendants, of matters growing out of business connected with the property known as the "Bijou Theater." Defendant Trumbo filed a demurrer to the complaint, which was overruled. He then filed an answer, and also a cross complaint. Defendant Thomas did not demur, but filed an answer and cross complaint. Each of the defendants filed an answer to the other's cross complaint. Judgment was rendered for plaintiff against Trumbo for a certain sum of money, against Thomas for a certain sum of money, and also in favor of Trumbo, against Thomas, for a certain sum of money. Thomas appeals from the judgment. He procured the case to be submitted upon his own points and authorities, because none had been filed by respondent within the time prescribed by the rules of this court.

There is no bill of exceptions or statement before us which we can consider. The defendant Trumbo made a motion for a new trial, and submitted a draft of a bill of exceptions to be used on his said motion, and on any appeal which he might take. The judge certified it in this language: "The foregoing bill of exceptions is hereby certified to be correct, and may be received as the engrossed bill of exceptions of the defendant and cross complainant Isaac Trumbo on his motion for a new trial, and may also be used by him on any appeal that he may have taken, or may hereafter take, from the judgment and decree rendered herein." Trumbo has not appealed, and it does not appear whether or not his motion for a new trial was ever determined. The appellant, Thomas, has procured this bill of exceptions of Trumbo to be printed in the transcript, but it is quite evident that it cannot be considered. It was prepared and submitted by Trumbo alone, and certified as his bill. There is not in it, from beginning to end, a single objection made by Thomas, or a single exception taken by him. He may have waived every point made by Trumbo, and every exception which the latter took. If it had been intended to be, and had been, Thomas' bill of exceptions, to be used by him on any motion on appeal, the matter of the bill might have been materially different. He also prints on the last page of the transcript, after the stipulated certification thereof, what is called, "Bill of Exceptions of Defendant and Cross Complainant and Appellant, R. P. Thomas," and consists entirely of specifications of errors, but it is not certified or authenticated in any way whatever. Leaving out of view all but the judgment roll, there is nothing to warrant a reversal of the judgment. The complaint is certainly good as against the general objection of want of facts, or of jurisdiction.

Appellant contends that the judgment should be reversed because the judgment seems to contemplate that the relation between the parties was that of partnership, while the complaint states some facts inconsistent with the theory of partnership. But the prayer of each party asks for an accounting against the others of the business transactions related in the complaint; and we have not a history of the trial before us, and cannot now know upon what theory it was conducted, what objections, if any, were interposed by appellant, or what defenses or points were made or waived. We cannot, therefore, reverse the judgment upon this point.

Appellant also contends that the findings are not full enough. There were some findings at the time a certain interlocutory decree was rendered, but none at the time of the final judgment; and we find in the transcript a written stipulation of the parties "that findings other than those hithertofore signed and filed upon the rendition of the interlocutory decree be, and the same are hereby, waived." Indeed, the judgment looks very much like a consent judgment, although its character as such judgment is not quite so pronounced as to warrant us in granting respondent's motion to dismiss the appeal on that ground. But we see no reason for reversing the judgment. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(4 Cal. Unrep. 680)

WARNER v. F. THOMAS PARISIAN DYEING & CLEANING WORKS. (No. 15,266.)[1]

(Supreme Court of California. June 19, 1894.)

REVIEW ON APPEAL—AMENDMENT OF RECORD.

1. The action of the court in granting a new trial must be affirmed where the grounds for granting the same are not stated.

2. After the statement of the case has been settled for an appeal, the court can allow additions to be made thereto, though the omissions arose from the negligence of the attorney.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Seth Warner against the F. Thomas Parisian Dyeing & Cleaning Works. There was a judgment for plaintiff, and, from an order granting defendant a new trial, plaintiff appeals. Affirmed.

Horace W. Philbrook, for appellant. Reinstein & Eisner, for respondent.

PER CURIAM. A verdict was rendered in this cause in favor of the plaintiff for $1,321. The defendant moved for a new trial upon several grounds, one of which was that the evidence was insufficient to justify the verdict. The court granted the motion without specifying the ground upon which it made the order, and from this order the plaintiff has appealed.

Upon well-established rules, the action of the court must be affirmed. Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481; Domico v. Cassassa (Cal.) 35 Pac. 1024; People v. Flood (Cal.) 36 Pac. 663; Mills v. Navigation Co., Id. 772.

After the statement of the case had been settled by the judge, and filed with the clerk, it was brought to the notice of the court that the statement was incomplete, in that several exhibits referred to therein had not been engrossed at length, although it was recited in the statement that it contained all the material evidence taken at the trial of the action. The defendant's attorney thereupon moved the court that the settlement and allowance of the statement be vacated, and that they be allowed to re-engross the same, and place these exhibits therein. This motion was resisted by the attorney for the plaintiff, but, after a hearing of the parties, was granted; and the plaintiff's attorney excepted to this action of the court. We see no error in this proceeding. Courts of justice are organized for the purpose of determining the controversies between litigants according to their respective rights; and rules of procedure are intended to facilitate this purpose, rather than to hamper or obstruct the action of the court in determining which of the parties is entitled to a judgment. Section 659, Code Civ. Proc., makes it the duty of the judge, in settling the statement, to make it "truly represent the case, notwithstanding the assent of the parties to any inaccurate statement." If the judge shall become satisfied that a statement, as settled by him, does not truly represent the case, he is authorized, and it is his duty, to make such corrections therein as will cause it to conform to the facts. In the present case the defendant's attorney, in preparing the proposed statement, had included therein a reference to these exhibits by inserting the words, at the place where they were referred to, "here insert plaintiff's exhibit ——," so that the plaintiff's attorney was not misled in preparing amendments thereto; and, when the attention of the judge was drawn to the fact that the exhibits had not been engrossed in the statement, he was authorized to vacate his certificate of settlement, and direct that they be engrossed therein, so that his certificate may conform to the facts. Whether the omission to engross them was the result of inadvertence or carelessness on the part of the defendant's attorney did not deprive the court of a discretion to settle it correctly; and, for the purpose of determining what exhibits were in reality referred to in the statement, it was authorized to make such investigation as would enable it to settle the statement according to the facts. The order is affirmed.

(103 Cal. 242)

PEOPLE v. HARTMAN. (No. 21,100.)

(Supreme Court of California. June 26, 1894.)

RAPE—RIGHT TO A PUBLIC TRIAL—UNCHASTE CHARACTER OF PROSECUTRIX.

1. On indictment for assault with intent to rape, an order excluding all persons from the court room, except defendant and the officers of the court, violates defendant's right to a public trial, and is erroneous.

2. The fact that prosecutrix is of unchaste character is no defense to an indictment for assault with intent to rape.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Horace G. Hartman was convicted of assault with intent to rape, and appeals. Reversed.

C. W. Hartman, for appellant. H. V. Rearden and Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of an assault with the intent to commit rape, and now presents this appeal from the judgment of conviction.

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[1] For opinion on motion to set aside judgment, and to reinstate causes. see 37 Pac. 213.

When the information had been read to the jury, and the defendant's plea stated, on motion of the district attorney, and against the objection of the defendant, the court made an order excluding from the court room, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case, decided in this country, supporting the course of procedure here pursued. It is in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution, the presence of the officers of the court—men whom, it is safe to say, were under the influence of the court—made the trial no more public than if they too had been excluded. While a right to the public trial contemplated by the constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceedings, regardless of the conveniences of the court, and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused. Judge Cooley, in his work upon Constitutional Limitations (page 383), has well declared the true rule in the following language: "The requirement of a public trial is for the benefit of the accused,—that the public may see that he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether." In the case of People v. Murray, 89 Mich. 276, 50 N. W. 995, the question now before the court is elaborately discussed; and, upon a state of facts more favorable to the accused than is presented by the present record, it was held that the defendant had not had a public trial. There is nothing to be found in Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631; State v. Brooks, 92 Mo. 573, 5 S. W. 257, 330; or People v. Kerrigan, 73 Cal. 222, 14 Pac. 849,—that justified the action of the court in making the order of exclusion here assailed. The facts of those cases are widely at variance with the facts before us, and the law there declared entirely fails to serve as a legal support to the judgment here rendered. It is intimated in both the Kerrigan and Grimmett Cases that, conceding the accused to be deprived of the right to a public trial, still the burden was upon him to show injury by reason of the deprivation. These intimations cannot be indorsed. A defendant charged with crime is entitled to certain rights under the constitution; and, when he has been deprived of any one of them, he has not had that fair and impartial trial to which he is entitled, however bad and degraded. This principle of law is in entire consonance with the views of the Michigan court, as declared in People v. Murray, supra. In the case of People v. Swafford, 65 Cal. 223, 3 Pac. 809, the court excluded all persons except the witnesses and persons connected with the case, and this action was sustained. It is there said that it does not appear that the accused objected to the order of exclusion, and non constat but that such order was made at his express request. Whatever may be the legal soundness of the court's conclusion, drawn from such a condition of the record, we think the compass of the order of exclusion too wide, and its limitations as to those allowed to be present at the trial entirely too restrictive. The trial should be "public," in the ordinary commonsense acceptation of the term. The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the court room, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial. Section 125 of the Code of Civil Procedure, upon which the attorney general relies to support the action of the trial court, has no reference whatever to the question here involved. The application of the rule there stated is confined exclusively to civil cases.

The fact that the prosecutrix may have been a woman of unchaste character is no defense to the charge stated in the information. A defendant is equally guilty, under the law, regardless of the good or bad morals of the woman assaulted. It is ordered that the judgment be reversed, and the cause remanded.

We concur: VAN FLEET, J.; DE HAVEN, J.

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4 Cal. Unrep. 684

PHILLIPS v. WINTER et al. (No. 15,177.)

(Supreme Court of California. June 26, 1894.)

RES JUDICATA.

A party to an action for partition, who acquires an independent title by deed pending the suit and before decree, and who does not assert such title in that action, will be concluded by the judgment therein from setting up such title in a subsequent action for the partition of the same property.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Abraham Phillips against Fanny M. Winter and others for partition. Judgment for plaintiff, and defendants appeal. Affirmed.

Daniel Titus and Henry Sears, for appellants. I. N. Thorne and Myer Jacobs, for respondent.

PER CURIAM. The plaintiff commenced this action to obtain a partition of certain blocks and lots of land situate in the city and county of San Francisco, and known as "outside lands." There were a large number of defendants, all of whom answered, and set out their respective claims to interests in the lands described in the complaint. Among the defendants were the minor heirs and the adult heirs, and the executrices of the will of, William Winter, deceased. The minor heirs answered separately by their guardian ad litem, and alleged that said William Winter, at the time of his death, was the owner and entitled to the possession of an undivided third part of all the lands and premises described; and they prayed that the said lands be partitioned, and that the shares and interests to which they were entitled might be determined by the court, and set off in severalty to them. The adult heirs and executrices, by their answer, denied that the plaintiff and defendants were the owners, as tenants in common, of the lands and premises described in the complaint; denied that the plaintiff or the defendants, other than themselves, had any interest in the said lands and premises, or any part thereof, as tenants in common or otherwise; and alleged that said William Winter, in his lifetime, and at the time of his death, was seised in fee, and was the owner in severalty, of all the said pieces and parcels of land mentioned and described in the complaint. Wherefore, they prayed that it be adjudged and decreed by the court that they were the owners and entitled to the possession of all the said lands and premises, and that the relief asked by the plaintiff be denied. The case was tried, and very full findings made, by which it was determined that each of the parties to the action had a certain stated interest in the said premises; and thereupon, in accordance with the findings, an interlocutory decree of partition was made and entered, from which, and from an order denying their motion for a new trial, the adult heirs and executrices appeal.

The appellants contend that the heirs, devisees, and representatives of the estate of William Winter, deceased, were shown to be the owners in fee and entitled to the possession of all the property involved in the action, and that the court erred in awarding and setting off portions thereof to the plaintiff and the other defendants. This contention is based upon the following facts: On November 20, 1869, an action was commenced in the district court of the twelfth judicial district in and for the city and county of San Francisco, by Robert S. Randall against William Winter and others, for the partition between the parties, as tenants in common, of a tract of land described as "that certain tract of land situated in the city and county of San Francisco and state of California, known as and being the southeast quarter of section 13, township 2 south, range 6 west, according to the United States survey of the state of California, and being more particularly described as the same is delineated and shown on the map of the outside lands of the city and county of San Francisco, made under and by virtue of the provisions of order No. 800, as follows, to wit, 'All those certain blocks of land,' " etc., including the blocks and lots involved in this action. The answer of Winter was filed March 4, 1870. The trial of the action was commenced August 15, 1871, and on the next day the case was submitted to the court for decision. The interlocutory decree was entered October 13, 1871, and the final decree on December 8, 1875. By these decrees there were allotted and set off to the plaintiff, Randall, in severalty, all the blocks and lots of land described in the complaint in this action; and the said decrees are still in full force and effect, having never been set aside, vacated, or reversed, and under deeds from Randall the several parties to this action have acquired the interests in the property which were respectively allotted and set off to them. While the action of Randall v. Winter et al. was pending, and before the interlocutory decree therein was entered, seven deeds were executed by the city and county of San Francisco to said Winter and his codefendants, purporting to convey to them, in pursuance of the authority given by the statutes of the United States and of this state, and said order No. 800, the property involved in that action, and including that involved in this action. Two of the said deeds were dated May 6, 1870; two of them, July 8, 1870; one of them, October 20, 1870; one of them, October 7, 1871; and one of them October 9, 1871. But it does not appear what particular part of the lands was conveyed by either of the said deeds. Subsequently, his cograntees executed and delivered to said Winter deeds purporting to convey to him all their respective interests in the lands involved in this action. Under the several deeds above referred to, appellants claim that Winter, at the time of his death, was the owner and entitled to the possession of all the lands in controversy; and whether this claim can be sustained or not is the question to be decided. We do not deem it necessary to discuss the matter at length, for in Christy v. Waterworks, 68 Cal. 73, 8 Pac. 849, a like question arose, and was decided against the contention of appellants. That case grew out of the same partition suit of Randall v. Winter; and there, as here, a city deed, received by a tenant in common pending the partition proceedings, was set up as a defense to the action. It was held that the judgment in partition was conclusive upon all the parties thereto as to whatever title or claim they had to the land at the time of the rendition of the judgment, and on the second appeal of the case the same doctrine was announced and followed. 84 Cal. 541, 24 Pac. 307. Those decisions, we think, correctly declare the law applicable to this case; and we see nothing in Newman v. City and County of San Francisco, 92 Cal. 378, 28 Pac. 569, or in the other cases cited by appellants, that in any way conflicts with them. Appellants further contend that the decree in Randall v. Winter et al. is void on its face, and of no effect, but we fail to see any valid ground for this contention. The court had jurisdiction of the parties and of the subject-matter, and its judgment cannot now be attacked collaterally. It follows that the decree and order appealed from must be affirmed, and it is so ordered.

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103 Cal. 144

HACKETT v. STATE. (No. 15,319.)

(Supreme Court of California. June 16, 1894.)

CONSTRUCTION OF CONTRACT — ERECTION OF SEA WALL.

Plaintiff's assignor agreed to build for defendant a sea wall, whose dimensions were specified in the contract, and defendant agreed to pay 52 cents per ton for the stone and 29 cents per cubic yard for the earth used therein, and the contract stated: "The stone embankment will contain about 216,000 tons of stone; the earth embankment about 285,000 cubic yards of earth." Only 119,025 tons of stone and 272,499 cubic yards of earth were used in constructing the wall. *Held*, that plaintiff could recover only for the amount of the material actually put in the wall.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John Hackett, as assignee of W. D. English and the Pacific Coast Dredging & Reclamation Company, against the state of California. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Sullivan, for appellant. Garber, Boalt & Bishop, Geo. A. Johnson, and Dennis Spencer, for the State.

HAYNES, C. This action was brought in the superior court of the city and county of San Francisco against the state of California by John Hackett, as assignee of W. D. English and the Pacific Coast Dredging & Reclamation Company, pursuant to a statute enacted March 15, 1889, authorizing such suit to be brought. St. 1889, p. 221. Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment was entered for defendant, and the plaintiff appeals therefrom.

The contract out of which this controversy arose was made by W. D. English with the board of state harbor commissioners on February 20, 1884, for the construction of section 5 of the sea wall and thoroughfare and wharf along the water-front line of the city and county of San Francisco. This contract was made by English for the Pacific Coast Dredging & Reclamation Company, a corporation, and on January 2, 1889, the corporation assigned the contract to plaintiff. The point of plaintiff's contention is that by said contract the contractor agreed to furnish, and the state agreed to pay for, 216,000 tons of stone at 52 cents per ton, and 285,000 cubic yards of earth at 29 cents per cubic yard; that the contractor was ready and willing, and offered to furnish the full quantities of stone and earth above named, but that the board would only accept 119,025.86 tons of stone and 272,499.2 cubic yards of earth. The difference between these quantities, estimated at the prices named, amounts to $55,000, and this amount plaintiff seeks to recover in this action.

Respondent contends that the contract was for the construction of the sea wall of a definite length, according to the specifications; that the quantities of stone and earth mentioned in the specifications and in the notice to contractors were mere estimates of the quantities which would be required to complete the work; that the contract required the board to take and pay for only so much of these materials as were necessary to complete the work, and were actually used therein; the complaint alleging that the work was fully performed, and that the engineer overestimated the quantity of stone required by 96,774 tons, and the quantity of earth by 12,501 cubic yards; it being for these quantities of stone and earth so overestimated, and not used, or necessary to be used, that plaintiff seeks to recover. The complaint sets out in full the notice to contractors, under which bids were received, and also the contract and the specifications of the work to be done and the materials to be used, which are made part of the contract. The notice was for proposals to construct a section of the sea wall, thoroughfare, and wharf, the sea wall and thoroughfare to extend from the southerly end of section 4 1,000 feet southerly, and to have a surface width of 200 feet, the work to consist of a stone embankment, the character and dimensions of which are described, and to construct this, the notice stated, "It is estimated by the chief engineer of the board that it will take 216,000 tons of rock." The earth embankment to be the same length. "Its width on top, twelve feet above the mean of low tide, will be 139 feet; its width on the bottom (estimated) 165 feet, its average width 152 feet, and its average depth (estimated) 51 feet 6 inches." No question is made in regard to the wharf. Under the head of "General Conditions" the notice specified, among other things, that "the work will not be accepted until the stone and earth embankments shall have been brought to grade, and maintained thereat for a period of three months. * * *

The whole of the material to be furnished and work to be done as required by the plans and specifications, to which special reference is hereby made. * * * The contract for the whole work will be let to one party, but each bidder must state: First. The price per ton of 2,240 pounds for which he will furnish and place the stone required for the stone embankment. The price per ton, multiplied into 216,000, the estimated number of tons required, will give the amount of his bid on the stone embankment. Second. The price per cubic yard, to be determined in the vehicle of transportation, for which he will furnish the material and build the earth embankment. The price per cubic yard multiplied into 285,000, the estimated number of cubic yards of material required, * * * will give the amount of the bid on the earth embankment. Third. The sum for which he will furnish the material and build the wharf. The sum of these three bids, thus ascertained, will constitute the bid for the whole work. The contract will be awarded to the bidder, the aggregate of whose bid, determined as above, is the lowest." The bid of Mr. English, under which the contract was awarded, is as follows:

"San Francisco, February 20, 1884. To the Board of State Harbor Commissioners—Gentlemen: The undersigned hereby propose and agree to construct the work described in the annexed advertisement, according to the plans and specifications on file in your office, and within the time prescribed in the said advertisement, at the following rates:

The stone embankment at 52 cents per ton of 2,240 pounds, 52x216,000	$112,320 00
The earth embankment at 29 cents per cubic yard (determined in the vehicle of transportation) ——x285,000........	82,650 00
The wharf (furnishing the material and doing the work) for	29,000 00
Total	$223,970 00"

The contract contained, among others, the following provisions: "That the party of the second part hereby covenants and agrees with the party of the first part to furnish the labor and materials and do the following work, to wit: The construction of section five of the sea wall and thoroughfare and wharf along the water front line of the city and county of San Francisco, state of California. * * * And the party of the first part covenants and agrees with the party of the second part to pay for the said work by drafts drawn on the San Francisco Harbor Improvement Fund in gold and silver coin of the United States in manner following, viz.: Upon monthly estimates of the value of the materials used and work performed to the extent of seventy-five per cent. of such values, said estimates to be made in writing by the chief engineer of the board, and the final payment of twenty-five per cent. when the work is completed and accepted by the board at the following rates, viz.: The stone embankment at fifty-two (52) cents per ton of two thousand two hundred and forty (2,240) pounds; the earth embankment at twenty-nine (29) cents per cubic yard (determined in the vehicle of transportation); the wharf (furnishing the materials and doing the work), twenty-nine thousand ($29,000) dollars."

The material parts of the specifications affecting the question at issue follow closely the notice to contractors in the particulars above noticed. One or two extracts, however, may be pertinently made. "The work to be done under these specifications consists in furnishing all materials and erecting a stone embankment, an earth embankment, and a wharf. The stone embankment will contain about 216,000 tons of stone; the earth embankment about 285,000 cubic yards of broken stone, sand, or other suitable material; and the wharf will contain 501,320 feet B. M. of timber, and 802 piles, together with the requisite quantity of cast-iron mooring bits, wrought-iron spikes, bolts," etc. "The quantity of stone used in the stone embankment will be determined by weight. A ton is 2,240 pounds. The board will erect the necessary scales, and the weighing will be done under the direction of the chief engineer. The contractor must give every facility for the thorough and accurate determination of the quantity of stone used."

I think the court below did not err in sustaining the demurrer to the complaint, and rendering judgment for the defendant. What the board of harbor commissioners contracted for was the construction of a section of the sea wall of a defined length, and for which they agreed to pay a fixed price per ton for the stone, and a fixed price per cubic yard for the earth used in the construction of it; and not that they agreed to buy or pay for a fixed and definite number of tons and cubic yards of material, whether used in the work or not. If the "estimates" of the quantities required for the work, as made by the engineer and stated in the notice, bid, and specifications, be laid aside or disregarded, there could be no question as to the correctness of our conclusion. On the other hand, if the notice, bid, and specifications had been for furnishing and putting in place 216,000 tons of stone and 285,000 cubic yards of earth in a sea wall, under the direction of the engineer, there could be no question that the contractor would have been required to furnish those quantities of material, and that the board should have paid therefor, if such contract was within their powers. In such case, however, no estimates were necessary. Estimates became necessary only because the work to be done was restricted to definite and precise limits, the amount of material for which was difficult or, indeed, incapable of exact computation. This is apparent from the notice under which the bid was made, where it is stated that the average depth from the top of the embankment to hard bottom is (omitting inches) 61 feet, to stiff mud 39 feet, and average thickness of stiff mud 21 feet. "The average height of the embankment, as estimated by the chief engineer, will be 55 feet 4 inches." It is further provided that the contractor shall keep the stone embankment up to grade for three months. These facts contemplate a settling of the wall, but the extent of such settling is an uncertain quantity, and one that is continuous from the commencement of the work to its completion, and necessitates the provision for weighing the rock as it was used. Besides, it is not like solid masonry of given dimensions, which can be measured by the perch. The greater part of it is under water, and, to a certain height, the stone is simply "dumped" in, and allowed to form a natural slope, which introduces another element of uncertainty. Still another unknown quantity is involved in the estimation. The rock is not estimated by bulk, but by weight. All that is required by the specifications is that it shall be rock that will not disintegrate by the action of the water; and it is a matter of common knowledge that different kinds of rock vary greatly in weight. The lighter the rock the less number of tons are required, and vice versa. Similar considerations affect the estimate of the quantity of earth required for the earth embankment. This was to be measured in the vehicle of transportation in its loose state. How much of bulk it would lose in place by settling would depend on the material used and the weight of the embankment, and could not, therefore, be accurately calculated. These considerations were apparent, and open to the bidder. He saw precisely what work the state wished to accomplish, and must have known that the quantities of material necessary for its accomplishment were not, and could not be, accurately determined; and, therefore, that it was essential that his bid should specify the price per ton and cubic yard, as otherwise a bid of a lump sum for each of the embankments would have been all that could be required. Besides, the clause in the contract relating to payments was not that $112,320 would be paid for the stone, nor $82,650 for the earth, but the stone embankment was to be paid for at 52 cents per ton, and the earth at 29 cents per cubic yard; 75 per cent. of the value of the materials used and work performed to be paid upon estimates monthly, and the final payment of 25 per cent. when the work should be completed and accepted; thus clearly limiting the payments to the work and materials used.

The authorities cited by appellant do not conflict with this view. In Cabot v. Winsor, 1 Allen, 546, the contract was for the sale of 500 bundles, more or less, of gunny bags, at 10 cents per bag. The court, in construing the contract as affected by the words "more or less," said: "As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute or definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus, occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantities specifically named as a subject of the contract, * * * or, as it is sometimes briefly expressed, it is an absolute contract for a specific quantity within a reasonable limit." The case of Hardy v. U. S., 9 Ct. Cl. 244, was for the transportation of a given number of tons, "more or less," of government stores to certain military stations, and a similar construction was given. In neither of these cases was the quantity limited in any manner, except by the words "more or less," while in this case the quantity of rock and earth was capable of exact ascertainment upon the completion of the work, which was itself precisely defined. Another case, cited by appellant, illustrates this distinction. That is the case of Brawley v. U. S., 11 Ct. Cl. 522, where the court quoted with approval both of the cases above cited, and said: "In each of these cases which we have cited, it will be seen that the contract was for a definite quantity, with the words 'more or less,' added thereto without reference to any other method of determining and making certain what appeared to be rendered uncertain by the latter words. To give force to the words 'more or less' in such connection to the full extent of their literal meaning would be to allow either party practically to avoid the whole contract, except as to the price of the goods actually delivered and accepted. This would clearly be an unreasonable construction, and not in acordance with the plain intent of the parties." In the case last above cited, however, the quantity specifically mentioned was immediately followed by the words "more or less, as shall be determined by the post commander;" and the court held that the specified quantity was subject to his control, and that both parties agreed thereto by adopting that language. So, in the case at bar, the controlling words of the contract are that the contractor will "furnish the materials and do the following work, to wit, the construction of section five of the sea wall and thoroughfare and wharf;" and that the quantities named are only estimates of the material required for that work, the requirements of the work being the ultimate and controlling measure of the quantity. While an accurate computation of the amount or quantity of material required could not be made in advance of the work, so gross an error in the estimate of the quantity of stone required is incomprehensible. But the extent of the error does not affect the construction we have given to the contract. It is not true, as argued by appellant, that under this contract the contractor could have been compelled to furnish the estimated quantity of stone and earth, unless qualified by the further statement that the whole of such estimates were required for the erection of the section of the sea wall embraced in his contract. That contract he was bound to fulfill, whether it required more or less than the quantity of materials estimated, but for all that he used he would have received compensation at the contract rates.

Other points are urged with much force by appellant, but, in view of the conclusion reached as to the construction of the contract, it is not necessary to consider them, since if they were all determined in appellant's favor the result would not be changed. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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4 Cal. Unrep. 691

MATTS et ux. v. BORBA. (No. 15,381.)

(Supreme Court of California. June 26, 1894.)

SLANDER—EVIDENCE—REMARKS OF COUNSEL.

1. In an action for slander, for calling plaintiff "valhaca," plaintiff and several witnesses (all illiterate Portuguese) testified that the word was in common use among the Portuguese, and meant "whore." Defendant's witnesses, some of whom were educated Portuguese, testified that the term "valhaca," did not mean "unchastity," but that it meant "knave, rogue, crafty," and that the word "puta" was in common use, meaning "whore." *Held* sufficient to support a verdict that defendant intended to impute unchastity to plaintiff.

2. After defendant had examined his witnesses, and rested, plaintiff gave evidence that the word "valhaca" meant "whore." *Held* that, if the evidence was improperly admitted, defendant was not prejudiced, there being already sufficient evidence to support the verdict.

3. It was agreed that the cause should be submitted without argument, but plaintiff's attorney said: "I want to make this statement to the jury: That plaintiffs, having commenced this case in the superior court, cannot recover any costs unless they recover $300 damages." And the court said, "You must not make those statements. *Held* that, if defendant thought the court had not sufficiently informed the jury not to consider the remarks, he should have asked for an instruction to that effect, and that a new trial would not be granted on account of such remarks.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Frank Matts and wife against Joseph Borba. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Wm. L. Gill, for appellant. W. B. Hardy, for respondents.

HAYNES, C. Action for slander. The plaintiffs had judgment, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. The parties plaintiff and defendant are Portuguese, and the slanderous words are charged to have been spoken of and concerning the plaintiff Catherine Matts, in the Portuguese language, in the presence and hearing of persons who understood that language, to wit: "'Valhaca! quando e que es meus homes foram enhar bariga de carne a tua casa.' Plaintiffs aver that said words signify, and are understood to mean, in the English language, 'You whore! when my men went and filled their bellies with meat at your house,' and the said Portuguese words were so understood by the said persons in whose presence and hearing they were spoken; that the defendant meant by said words so spoken to impute to the plaintiff Catherine Matts a want of chastity." The answer denied speaking the said words, or any of them, or any other words meaning to impute a want of chastity, or that said words, or any of them, signify, or are understood to mean, "you whore," or "whore," or were so understood by any person who heard them. Both the plaintiffs and several other witnesses testified to the speaking by defendant of the Portuguese words set out in the complaint, and that the word "valhaca" has the meaning attributed to it in the complaint, some of the witnesses defining it to mean a "private whore; that is, a married woman who is doing it on the sly;" that "the word is in common use among the Portuguese to express a woman who has fallen so low as to be common with every one, even without pay;" while the defendant, and about the same number of witnesses, testified that the words charged were not spoken. All the witnesses in chief on the part of the plaintiff were illiterate, and, with the exception of Mrs. Matts, could not read or write, and she only to a limited extent. The defendant, in addition to the witnesses who were present, and who testified, as positively as witnesses can to a negative fact, that the words were not spoken, called six intelligent Portuguese, two or three of whom had received a collegiate education in Portugal, who testified that "'valhaca' means 'knave, rogue, rascal, scamp, scapegrace, crafty, cunning;'" that it never means "unchastity;" that they never heard it used to impute unchastity; that the word in common use, having the meaning of the English word "whore," is "puta;" and that "meretriz" and "prostituta" are also used to express the same meaning.

Appellant, in his statement on motion for a new trial, specified as one of the grounds thereof that the evidence was insufficient to justify the verdict as to the meaning of the words alleged to have been spoken. Respondents contend that this ground cannot be considered, for the reason that it was not included in appellant's notice of intention to move for a new trial. The only clause in the notice which could possibly authorize the specification in question is the following: "Third. Insufficiency of the evidence to justify the decisions and rulings of the court, and that said rulings and decisions are against law." It is difficult to determine what was meant by this statement as a ground of motion for a new trial, nor do I think it necessary to determine it, as it will not affect our conclusions. That there was a conflict in the evidence as to whether the defendant spoke the Portuguese words charged in the complaint is beyond question, even if we add to the evidence upon this point the additional fact that Mrs. Matts, upon a former trial, based upon the occurrences which took place at the time the words are alleged to have been spoken, testified to different language used by defendant, to which she made the same response she now testifies she made to the language stated in the complaint, and in which she applied to defendant's wife the epithet "puta" to express the same meaning that was given by plaintiff's witnesses to the word "valhaca." Similar doubts may be expressed as to the meaning intended to be conveyed by the word "valhaca;" but doubts upon these questions of fact would neither justify the court below in setting aside the verdict of the jury, nor this court in reversing the order denying a new trial. Appellant insists, however, that the testimony of his witnesses as to the meaning of the word "valhaca" leaves no doubt; that, in effect, it is wholly uncontradicted. As to the primary meaning of the word, this is true. Standing alone, as a single word, it does not imply want of chastity, but, like many words in the English language, no definition of which, as found in the dictionaries, refer to chastity, or the want of it, are nevertheless used to imply a want of chastity. There are other words, however, corresponding very closely to the word "valhaca," which, in their ordinary use, do not refer to the subject of chastity, but yet imply qualities which embrace chastity. The word "dishonest," for example, corresponds very nearly, in its primary meaning, to the word "valhaca." The first definition given by Webster is: "Wanting in honesty; void of integrity; faithless; fraudulent; disposed to deceive or cheat," while the third meaning given is "dishonorable; disgraceful; shameful; wanton; unchaste." So Shakespeare used the word "honest" to denote chastity: "Wives may be merry, and yet honest too." Even the word "occupy" was formerly used to express sexual intercourse, though now never so used. That the word "valhaca" is capable, without greatly distorting some of the definitions given to it, of expressing the imputed meaning, is reasonably clear, and the evidence in this regard is sufficient to support the verdict.

It is also specified by appellant that the court erred in giving the first and second instructions requested by the plaintiffs. It is sufficient to say of these instructions that, if they had been the only instructions given, they were too general to be of much aid to the jury. But the court, in other instructions given of its own motion, fully and very fairly instructed the jury that they must, in order to warrant a verdict against the defendant, not only find that the words charged were spoken by the defendant, but that they have a meaning imputing, and were intended to impute to Mrs. Matts, a want of chastity; that it was not sufficient to find that they were insolent and reviling or opprobrious, but that they had the meaning charged in the complaint; and that, in ascertaining the meaning of the speaker, reference must be had to the words used, and the circumstances under which they were spoken. These and other expressions used by the court must be taken with the more general statements in the instructions excepted to, there being no real inconsistency between them.

Plaintiffs offered in evidence a lease of the land where they resided, and where the alleged slanderous words were spoken. The lease was made to the husband, and had not expired. The difficulty arose from a new tenant going upon the premises with several teams, hauling lumber to erect a barn; one of the teams being driven by defendant, between whom and the plaintiffs ill feelings existed. Objection was made to the introduction of the lease, and, to the ruling of the court permitting its introduction, defendant excepted. We see no ground upon which it can be said that defendant was prejudiced, even if it be conceded that the evidence was immaterial.

After the defendant had examined his witnesses, and rested, the plaintiffs called several witnesses, who were permitted, against defendant's objection, to testify that the word "valhaca" meant "whore." The objection was that it was testimony in chief, and not in rebuttal. This evidence might have been properly received in chief, and indeed was of the same character, and given by witnesses having no better qualifications as to learning than those first examined. Appellant contends that the court erred in overruling his objections, no reason being given why they were not called in chief, and cites several cases in support of his contention. These cases were all where the testimony offered in rebuttal was in fact evidence in chief, and was excluded by the court, and the exclusion was sustained upon appeal. In this case, if the evidence offered in rebuttal had been excluded upon the ground urged by appellant, we see no reason why such ruling would not have been affirmed, for the same reason that the action of the court in receiving it should be affirmed. In Lux v. Haggin, 69 Cal. 414, 10 Pac. 674, it was said: "All agree that it is within the discretion of the trial court to admit additional evidence in support of the plaintiff's case after the defendant has rested. Of course, it is always safer to admit evidence claimed to be in reply, if the court entertains doubts of its admissibility." Section 2042, Code Civ. Proc., is as follows: "The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence." And subdivision 3 of section 607 provides: "The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Defendant's witnesses having testified to the meaning of the word as given in the dictionaries, and its primary meaning as used by educated people, it would have been competent for plaintiffs to rebut by showing that a secondary or corrupted meaning had been given it. If the evidence ostensibly introduced in rebuttal proved not to be properly of that character, the defendant still had recourse to a motion to strike out, when the court, with the evidence before it, could more accurately determine its character. The record does not show the ground upon which it was received; that is, whether it was regarded as properly in rebuttal, or whether the court, in the exercise of its discretion, and in the furtherance of justice, permitted the plaintiffs to strengthen their case by the admission of original testimony; nor do we think it necessary that it should appear. Upon the point in question there was already sufficient evidence to have supported the verdict, and hence we cannot say that the defendant was prejudiced, or that upon a new trial the evidence given by these witnesses could be disproved.

Upon the conclusion of the evidence, it was agreed that the cause be submitted to the jury without argument; that thereupon the attorney for the plaintiffs arose, and said to the jury: "I do not care to argue this case, but I want to make this statement to the jury: That, plaintiffs having commenced this case in the superior court, they cannot recover any costs unless they recover three hundred dollars damages." Defendant's counsel said: "I object to that statement." The Court: "You must not make those statements." No request was made of the court to instruct the jury to disregard the statement of counsel, nor was any exception taken. The conduct of plaintiffs' counsel in this regard was highly improper, but it was at once met by a prompt and decided rebuke from the court. This the court no doubt considered sufficient to inform the jury that they must not be influenced by it. If defendant thought it not sufficient, he should have requested the court to give such instruction as he deemed proper, and, upon a refusal, to have taken an exception. Conceding that the verdict was for a sum suspiciously near the line ($305), we cannot say that the improper remarks of counsel in fact influenced the jury. Such irregularities can usually be dealt with by the trial court so as to protect parties against injury, and in proper cases afford relief by granting a new trial. We do not think the court erred in refusing to grant a new trial upon this, nor upon any of the grounds assigned. We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

(103 Cal. 377)

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HOUSER. (No. 19,366.)

(Supreme Court of California. July 17, 1894.)

CHANGE OF VENUE—CONVENIENCE OF WITNESSES.

It is no abuse of discretion to refuse plaintiff a change of venue for the convenience of witnesses, when defendant files a stipulation admitting the truth of the facts alleged in the complaint.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Stockton Combined Harvester & Agricultural Works (a corporation) against Daniel Houser on a stock assessment. Plaintiff's notice for a change of venue denied. Plaintiff appeals. Affirmed.

Nicoll & Orr, for appellant. Stanton L. Carter and Anderson & Anderson, for respondent.

BELCHER, C. This is an appeal by the plaintiff from an order of the superior court of Los Angeles county denying its motion for a change of the place of trial of the action from that county to San Joaquin county. The motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by the change. The plaintiff was a corporation organized under the laws of this state, and having its principal place of business at the city of Stockton, in San Joaquin county. Its capital stock was $300,000, divided into 3,000 shares, of which about 2,800 had been actually subscribed for and taken. On October 4, 1892, the defendant was the owner and holder of 400 shares of the said capital stock, and at that time $50 on each share of the subscribed capital stock had been fully paid up. The action was brought to recover an assessment of $25 per share, levied on October 4, 1892, on the stock held by defendant. The complaint averred that the plaintiff was indebted to divers persons, companies, and corporations in sums aggregating $150,000, and was unable to meet its liabilities and satisfy the claims of its creditors, and that to meet such liabilities an assessment in the sum of $25 per share on the subscribed capital stock was necessary; that the assessment was duly levied as required by statute, and notice of the order, in the form prescribed, was published, and copies of the notice were sent through the mails, addressed to each of plaintiff's stockholders, including the defendant, at his place of residence; that the defendant had not paid the assessment on his stock, or any part thereof, and that before the time fixed for the sale of the delinquent stock the board of directors of the plaintiff corporation, by resolution duly adopted, elected to waive further proceedings, under chapter 2, tit. 1, pt. 4, of the Civil Code, for the collection of delinquent assessments, and elected to proceed by action to recover the amount of said assessment due from defendant. The only issues raised by the answer were as to the indebtedness of the plaintiff, its inability to meet its liabilities, the necessity of the levying the assessment, the adoption of the resolution levying the assessment, the publication by the secretary of the corporation of the notice of the assessment set out, the sending a copy of such notice through the mails to each of the said stockholders, and the adoption by the board of directors of plaintiff of the resolution electing to waive further proceedings, under the chapter of the Civil Code above referred to, for the collection of said alleged assessment, and ordering an action commenced to collect the same.

The motion to change the venue was based upon an affidavit of the plaintiff's president, which stated that all the transactions referred to in the complaint occurred in the county of San Joaquin; that all the officers and agents of the plaintiff resided in that county, except one, who resided in the county of Butte; that the affiant and certain other persons would be material and necessary witnesses at the trial of the action, and were the only ones by whom the plaintiff could prove the necessary facts; and that no witness except the defendant, whose testimony would be material or needful, resided in the county of Los Angeles. The affidavit also set out what the plaintiff expected to prove by each of its said witnesses. When the motion was called for hearing, counsel for defendant produced and filed a stipulation, signed by them, which admitted, in substance, that all the facts alleged in the complaint were true, and thus practically rendered it unnecessary for the plaintiff to call and examine any of its said witnesses. After the stipulation was filed, and upon due consideration, the court denied the motion, and the plaintiff excepted to the ruling. In support of the appeal it is claimed that, as no counter affidavits were filed, it was, in effect, admitted that the convenience of witnesses and the ends of justice would be promoted by the change asked for, and that, under the circumstances shown, plaintiff had a statutory right to have the motion granted. This claim cannot be sustained. Applications like this are addressed to the sound legal discretion of the trial court, and its action cannot be disturbed on appeal unless it clearly appears that there was an abuse of that discretion. Hanchett v. Finch, 47 Cal. 192; Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676; People v. Vincent, 95 Cal. 427, 30 Pac. 581. Here we are unable to see that the court in any way abused its discretion in denying the motion. The stipulation admitted the facts, and obviated the necessity of proving them. No counter affidavits were necessary. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the forgeoing opinion, the order appealed from is affirmed.

FIELD v. ANDRADA et al. (No. 19,461.)

(Supreme Court of California. July 16, 1894.)

Bond on Appeal.

A bond on an appeal from an order denying a motion to dismiss, and an order denying a new trial, must state that an appeal has been taken from both orders.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Field against Andrada and others. From an order denying their motion to dismiss the action, and from an order denying a new trial, defendants appeal. Dismissed.

R. Dunnigan, for appellants. Wells, Munroe & Lee and E. A. Meserve, for respondent.

PER CURIAM. Upon the authority of Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; and Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650,—the appeal from the order denying defendant's motion to dismiss the action, and the appeal from the order denying a new trial, are dismissed.

(4 Cal. Unrep. 701)

SAVINGS & LOAN SOC. v. BURNETT et al. (No. 14,553.)[1]

(Supreme Court of California. June 27, 1894.)

Trust Deed—Security for Future Advances—Conveyance by Grantor — Sale by Trustees — Title of Purchaser — Quieting Title — Pleading.

1. A deed of trust to secure $20,000, and also all further indebtedness of the grantor to the third party that might be contracted during the continuance of the trust, not exceeding $35,000, provided that on payment the trustees should reconvey to the grantor, his heirs or assigns, and contained a power of sale on default. *Held*, that where such grantor afterwards made an absolute conveyance to B., and paid the original debt secured, such deed of trust afforded no security for other sums advanced by such third party to the grantor for the purposes stated therein, with actual notice of such conveyance, and that a purchaser at the trustee's sale made on default in payment of such advances held the title in trust for B.

2. In an action by such purchaser to quiet title, the court found that the grantor was seised in fee originally, that he executed the deed of trust, and that default was made, and the property sold to plaintiff. *Held*, that such findings did not establish a full fee-simple title

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[1] Reversed in banc. See 39 Pac. 323.

in plaintiff, where it appeared that such default in payment was of sums not secured by the deed of trust.

3. Even if $2,000 of the original debt secured was unpaid, a sale of the property regarded by plaintiff as sufficient security for $35,000 did not give an absolute legal title to the purchaser having knowledge of all the facts.

4. The complaint in an action to quiet title alleged that the grantor was holding the property against his own deed, and that plaintiff was seised of and holds all the estate, right, title, and interest, at law or in equity, which such grantor ever had or could acquire. The answer specifically denied such allegations, and alleged the execution of a deed to one B., but asked no affirmative relief. *Held*, that the pleadings warrant findings and sustain a judgment for defendants.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the Savings & Loan Society against John M. Burnett and others to quiet title. From a judgment for defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

A. N. Drown, for appellant. Jarboe & Jarboe and Robt. H. Countryman (Robt. Y. Hayne, of counsel), for respondents.

HAYNES, C. This action was brought by the Savings & Loan Society against Denis Mahoney, John M. Burnett personally, and also as trustee, and the nine children of Mahoney, for the purpose of quieting the title of the plaintiff to certain real estate in the city of San Francisco, and determining the adverse claim of the defendants thereto. The defendants had judgment, and the plaintiff appeals therefrom, and from an order denying its motion for a new trial.

On May 22, 1868, Mahoney, being then the owner of the land in question, borrowed $20,000 from appellant, and gave his promissory note therefor, and also executed a deed of trust of the premises described in the complaint to E. W. Burr and B. D. Dean to secure said sum, and also "all further indebtedness of the party of the first part to the party of the third part [appellant] that might be contracted during the continuance of the trust, not exceeding $35,000 at any one time, whether evidenced by promissory notes or otherwise, whether for interest, insurance, or for moneys expended in and about said premises for repairs, taxes, liens, or incumbrances," etc., and provided that upon full payment of all existing and accruing indebtedness the trustees should reconvey to Mahoney, his heirs or assigns. It also contained a power of sale upon default in the repayment of the sum borrowed and the interest thereon, "or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon, and all future advances, disbursements, accounts, balances, and dues,"—the power to be executed, on the application of appellant, by sale at public auction, and by conveyance to the purchaser,—and further provided that such deed of conveyance, with its recitals of default and notice of sale, should be conclusive proof thereof, "and effectual and conclusive against the party of the first part, his heirs and assigns, and all other persons." On December 28, 1881, the premises in question (the same as described in said deed of trust) were sold thereunder by the trustees in the manner provided, and appellant became the purchaser, its bid being $17,250 (that being the amount then claimed to be due appellant, and secured by the deed of trust); and on the next day the trustees executed a deed in due form to appellant, and under this deed it claims title. Respondents answered, taking issue upon appellant's seisin and ownership, and claimed and alleged title to the land in question in John M. Burnett, as trustee under a deed executed to him by said Denis Mahoney on March 6, 1869, declaring certain trusts in favor of Mahoney's nine children, a copy of which deed is attached to the answer. The trusts declared in this deed were "to receive the issues, rents, and profits of said premises, and apply the same, or such portion thereof as shall be necessary, for the support, maintenance, and education of the nine children of Denis Mahoney," until the youngest of said children should arrive at age; that any surplus profits should be invested, and, when the youngest child should arrive at majority, to convey to them the said lands,—each taking an equal undivided interest, and a like interest in the accumulations. It was also provided that no estate should vest in the trustee, directly, contingently, or otherwise, except for the purposes of the trust. Said deed of trust also contained the following clause: "And in case it should become advisable, in the judgment of the said Denis Mahoney and Burnett, to make improvements upon said property, the said trustee is hereby authorized to raise money, by mortgage or otherwise, on said property, or such part thereof as may be necessary for that purpose, and to pay the same, and all charges and interest thereon, out of the rents and profits of the whole of said property, after the application of so much thereof as may be necessary for the support, maintenance, and education of said children, in place of investing the said surplus as hereinbefore provided."

The point of the controversy is this: Appellant claims that the amount for which the property was sold to it under said first deed of trust was due to it for moneys loaned and advances made for taxes, street assessments, and other purposes, directly connected with the property, including part of the original loan, and that all these sums, whether loaned or advanced before or after the execution of the trust deed to Burnett, were secured by said first deed of trust, and that, the sale being in all respects regular, the entire title to the premises passed to it by the sale and conveyance thereunder, while respondents claim that the original loan, and the interest thereon, and all advancements made by appellant prior to the execution of the trust deed to Burnett, were paid and discharged; that the sum for which the property was sold by appellant consisted of loans and advancements made after the conveyance in trust to Burnett, and with knowledge of such conveyance, and therefore were not secured by said first deed of trust; that the sale was therefore without authority, and the deed to appellant pursuant to said sale conveyed no title.

The findings state the facts very fully, and, in addition to the general facts above stated, other facts found by the court are essential to a consideration of the points made by appellant. The original loan of $20,000 was to be paid in 72 monthly installments, commencing in September, 1868, and at the date of the trust deed to Burnett, March 6, 1869, the amount of that loan remaining unpaid was $19,754.49. Appellant paid the taxes on the property covered by the deed of trust for the years 1869–70, 1870–71, and 1871–72, and also a considerable sum for insurance. On May 25, 1871, money was required for repairs and improvements on the property; and, on that day, appellant, at the request of Mahoney and of Burnett, claiming to act as trustee, loaned or advanced $500 for that purpose, and on March 5, 1872, for some purpose connected with the property, and, at the like request, loaned the further sum of $650. For these sums, respectively, Mahoney and Burnett gave their promissory notes payable at one year,—the latter signing the notes as trustee,—and in each of these notes it was recited that they were secured by the deed of trust made by Mahoney to Burr and Dean, reciting its date, and where recorded. Prior to the execution of these notes the insurance above mentioned, and the taxes for 1869–70, had been repaid; and on June 11, 1870, all of the original loan had been paid, except the sum of $2,000. On November 13, 1873, there remained unpaid said balance of $2,000 and the said two promissory notes above mentioned, together with interest and two years' taxes paid by appellant; and Mahoney and Burnett then desired to obtain the further sum of $249, with which to pay a street assessment charged upon the property. Upon a statement of these several matters, with accrued interest, it was found that they amounted to $4,565; and thereupon Mahoney and Burnett—the latter claiming to act as trustee—executed a promissory note for that sum, payable to appellant, at one year, with interest, and this note also recited that it was secured by said deed of trust made by Mahoney to Burr and Dean; said Burnett signing the note, "John M. Burnett, Trustee of Mahoney Estate." In this connection the court, after finding the indebtedness for which said note was given, and setting out the note in full, proceeded to find as follows: "And that the said note last above referred to was taken and received by the said Savings & Loan Society, as and in payment and satisfaction and extinguishment of all sums of money then due to it by said Denis Mahoney or the said John M. Burnett, and of all claims and demands which it then had against the said Mahoney or the said Burnett, or either of them; and that at the time of the execution of the note last herein referred to the said plaintiff stamped, and marked as paid and canceled, and surrendered up and delivered up to the said Denis Mahoney, the promissory note for the sum of $20,000, hereinbefore referred to, and marked and entered the same as satisfied and canceled upon the books of record kept by it; and that the note last above referred to was taken in payment and satisfaction of all the sums of money hereinbefore above referred to." After this transaction, appellant paid the taxes on the property up to and including the fiscal year 1881–82, and certain insurance on buildings, and also paid several street assessments, at the request of Mahoney and Burnett, which had become liens upon the property in question; and these payments, together with said promissory note of November 13, 1873, for $4,565, and accrued interest on all said sums, made up the amount of the claim for which said property was sold by the trustees, Burr and Dean, to appellant, after deducting certain payments of interest on said note, which payments were continued to August, 1878. It is also found that the sale of the property was several times postponed, at the request of Mahoney and Burnett, upon payment by them of the cost of publishing the notices of sale.

Appellant's first point is that the findings do not support the judgment, inasmuch as they show that plaintiff was seised in fee of the land at the commencement of the suit. It is not claimed that there is an express finding of title in fee in the plaintiff, but that it is found that Denis Mahoney was seised in fee originally; that he executed the deed of trust to Burr and Dean; that default was made, and the property sold and conveyed to the plaintiff. And these facts, it is argued, "establish irresistibly and completely an absolute and full fee-simple title in appellant at the dates alleged." But this argument assumes either that such title was vested in the trustees, Burr and Dean,—that they could, under any and all circumstances, convey a good title,—or that a default was in fact made, under which the trustees were authorized to sell and convey. The deed of trust specified the only condition upon which the trustees could sell and convey; and unless that condition existed the sale and conveyance were each void, under section 870 of the Civil Code, which provides: "Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void." By the express terms of the deed of trust, the power to sell depended upon Mahoney's default in the payment of moneys secured thereby, and upon payment they were bound to reconvey to Mahoney. It may be conceded that their deed to appellant vested a prima facie title in appellant; but, as this is a suit in equity to quiet title, appellant must have something more than an apparent title. But, in this connection, appellant insists that no title was vested in Burnett by the trust deed to him; that, by the deed of trust to Burr and Dean, Mahoney "emptied himself of his whole estate, and there was nothing left in him to be conveyed to Burnett." The learned counsel is mistaken. There was left in Mahoney the right of possession, carrying with it the rents and profits, and the right, upon payment of his indebtedness to the Savings & Loan Society, to have the entire estate and title as he had held and enjoyed it before; and this right to the possession and use of the property, and the right to have again the unincumbered estate and title upon payment of his debt, he could and did convey to Burnett. Whether the deed of trust to Burr and Dean vested in them the legal title to the land is controverted by respondent; but, assuming that it did, upon payment or satisfaction of the debt thereby secured the trustees had, at the most, the dry legal title, without any interest or ownership in the land. "When the purposes for which an express trust was created cease, the estate of the trustee also ceases." Id. § 871. And for that reason, if the purposes of the trust here created had ceased by payment of the debt, the subsequent deed of the trustees to appellant conveyed no estate or interest in the land; and whether such payment had been made before such conveyance is therefore a vital question in the case, unless it shall be held that the deed of trust to Burr and Dean was a valid security for all advances made by appellant,—as well those made after knowledge of the conveyance to Burnett as of those made before.

1. All the advances made by appellant after the original sum of $20,000 were optional. The terms of the deed of trust did not require it to make further advances. Assuming that appellant had actual notice of the conveyance to Burnett in trust for the children of Mahoney, it had notice that Mahoney no longer had power to deal with or incumber the property. To the extent the terms of the contract between them, expressed in the deed of trust, required them to make loans or advancements, if any, the Savings & Loan Society might safely go, as any conveyance Mahoney might make would be subject to its requirements. Mahoney not only conveyed all the interest he had in the property to Burnett, but he reserved no power or right over it. It is obvious that those cases cited by counsel as to the rights of a subsequent mortgagee, where advancements have been made by a prior mortgagee after notice of the second mortgage, involve quite different facts, for in those cases the mortgagor remained the owner of the property mortgaged, with full power to create additional liens upon it, so that the question there was not as to the validity of the liens, but as to which had priority. The principles involved are applicable here, however, with even greater force. In such cases the great weight of authority seems to establish the following propositions: (1) A mortgage for obligatory advances is a lien from the date of its execution, and will therefore secure such advances, although other incumbrances are put upon the property before such advances are in fact made, and such advances are not affected by the mortgagee's knowledge of the subsequent incumbrances. (2) But where the mortgagee is not bound to make the advances, and has actual notice of a later incumbrance, such later incumbrance will take precedence of the first mortgage, as to all advances made after such notice. For a discussion of these propositions, see 1 Jones, Mortg. §§ 369-371, and the numerous cases there cited, and also Tapia v. Demartini, 77 Cal. 387, 19 Pac. 641. If, therefore, Mahoney had mortgaged the property in question to Burnett, and appellant, with actual notice of such mortgage, had made these advances to Mahoney, such advances would have been postponed, and, as to Burnett's mortgage, would have taken the place of a junior mortgage. Much more, then, would an absolute conveyance by Mahoney cut off the lien of future advances to Mahoney which appellant was not obliged to make. If, therefore, the further advances made with actual notice of the deed to Burnett were secured by the deed of trust to Burr and Dean, it must have been because of Burnett's relation to these advancements, or because of the purposes to which the money advanced was applied. It cannot be questioned that both Burnett and the beneficiaries under the deed of trust to him were charged with notice of the deed of trust to Burr and Dean, and of all sums of money loaned or advanced thereunder prior to the date of the deed to Burnett, and that the property was liable therefor, and for all moneys thereafter advanced (if any were advanced) prior to actual notice to appellant, of such conveyance. But, after such notice to appellant, the deed of trust, which operated as security for moneys theretofore loaned or advanced, could not be extended to further advances unless Burnett had the power, as trustee, to bind his cestuis que trustent, not only for moneys borrowed, but by a security to which he was not a party.

The powers of trustees are thus defined: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." Civ. Code, § 2267. The only clause in the deed of trust of Burnett, empowering the trustee to raise money, has been hereinbefore quoted. No reference is made in any manner to the deed of trust to Burr and Dean as a means of securing money for improvements, nor of any reservation of a power in Mahoney to secure further advances thereunder for any purpose; and, as Burnett did not execute a mortgage or other instrument pledging the trust property, a discussion of his power to do so under the terms of the trust deed is not necessary, for if it be conceded that he had the power to procure all these advancements, and to secure the same by a mortgage with a power of sale, or by a deed of trust such as that in question, which ordinarily creates a strict legal right which may be enforced without the aid of a court of equity, no such legal right was created by Burnett, and the advancements could only be made a charge upon the trust property by the aid of a court of equity. The deed of trust given to secure appellant did not restrict the use of the money loaned to any particular purpose, except as to the payment of taxes, insurance, etc., which the appellant or the trustees were empowered to pay of their own volition; and if, instead of taking the note of November, 1873, for $4,565, the bank had loaned to Mahoney at that date the difference between that sum and $35,000, to which the security was limited, and had taken the note for the last-named sum, and this sum had been used by Mahoney for his individual purposes in no way connected with the property, it would hardly be contended that Mahoney or Burnett, or both jointly, could charge the estate of the children with such a liability; and, if not, it is apparent that appellant's claim is based upon an equity arising from the fact that the moneys so advanced were used to relieve the trust estate from liens which endangered the estate of the beneficiaries, and not because of the deed of trust under which appellant claims they were made, and such equity could not be enforced through or under the terms of a dry legal contract to which Burnett was not a party. The sale to appellant, therefore (assuming the facts found by the court to be sustained by the evidence), did not vest in appellant an absolute estate in the land. Burr and Dean were not only trustees for the bank, but were also trustees for Mahoney, and were bound to reconvey to him or his assigns upon the condition expressed in the deed; and unless the facts existed, authorizing a sale, appellant took the conveyance subject to the same trust imposed upon them. It is true the deed of trust under which the sale was made contained a provision that the recitals in the deed to be made by them to the purchaser "shall be conclusive proof of such default, and of the due publication of such notice [of sale], and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part, his heirs, assigns, and all other persons." But such recitals could only avail for the protection of an innocent purchaser without notice of any want of authority in the trustees to sell, and could not be invoked by appellant for its protection. The deed of trust to Burr and Dean was not an absolute deed of trust, but a deed of trust in the nature of a mortgage. The distinction between these instruments is clearly stated in the recent case of Powell v. Patison, 100 Cal. 235, 34 Pac. 676, and in Perry, Trusts, § 602d. Speaking of mortgages with power of sale and deeds of trust, it is said: "At law, both kinds of deeds purport to convey the legal title to the grantee or creditor or trustee; but in equity the land, the title, and deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.' If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but, if his debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance, or a discharge of the mortgage, as the case may be." Courts do not favor constructions that confer upon trustees absolute and uncontrollable powers. Burr and Dean were not the absolute owners of the property, but were the donees of a power over it for the benefit of appellant; and, if the debt legally secured by the deed of trust to them had been satisfied before the sale, they could convey no greater interest in the property than was then vested in them, and appellant in such case holds the legal title in trust for respondents.

2. Appellant contends, however, that the finding that the note for $4,565, dated November 13, 1873, was taken and received by appellant in payment and satisfaction of all claims and demands which it then had against Mahoney or Burnett, or either of them, is not justified by the evidence; that, if said note was not so taken, at least the $2,000 remaining unpaid of the original loan of $20,000 was a valid lien upon the property, and sufficient to sustain the validity of the sale by the trustees to appellant. We think the evidence sufficient to support the finding. At the time the note for $4,565 was given, there was a balance of $2,000 due upon the original note for $20,000, for which Mahoney alone was liable. In addition to that, some taxes had been paid by appellant, and two small notes for moneys loaned had been given by Mahoney and Burnett, the latter signing as trustee.

The note for $4,565 covered the amount of these several items, and the accrued interest, and upon its execution the $20,000 note was canceled and surrendered; and the note then taken represented the entire claim of appellant at that date, and this note purported to be secured by the deed of trust. There does not appear to have been, in words, any express agreement as to the effect of this transaction in relation to the question of payment. Nothing was said upon that subject. Mr. Burr testified, in substance, that the whole balance was made into one note, instead of having three notes upon which to carry the interest every month, and to that extent the $4,565 note was made at his instance; that the consolidation was merely to facilitate the bookkeeping of the bank. It is conceded that the mere fact of the acceptance of a note for a pre-existing debt does not extinguish it, or that one simple executory contract does not extinguish another for which it is substituted, unless such be the agreement of the parties. Whether such was the agreement of the parties is a question of fact, which the court, in the absence of a jury, was required to determine. Griffith v. Grogan, 12 Cal. 324. In Brown v. Dunckel, 46 Mich. 32, 8 N. W. 537, it was said: "The giving of a note for the debt did not, as a matter of law, operate as a payment of the debt, unless it was so expressly agreed; but it should be understood to be so expressly agreed if the jury could ascertain from the facts and circumstances that it was so mutually understood between the parties." In Stanley v. McElrath, 86 Cal. 455, 25 Pac. 16, it was said: "The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it be offered and accepted as payment." The facts that, as to the balance of the $20,000 note, a new party was added as a joint maker; that the old note was surrendered; that there was not at any time an offer to return the new note, nor any demand for the redelivery of the former; that the new note was set down in the statement of the items comprising the sum for which the property was sold as constituting part of the appellant's claim; that the new note, upon its face, purported to be secured by the deed of trust, which provided for securing other sums besides the $20,000 note,—tend strongly to show such understanding. The giving of a new note is at least a conditional payment, and suspends the first obligation until the maturity of the new note, when the creditor may suspend or cancel the new obligation, and proceed upon the original. Brewster v. Bours, 8 Cal. 506. "When suit is brought against a defendant upon a debt, whether evidenced by a note or otherwise, and it appears that he has given a bill or note for the same debt, which has become mature and is unpaid, while it does not operate as a bar to the suit, it is essential to the plaintiff's recovery that it be produced and surrendered up, or otherwise satisfactorily accounted for at the trial. This is necessary as a safeguard to the defendant, for, if the plaintiff should have passed it off before maturity to a third party, the defendant might be compelled to pay the debt a second time." 2 Daniel, Neg. Inst. § 1275. See, also, Burdick v. Green, 15 Johns. 247; Rayburn v. Day, 27 Ill. 47; Morrison v. Welty, 18 Md. 176. We think there is such evidence as forbids us to set aside the finding that the new note was given and received in payment of the balance due upon the original note. But, even if it were otherwise, we think a sale of the whole property, which was regarded by appellant as sufficient security for $35,000, should not be held to give an absolute legal title to a purchaser having knowledge of all the facts, but that, in such case, appellant, by the purchase, became a trustee, and held no other or better title than that held by Burr and Dean.

3. Appellant further excepts to the findings, in that it is there said that Burnett "claimed to act as trustee," while appellant contends that the evidence shows that he "did act as trustee." What Burnett did, and how he did it, are fully set out in the findings. Whether these acts were the authorized and valid acts of a trustee is a conclusion of law. That he "claimed to act as trustee" is the finding of a pure matter of fact.

4. The finding that the $20,000 note was canceled upon appellant's books is amply sustained by the evidence. Mr. Burr testified that the new note was taken to simplify or facilitate the bookkeeping of the bank, as the monthly interest would be computed upon one note, instead of three. The plain inference is that the account of the $20,000 note was balanced, closed, or canceled. If it had not been closed, the books of the bank would have shown the debt to be $2,000 more than is claimed. Besides, no mention is made of any balance of that account in the statement under which the property was sold.

5. E. W. Burr, a witness on behalf of the plaintiff, was asked by counsel for the plaintiff the following question: "To what extent, if at all, was it the intention of the bank, or of yourself acting for the bank, at the time of taking this $4,565 note, to receive it in extinguishment or satisfaction of the existing obligation or indebtedness?" An objection was sustained, and the same question, varied somewhat in form, was several times repeated, and objections sustained to each. It is not necessary to consider whether the court erred in these rulings, since the final question of the series was not objected to, and in response to that, as well as in the testimony of the same witness to preceding questions, the witness stated all that could be properly said upon the subject, even to including the "purpose" for which, as well as the circumstances under which, it was taken.

6. The finding that appellant had full knowledge of the deed to Burnett from and after the time it was recorded is sustained by the evidence. It is clear that on May 25,

1871, appellant required Burnett, as trustee, to sign the $500 note. Some small amounts had been advanced for taxes and insurance; but these sums were all repaid prior to the making of this note, except the taxes for 1870–71, amounting to $415.37, which was included in the note of November 13, 1873, which the court found was received in payment of all sums then unpaid. While there is no direct evidence of actual knowledge or notice of the Burnett deed prior to May 25, 1871, there was evidence tending to show that such actual notice was obtained from the record presumably at or about the date at which the deed was recorded.

7. The objection that the pleadings do not warrant the findings nor sustain the judgment is not maintainable. The complaint alleged that Denis Mahoney was holding the same against his own deed, and "that plaintiff is seised of, and now holds, all the estate, right, title, and interest, at law or in equity, which said Denis Mahoney ever had, or could at any time acquire, of, in, or to said real property, or any part of the same," and that defendants wrongfully claim, etc. The answer specifically denied all these allegations, and alleged the execution of the trust deed to Burnett. No affirmative relief was prayed for by defendants, and none was given. The issue was upon the title of the plaintiff,—whether, as against the defendants, it had such title as would authorize a decree in its favor,—and the judgment was upon that issue.

The conclusions reached have not been arrived at without difficulty. It has been impossible to notice in detail the very extended and able arguments of counsel, or to close our eyes to the hardship of appellant's situation. Whether any relief may yet be obtained has not been considered, and any language used which might be construed as an intimation upon that point must be disregarded. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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103 Cal. 280

RYAN et al. v. JACQUES et al. (No. 19,250.)

(Supreme Court of California. June 27, 1894.)

STOCKHOLDERS IN CORPORATION — LIABILITY FOR UNPAID SUBSCRIPTIONS—ACTION BY CORPORATE CREDITOR—PLEADING.

1. The complaint in an action by judgment creditors of a corporation alleged that defendant stockholders were the original subscribers for stock, and had only paid a certain amount on the shares, and that a certain amount was yet "due" thereon, for which the stockholders were "liable." Defendants simply denied that any sum was due, and that they were liable for any sum. The court found that no sum was due from defendants, and that they were not liable for any sum. *Held*, that as the allegations "due" and "liable" in the pleadings and findings were mere allegations of law, and as the allegation that only a certain amount had been paid by the stockholders on the share was not denied, judgment for defendants was erroneous.

2. The complaint is not subject to a general demurrer on the ground that it merely alleges that only a certain sum has been paid on the subscriptions by defendants, when it also alleges that defendants were the original subscribers, as it cannot be presumed that defendants sold the stock to persons who made additional payments thereon, and then resold to defendants.

3. In an action by judgment creditors of a corporation for the unpaid balances of stock subscriptions, the defense that defendant stockholders purchased their shares in open market and in good faith, without notice that any amount was unpaid thereon, must be pleaded.

4. A complaint in an action by judgment creditors of a corporation to compel stockholders to pay the unpaid balance on their stock, which, after alleging that the defendants were the owners of the capital stock as original subscribers thereto, and stating the amount held by each, alleges that only a certain sum has been paid on each share held by them, is not demurrable, on the ground that it joins a joint liability of defendants with a several liability, as the complaint shows that the latter allegation was used merely to show the amount paid on the shares, and not the manner in which they were held by defendants.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Henry L. Ryan against Burkill Jacques and others, and Oscar Trippett intervenes. From a judgment for defendants, plaintiff and intervener appeal. Reversed.

Trippett, Boone & Neale, for appellants. J. E. Deakin, James E. Wadham, and Hunsaker, Britt & Goodrich, for respondents.

HAYNES, C. This action was brought against several stockholders in the Santa Rosa Land & Improvement Company by appellant Ryan, to subject an alleged balance remaining unpaid to the corporation upon the stock held by the defendants in satisfaction of a judgment recovered by him against the corporation. Trippett, the other appellant, is also a judgment creditor of the corporation, and came in as an intervener, and sought similar relief. All the defendants had judgment, and this appeal is upon the judgment roll from the judgment in favor of four of the defendants, viz. Burkill Jacques, William H. Anderson, J. E. Deakin, and T. C. Stockton. The appeal as to Anderson was dismissed.

The principal question is as to the sufficiency of a certain allegation of the complaint. Certain other allegations should be stated, however, in order to a proper construction of the clause more particularly in question. After alleging that the capital stock of said corporation is $600,000, divided into 6,000 shares of $100 each, all of which were subscribed for, it is alleged as follows: "On information and belief, plaintiff alleges that the following are the owners of said stock of the said corporation, as original subscribers thereto, and were such owners at the time of the commencement of this action, excepting the defendant George Neale, who is a transferee of an original stockholder." "Burkill Jacques is the owner of three hundred shares of said capital stock, and was such owner at the time this action was commenced." Then follows a similar allegation as to the number of shares held by each of the defendants, and immediately succeeding these allegations is the following: "Upon information and belief, plaintiff alleges that only the sum of $9.50 has been paid by said stockholders upon the capital amount of each and every share of said stock of said corporation held and owned by them, and the present holders thereof are, and each of them is, liable for the balance due upon said stock, to wit, the sum of $90.50 upon each and every share of said capital stock held and owned by them." After alleging that the corporation had failed and refused to levy an assessment to pay plaintiff's judgment, the complaint further alleges: "On information and belief, the plaintiff alleges that there is remaining due to said Santa Rosa Land and Improvement Company from the defendant Burkill Jacques the sum of $27,150, upon the capital stock of said corporation held and owned by him." Allegations in the same language, except as to names and amounts, were made as to each of the other defendants. The complaint in intervention of appellant Trippett was in the same form. The defendants severally demurred to each complaint for misjoinder of parties defendant; also for misjoinder of causes of action, in that a several cause of action against each defendant was joined with a several cause of action against each of the other defendants; and also that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and the defendants answered severally. The only denials necessary to be noticed are the following, taken from the answer of respondent Jacques, the denials of the other respondents being in the same form: "Denies upon and according to his information and belief that the present holders of any or all of the stock mentioned in the said amended complaint are liable, or that any of them is liable, for the sum of $90.50, or any other sum, upon each or any share of the said capital stock." "This defendant denies that there is remaining due the Santa Rosa Land and Improvement Company from this defendant, upon the capital stock of said corporation, now or ever held or owned by him, the sum of $27,150, or any other sum." The court found that plaintiff obtained judgment against the corporation, as alleged; that it remained unreversed and in full force; that execution was issued thereon, and returned wholly unsatisfied; that respondent Jacques, at the time suit was commenced, was the owner of three hundred shares of said stock, Anderson of four hundred shares, Stockton of forty shares, and Deakin of five hundred shares. Then follows this general finding: "(12) That the sum of $90.50 is not, nor is any sum, due upon each and every or any share of stock of said corporation, held or owned by the defendants, from said defendants, or either or any of them, to the Santa Rosa Land and Improvement Company, or any other person. (13) That the sum of $27,150 is not, nor is any other sum, due from said defendant Burkill Jacques to the Santa Rosa Land and Improvement Company, or any other person, upon the capital stock of said corporation." The same finding is made as to each of the other defendants. As conclusions of law, the court found that none of the defendants were indebted to said corporation or to plaintiff or to the intervener, Trippett, in any sum on account of subscriptions to the capital stock or otherwise, and that defendants have judgment for costs.

If the complaint is sufficient as against a general demurrer,—and we think it is,—the findings do not support the judgment. There was no misjoinder of parties or causes of action. There are in the complaint several matters stated which are purely conclusions of law, and some of the facts are not stated with the clearness and precision which good pleading requires. Whether a demurrer for ambiguity would have been sustained, it is not necessary to consider, as no such objection was taken. If, however, facts are stated showing the liability of the defendants, the complaint must be sustained, notwithstanding they are imperfectly stated. Brown v. Weldon, 71 Cal. 393, 12 Pac. 280; Tehama Co. v. Bryan, 68 Cal. 57, 8 Pac. 673; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

There is no finding as to the amount that had been paid or remained unpaid upon each share of the subscribed capital stock, but it is alleged that the par value of the shares is $100, and that only $9.50 had been paid thereon; and neither of these allegations was denied. No finding was therefore required of either fact. Under such circumstances, the court was bound to draw the conclusion that $90.50 remained unpaid upon each share. Any other conclusion would contradict admitted facts. But respondents contend that the allegation in question was of a "joint" ownership and holding, while the other allegations are of a several holding. The references in the clause in question to the preceding allegations by the word "said," and the whole frame of the complaint, show that this clause was not intended to allege how the stock was owned or held, but to show how much had been paid on each share, and how much remained unpaid. It is also contended that this allegation pleads evidence only; that "it might be admitted that the defendants had paid only $9.50 per share on the stock held by them, and yet some precedent owner may have paid the remainder upon each share necessary to complete payments in full, or that defendants may have purchased the stock in open market in good faith, and without notice that any part was unpaid." But, if the defendants had purchased the stock under such circumstances as to relieve them from liability for the amount unpaid, it was matter of defense, to be pleaded and proved by them, and the plaintiff was not bound to anticipate and negative such defense; and, as to the objection that others than the defendants may have paid the $90.50 not paid by them, it is sufficient to say that it was alleged that the stock held by each of the defendants, except Neale, was held by them as original subscribers, and it will not be presumed that they sold their stock after paying $9.50 per share, that the purchasers paid the remainder, and then sold the stock back to the defendants. The allegation that the defendants were the subscribers, that they only paid $9.50 on each share, required them, if they admitted they had only paid that amount, and claimed that they were not liable for the remainder of the subscription price, to plead the facts which exonerated them from such liability. If they still held the stock subscribed for by them, no one else had the right to pay therefor; and if payment had been made by a third party, under such circumstances as entitled the defendants to credit for such payment, it was a payment by them, and might be proved under a proper denial of the averment that only $9.50 had been paid. If defendants had demurred upon the ground of ambiguity or uncertainty, there would be much force in respondents' objections above noticed; but they do not show that a cause of action is not stated, though they point out its imperfections. If a complaint, or any allegation of a complaint, is capable of different constructions, that which the plaintiff gives it or which the court finds necessary to support the action will be given, in the absence of a special demurrer. In other words, a pleading must be construed, for the purpose of determining its effect, with a view to substantial justice between the parties. Code Civ. Proc. § 452.

The allegation of the complaint that defendants are "liable for the balance due upon said stock, to wit, $90.50 upon each and every share," is but a conclusion of law, and the denial by the defendants of their "liability" for that or any other sum raised no issue; and the finding "that the sum of $90.50 is not, nor is any sum, due" is a conclusion of law also, and not the finding of a fact, nor is any fact found from which that conclusion could be drawn. Respondents contend that the word "due," in the finding, is equivalent to "unpaid;" but it must have the same meaning in the complaint, and, if we substitute "unpaid" in the complaint in the place of "due," we have a fact which is not denied in the answer, and is therefore admitted, and hence the finding, as construed by respondents, would contradict the admission. In the absence of a special demurrer, that is pleaded with sufficient certainty which is capable of being certainly ascertained from the complaint. It was so said of findings in Ward v. Clay, 82 Cal. 512, 23 Pac. 50, 227. And that which is sufficiently certain in findings must be sufficiently certain in a complaint. The obligation being to pay $100 on each share, and it being alleged that "only $9.50" had been paid thereon, it is certain that $90.50 remains unpaid. Nor will it help respondents to treat the conclusion of law drawn by the court that defendants are not "indebted" as a finding of fact, for such finding would be contrary to the admission that only $9.50 had been paid, no fact being averred or found which discharged them from liability to pay the remainder of the par value of the stock. The cases cited by respondents to this proposition merely hold that a common count that "defendant is indebted to the plaintiff for goods sold and delivered," etc., was sufficient as a complaint; but it has not been held that an answer to such complaint was sufficient which only denied the "indebtedness." How these so-called "issues," involving only conclusions of law, were treated upon the trial, we cannot know, the appeal being upon the judgment roll alone; but, as the conclusions of law are inconsistent with the facts found, taken with the admission, for want of a denial, that only $9.50 had been paid on each share, the judgment is wrong. I advise that the judgment be reversed, with leave to the parties to amend their pleadings.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with leave to both parties to amend their pleadings.

103 Cal. 108

GREEN et al. v. GREEN et al. (No. 15,380.)

(Supreme Court of California. June 13, 1894.)

DEED—AFTER-ACQUIRED TITLE—RECORDING—ASSIGNMENT OF ERRORS.

1. A deed purporting to convey a fee-simple estate, and also all the after-acquired interest of the grantor, causes any after-acquired interest of the grantor to inure to the benefit of the grantee.

2. Where, at the time of the execution of a deed, the land conveyed was situated in a county which has been subsequently divided, the deed is properly recorded in the county it is in at the time of the recording.

3. An assignment that a certain finding is contrary to the evidence cannot be considered if not raised on motion for new trial.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; W. G. Lorigan, Judge.

Action by Lulu Green and another against Jasper N. Green and another. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Z. N. Goldsby, for appellants. Edw. F. Fitzpatrick, for respondents.

VANCLIEF, C. Action to quiet plaintiffs' alleged title to 160 acres of land situated within the present boundaries of the county of San Mateo. The action was tried and judgment rendered in favor of the plaintiffs, except as to a life estate in the defendant Delana Green, in October, 1888. The defendants moved for a new trial on a statement of the case, which was settled and allowed by a succeeding judge on January 21, 1893. This appeal by the defendants is from an order denying their motion for a new trial, made January 11, 1893.

The land in controversy was pre-empted in 1863 by Havilah Green, husband of the defendant Delana Green. He declared a homestead upon the premises January 2, 1865, and died July 21, 1865. After his death, the land was entered by his heirs, and a United States patent was issued to them on January 10, 1868, pursuant to Rev. St. U. S. § 2269. On December 28, 1867, the defendant Jasper N. Green, and his brother John R. Green, two of the sons and heirs of the deceased, Havilah Green, executed a grant, bargain, and sale deed of the land to their brother Henry H. Green, under whom the plaintiffs claim title by descent, as his heirs. This deed purported to convey absolute title to the land, and also all present and future interest of the grantors therein. On March 12, 1883, Delana Green, widow of Havilah, conveyed the land to defendant Jasper N. Green, reserving a life tenancy in herself. On June 11, 1883, the superior court set the premises apart as a homestead for the use of the widow, Delana, and on July 9, 1883, she conveyed the land to William H. Bias, subject to her life estate therein; and on January 31, 1884, Bias conveyed all his rights to Jasper N. Green. The judgment quieted the title of plaintiffs as against Jasper N. Green, and also against Delana Green, excepting her life estate, as to which the judgment quieted her title as against the plaintiffs.

1. Upon these facts, which are principally taken from the answer of the defendants, I think the judgment is clearly right. The conveyance by the defendant Jasper N. Green, on March 28, 1867, to Henry H. Green, being of a title in fee simple absolute, and expressly purporting to convey all after-acquired interest of the grantor, operated upon all the interest thereafter acquired by him, causing it to inure to the benefit of Henry H. Green, and of his heirs, the plaintiffs. Hitchens v. Nougues, 11 Cal. 28; Clark v. Baker, 14 Cal. 613; Quivey v. Baker, 37 Cal. 465; Dalton v. Hamilton, 50 Cal. 423; Civ. Code, § 1106.

2. Appellants contend that a certified copy of the record of the deed of March 28, 1867, was not competent evidence of the contents or execution of that deed, for the reason that the deed was not recorded in Santa Cruz county, in which the land was situated at the time that deed was executed. The land was situated in Pescadero township, in Santa Cruz county, at the time the deed was executed and acknowledged, and the execution thereof was acknowledged before Robert Knowles, a justice of the peace in that township, on the day the deed was executed. In March, 1868, Pescadero township was severed from Santa Cruz county and annexed to San Mateo county. The deed was not recorded until June 20, 1872, when it was recorded in San Mateo county. The acknowledgment is in due form; and besides, Knowles, who took it, also signed as a witness to the execution, and testified at the trial that the deed was executed in his presence. The deed was properly recorded in the county in which the land was situated at the time of recording (Civ. Code, § 1169), and a certified copy of the record was prima facie evidence of the execution of the deed, since it was proved that the original was not in the possession or under the control of the plaintiff. Code Civ. Proc. § 1951, as approved March, 1874 (in force at the time of trial); Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889.

3. Appellants contend that the finding by the court that plaintiffs' cause of action was not barred by the statute of limitations is not justified by the evidence. But there is no specification in the statement on motion for a new trial of any deficiency of evidence in respect to that finding.

Other points made are so obviously untenable that they merit no special consideration. I think the order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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103 Cal. 97

DIMOND v. SANDERSON. (No. 15,359.)

(Supreme Court of California. June 13, 1894.)

NOTE BY HUSBAND TO WIFE—PRESUMPTION—UNDUE INFLUENCE—BURDEN OF PROOF.

Civ. Code, § 158, provides that husband or wife may enter into any transaction with the other, respecting property, which either might, if unmarried, subject "to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." Section 2235 provides that all transactions between a trustee and his beneficiary, by which the former obtains any advantage, "are presumed to be entered into by the latter without consideration and under undue influence." Sections 1614, 1615, provide that a written instrument imports a consideration, and that the burden of showing want of it lies with the person seeking to avoid it. *Held* that, in an action on a note given by a husband to his wife, the burden was not on plaintiff to show sufficient consideration and absence of undue influence, and that no presumption of undue influence could arise until defendant showed want of consideration, or that an unfair advantage was obtained by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Lydia E. Dimond against Lemuel A. Sanderson on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Jacob Samuels, for appellant. Andrew Thorne, for respondent.

HAYNES, C. This action was brought upon a promissory note made by the defendant June 1, 1888, whereby he promised to pay Lydia Emma Sanderson $6,000 at 24 months after date, with interest payable monthly. The complaint is in the usual form, except that it alleges "that Lydia Emma Sanderson was the name of the plaintiff prior to her marriage with Henry P. Dimond on the 25th day of June, 1890; that the name of the plaintiff is now Lydia Emma Dimond; and that the subject-matter of this action concerns and is the separate property of the plaintiff." Defendant's answer contained three defenses: (1) Admitted the making and delivery of the note, but denied that anything remained unpaid, due, or owing thereon, or that he was indebted thereon. (2) That he received no consideration for the note. And (3) that at the time the note was made the plaintiff and defendant were husband and wife; alleged certain misconduct of the wife; that her affections were alienated by another; that he gave the note under certain promises made by the plaintiff, which were not kept, and with a view to regain her affections, and upon no other consideration; that she remained with him but a short time; that he procured a divorce in December, 1889; and that plaintiff and Dimond intermarried in June, 1890. Upon the trial the plaintiff testified in chief that defendant was her former husband, and that certain payments, and no other, had been made upon the note. Upon cross-examination she stated her maiden name; that she was married to defendant in 1877; and that she and defendant were husband and wife until December 29, 1889. Plaintiff put the note in evidence and rested, and the defendant offered no evidence. Findings and judgment were in favor of plaintiff, and the defendant appeals from the judgment upon the judgment roll, and a bill of exceptions setting out the evidence above stated.

Appellant insists that the plaintiff failed to make out her case, because it appeared that she and defendant were husband and wife at the time the note was given, and that that fact threw upon her the burden of proving a sufficient consideration for the note, and that it was not given under undue influence. This contention he bases upon the following provisions of the Civil Code:

"Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

"Sec. 2235. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence of the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

The only cases cited by appellant, involving the confidential relation of husband and wife, are Brison v. Brison, 75 Cal., at page 528, 17 Pac. 689, and Jackson v. Jackson, 94 Cal., at page 461, 29 Pac. 957. It is conceded, however, that neither of these cases decides the very point at issue, and that this court has never expressed an opinion upon the question here presented. In each of the cases above cited the husband had conveyed real estate to the wife, and sought to compel a reconveyance, and of necessity assumed the burden of proving the circumstances under which the conveyance was made, and which entitled them to a reconveyance. Laying aside the distinction between the subject of those actions and of this, if the action here had been brought by the husband to have the note canceled upon the ground that it was without consideration, or had been obtained fraudulently or by undue influence, these cases would have been in point. Appellant's contention would destroy the effect of another presumption declared by the Code, as well as an express provision as to the burden of proof. Section 1614 of the Civil Code declares that "a written instrument is presumptive evidence of a consideration;" and section 1615 provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." These, it is said, are general provisions, while sections 158 and 2235 of the Civil Code are special, and therefore control. But all these provisions should be harmonized and given effect, if possible, and this, we think, may be accomplished. Section 2231, Civ. Code, is as follows: "A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary." And the transactions referred to in section 2235, to which the "presumption" there mentioned attaches, are those by which the trustee "obtains any advantage from his beneficiary." The relation of husband and wife is not that of trustee and beneficiary, though it is a confidential relation, and transactions between them are to be considered in the same light and controlled by the same general rules affecting the confidential relation of trustee and beneficiary; but whether any particular transaction between husband and wife creates a trust, and, if so, which is the trustee and which the beneficiary, must depend upon the facts of the particular transaction involved in the controversy. The giving of the promissory note in question does not indicate a trust. It is an ordinary contract. Being in writing, the law presumes a sufficient consideration, though it may be in fact wholly without consideration. If it had been given in consideration of $6,000 then loaned by the wife, or for the amount of a debt then owing to her, no presumption of undue influence could arise to defeat the obligation, because it would not appear that she had obtained any "advantage" over the defendant; and the presumption arising from the written obligation that the consideration is sufficient repels the assumption that plaintiff obtained any advantage by the transaction. The moment it appears, however, that "an unfair advantage" has been obtained, the presumption that it was procured by undue influence arises out of the existence of the confidential relation of husband and wife; but this cannot appear until the presumption of a sufficient consideration, arising from the written obligation, has been overcome by proof. "Undue influence consists: (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him." Civ. Code, § 1575, subd. 1. In Brison v. Brison, 90 Cal. 336, 27 Pac. 186 (second appeal), in speaking of the above provision of the Code, it was said: "Such influence the law presumes to have been undue whenever this confidence is subsequently violated."

We think, therefore, that it must appear upon the face of the transaction, or by proof, that there was no consideration, or that the marital confidence was used to take an unfair advantage, or that this confidence was subsequently violated, before the burden is cast upon the plaintiff of sustaining the fairness and the consideration of the transaction against the presumption invoked by appellant. It is manifest that there may be a fair and honest transaction between husband and wife upon a good and sufficient consideration, and this may be one of them, while it is also true that the use of a confidential relation to obtain an unfair advantage is a fraud upon the other party to the transaction. Civ. Code, § 2234; Brison v. Brison, 75 Cal. 525, 17 Pac. 689; Id., 90 Cal. 336, 27 Pac. 186; Jackson v. Jackson, 94 Cal. 461, 29 Pac. 957. In the notes to the leading case of Huguenin v. Baseley, under the title "Husband and Wife" (2 White & T. Lead. Cas. Eq. pt. 2, p. 1215), it is said: "The relation of husband and wife obviously admits of an influence that may be carried beyond just bounds, but it seems that either of the parties to it may accept a benefit from the other without the necessity of proving that it was not obtained by undue influence. In Hardy v. Van Harlingen, 7 Ohio St. 216 (one of the cases cited in the above note), it was said: "The transaction will be viewed with a jealous eye, on account of the peculiar facilities enjoyed by the husband for the exercise of an improper influence. At the same time, undue influence is not to be presumed from the mere relation of the parties. It must be shown, either by direct proof, or by circumstances from which it may fairly be inferred." This quotation possibly states the rule more broadly than a fair construction of the Code provision requires; but we think that, before the presumption contended for can apply, it must appear that plaintiff, in obtaining the note sued upon, obtained some advantage over the defendant, and that the possession of the note is not of itself evidence that any advantage had been obtained. Upon appellant's theory, a sufficient answer in this case would have consisted merely of the allegation that at the time said note was made and delivered the plaintiff and defendant were husband and wife. Such answer would have been clearly insufficient. Here, however, in addition to this relation, defendant sets out facts tending to show that the obligation was unfairly obtained, and was without consideration. The true issue was therefore upon the implied replication to the answer setting up the new matter; but how the pleader could expect these affirmative allegations to aid the defense, without evidence in support of them, we do not understand. It may be that in this case defendant's error in relying absolutely upon the presumption insisted upon may prove to be a serious one, but that cannot change the law. For the purpose of shifting the burden of proof, or creating a presumption, his answer cannot take the place of evidence. We think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 124

BRODER et al. v. SUPERIOR COURT OF MONO COUNTY. (No. 15,512.)

(Supreme Court of California. June 15, 1894.)

WRIT OF PROHIBITION.

A writ of prohibition will not be granted to restrain a court from proceeding in a cause of which it has jurisdiction of the parties and the subject-matter.

In bank.

Application for a writ of prohibition by R. C. Broder and others to restrain the superior court of Mono county (W. H. Virden, judge) from proceeding with a cause. Denied.

Rich. S. Miner, for petitioners. P. Reddy and W. H. Metson, for respondent.

HARRISON, J. This is an application for a writ of prohibition, and is the counterpart of a proceeding between the same parties (No. 15,513, this day decided), 37 Pac. 143. At the same time that the superior court denied the petitioners' motion to enter judgment upon the findings that had been filed therein, it granted a motion of the defendants, and fixed a day for the trial of the cause, in accordance with its previous order of May 13th. Thereupon, the plaintiffs made application here for a writ of prohibition restraining the superior court from proceeding in the trial of the cause. That application must be denied, for the reason that the order of the court was made in a cause then pending before it, in which it had jurisdiction over the subject-matter and the parties thereto, and which had not been fully tried. If the court committed any error in the order, or should commit any error in its further proceedings during the trial of the cause, the plaintiffs have a complete and perfect remedy by an appeal from the judgment that may be rendered therein. The application for the writ is denied.

We concur: McFARLAND, J.; GAROUTTE, J., FITZGERALD, J.

(103 Cal. 111)

WESTERN GRANITE & MARBLE CO. v. KNICKERBOCKER et al. (No. 15,196.)

(Supreme Court of California. June 15, 1894.)

Easements—Passage of Light and Air—Division Fences—Constitutional Law—Rights of Adjoining Owners.

1. A landowner cannot acquire by user an easement over adjoining land for the passage of light and air.

2. Act March 9, 1885, regulating the height of division fences and partition walls in cities and towns, is a general law.

3. Act March 9, 1885, forbidding the erection of division fences and partition walls more than 10 feet high, in cities and towns, without the consent of the adjoining proprietor, relates solely to fences and walls erected on the boundary line resting partly on the adjoining land, and is constitutional.

4. The phrase "partition wall," as used in such act, means a wall used as a fence.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by the Western Granite & Marble Company against Eugene Knickerbocker and others to enjoin the erection of a fence. From a decree granting the injunction, and from an order denying a new trial, defendants appeal. Affirmed.

William L. Gill, for appellants. D. W. Burchard and Francis E. Spencer, for respondent.

TEMPLE, C. The defendants appeal from the judgment, and from a refusal of a new trial. The appellants and respondent own adjoining lots in the city of San Jose. The complaint contains two counts. The first describes plaintiff's lot, and avers that it has erected a building thereon for its offices, which building has six windows in the northerly wall, through which, only, light and air are or can be admitted into that portion of the building, and, if such light and air be materially obstructed, said portion of plaintiff's building will become useless. Plaintiff has been using the building and office for more than six months. Defendant owns the adjoining lot which he occupies as a residence, but, until the grievances complained of, has never obstructed the passage of light and air over that part of his premises to plaintiff's building, and has no use whatever for that portion of his premises whereby said light and air would be obstructed. Nevertheless, on the 19th of June, 1891, defendant commenced to build along the division line a solid board fence, 20 feet high, in such manner as to prevent the passage of light and air into said windows. That the defendant has not obtained the permission of the city council to build such fence, nor has plaintiff ever consented thereto. That defendant will build the fence unless enjoined, and plaintiff will suffer irreparable injury therefrom. The second count adds an allegation that the building of the fence is wanton and malicious. The court found the facts as stated in the first count of the complaint, but did not find that defendant was acting wantonly or maliciously.

The doctrine that a proprietor may by user acquire an easement over adjoining land for the passage of light and air does not prevail in this country, and, if it did, the facts stated in the complaint would be insufficient to show such easement. Indeed, no facts are averred or found which would give plaintiff any right whatever in the lands of defendant. The sole ground, therefore, upon which the judgment is based, is that the proposed structure is unlawful, and, as it interferes with the comfortable enjoyment of plaintiff's property, it is a private nuisance, which may be enjoined or abated. It is claimed to be unlawful because it violates the provisions of the act of the legislature passed March 9, 1885, entitled "An act regulating the height of division fences and partition walls in cities and towns." The act consists of three sections, the first two of which read as follows:

"Section 1. It shall be unlawful for any owner of real property in any city or town in this state, or any person having possession thereof, to construct, erect, build, permit or maintain upon such premises any fence or partition wall which shall exceed ten feet in height, without first obtaining a permit to do so from the board of supervisors or city council of the city or town in which said fence or wall is to be erected and maintained.

"Sec. 2. No permit to construct or maintain any fence or division partition wall having a greater height than ten feet, shall be granted by the board of supervisors or city council of any city or town in this state, unless the person applying therefor, and to whom such permit is granted, shall first obtain and present to such board of supervisors or city council the written consent of the person or persons having ownership or possession of the adjoining premises affected thereby: provided, that where such fence or wall is constructed around a public garden, or place of public resort where an admission fee is charged, no signature or consent of adjacent owners shall be required."

The third section declares that a violation of section 1 shall be a misdemeanor, and provides a penalty.

It is contended that this act is unconstitutional.

1. It violates section 11 art. 11, of the constitution, which confers upon counties, cities, and towns the power to make and enforce such police regulations as are not inconsistent with general laws. This position must be that the act is not a general law. This position cannot be maintained. It operates alike upon all who are within the reason of the act. There are reasons in the nature of things why it should not affect some property.

2. It is claimed that it is unconstitutional, because it gives the owner of the adjoining property the power to prevent such a structure. If the act must be construed as rendering it unlawful for the owner to erect such a structure upon his own land, although along the line, I think it is obnoxious to this objection. Merely owning the adjoining lot does not give the proprietor an easement over the property of another for the passage of light and air; nor is it competent for the legislature to vest in such proprietor the power to prevent his neighbor from building such structures as he pleases, provided it is not a nuisance, and it is not such merely because it obstructs the passage of light and air. The legislature cannot thus create an easement in favor of certain proprietors over the lands of another, nor declare the usual and ordinary use of property a nuisance when such use infringes upon the legal rights of no one. The court found in this case that the plaintiff's windows open towards defendant's lawn. That this portion of his premises shall be secluded and private may be a matter of great importance to defendant. That he has the right to secure such privacy, if he can, by building obstructions on his own land, has always been recognized by the courts. In Chandler v. Thompson, 3 Camp. 80, Le Blanc, J., said "that, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, * * * and that the only remedy was to build on the adjoining land, opposite to the offensive window." Washburn lays down the rule as follows: "And the cases are uniform that such adjacent owner may deprive his neighbor of the light coming laterally over his land by the erection of a wall, for instance, upon his land, within the period of prescription, although he may do it for the mere purpose of darkening his neighbor's windows." It is well settled that he may build upon his property, although the effect may be to entirely close the windows of his neighbor. But, if the statute is capable of a construction which will bring it within the legislative power, it should be so construed, rather than in a way to render it unconstitutional. The power has been conceded to the legislature to provide for and regulate the construction of division fences. It may authorize their construction upon the boundary line; that is, resting partly upon the land of the adjoining proprietor. It may provide for the character of the fence which may be thus built, so as to make it certain that the adjoining proprietor, who may be compelled to contribute to the expense, thereby secures something of value. While there are expressions in the statute that might well be understood as prohibiting a structure inclosing defendant's lot more than 10 feet high, although not on the boundary line, still the language is entirely consistent with the other view; and we should therefore presume that it was the intent of the legislature to do that which it had the power to do.

It is said that the act forbids a partition wall as well as a fence, and that, under the statute, one may not build a house on his land extending to his boundary line without the consent of his neighbor. But understanding the law as simply applying to fences or walls built upon the line, and so resting partly upon the land of the adjoining proprietor, it takes nothing from the owner, for he could build no such wall upon his neighbor's land without his consent. But I think the phrase "partition wall," in the first section, and "division partition wall," in the second, must be understood as applied to a wall which is merely a fence. "Partition wall" is not a phrase which in legal technology is used to designate a wall used by adjoining owners as a party wall. A party wall is always, at least in this state, such by agreement. A division fence is provided for in our Code (section 841, Civ. Code). Confining the operation of the statute to division fences, I see no objection to a requirement that they shall not be of such a character as to injure the neighboring proprietor. If my neighbor enjoys the privilege of resting his fence upon my land, he may justly be prevented from inflicting special injury upon me by the structure which partly belongs to me, and to the expense of building which I may be made to contribute. The finding is to the effect that plaintiff's building is about 18 inches from the line; that defendant Knickerbocker commenced the construction of the fence "upon his said premises and upon said boundary line." The evidence shows that there was already upon the boundary line a division fence, and that defendant cut into this old fence to let in the frame work of his new structure, which is therefore upon the old fence, and partly upon the land of plaintiff. By the decree, defendant is enjoined from erecting or maintaining any fence more than 10 feet high "on the division line," and is required to remove all that portion of the "division fence which is more than ten feet high," and he is enjoined from "obstructing the light and air coming from his said premises into the windows of said granite and marble company by any division fence or wall more than ten feet high." This shows how the trial court regarded the statute. The judgment has no effect upon the right of defendant to erect any kind of a structure upon his own land. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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103 Cal. 118

SOUTHERN PAC. R. CO. v. PIXLEY. (No. 15,105.)

(Supreme Court of California. June 15, 1894.)

CONTRACT FOR SALE OF LAND—SUIT TO FORECLOSE—VENUE.

Plaintiff alleged a contract to sell land in another county to defendant, whereby the latter was put in possession, and it prayed judgment against him for the sum due on the contract, and asked that, in case defendant failed to pay the same within a certain time, all his rights in said land by virtue of said agreement be foreclosed. *Held* that, as Const. art. 6, § 5, provides that all actions for the recovery of real estate or the enforcement of liens thereon shall be brought in the county in which the land is situated, the court had no jurisdiction of the action.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the Southern Pacific Railroad Company against Frank M. Pixley. There was a judgment for plaintiff, and defendant appeals. Reversed.

Robert Harrison, for appellant. Joseph D. Redding, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff. The action was brought in the superior court in and for the city and county of San Francisco. In the complaint it is averred that on September 17, 1887, plaintiff was the owner of certain described tracts of land situated in the county of San Diego, and that on said day plaintiff entered into certain contracts with defendant, by which the former agreed to sell and the latter agreed to buy said tracts of land. All of said contracts were alike, except that each referred to a different tract of land; and it is averred that the terms of each were that a certain part of the purchase money should be paid on the execution of the contract (which was done), and the balance, with interest annually, in manner as provided in said contract. The contracts provide that defendant may take possession of the lands therein mentioned, and averred that he did so take possession, and continues in possession. The complaint was filed in September, 1891, and it is averred that defendant has wholly failed and refused to make any of said deferred payments, although requested so to do. The prayer of the complaint is that it be adjudged that there is due from defendant to plaintiff a certain sum of money,—being the amount of said deferred payments; and that it be decreed that, if said amount be not paid within 30 days after the judgment, "then, and from that time, the defendant, and all persons holding said premises under said defendant shall be forever barred and foreclosed of all claim, right, or interest in said land and premises by virtue of said agreement, and be forever barred and foreclosed of all right to a conveyance thereof, and that plaintiff be let into the possession of said premises, and that said contracts be declared null and void." Defendant demurred to the complaint upon the ground, among others, that the court had no jurisdiction of the subject-matter of the action. The demurrer was overruled, and defendant filed an answer, and also a cross complaint, to which plaintiff answered. The judgment was substantially in accordance with the prayer of the complaint.

There is no necessity of discussing the questions which arose after the overruling of the demurrer to the complaint, for it is quite clear that the court had no jurisdiction of the subject-matter of the action. It is provided in section 5, art. 6, of the state constitution that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." Taking respondent's own view of the nature of the action, to wit, that it is for a "strict foreclosure," still it is clearly an action "for the enforcement of liens upon real estate," leaving out of view the prayer for the "recovery of the possession" of the lands. Moreover, the question has been decided adversely to respondent in Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154, which was a case precisely like the one at the bar, except that the judgment in that case decreed a sale of the lands covered by the contract. See, also, Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 487, 33 Pac. 322; Fritts v. Camp, 94 Cal. 393, 29 Pac. 867. The jurisdiction of the action was therefore in the superior court of San Diego, and there was no jurisdiction thereof in the superior court of the city and county of San Francisco. The demurrer to the complaint should have been sustained. And, as the cross complaint was a mere dependency of the original complaint, it falls with the original. The judgment is reversed, with directions to the superior court to dismiss the action.

We concur: DE HAVEN, J.; FITZGERALD, J.

103 Cal. 104

WAGNER v. HANSEN et al. (No. 15,403.)

(Supreme Court of California. June 13, 1894.)

MECHANIC'S LIEN—NOTICE OF CLAIM — ENFORCEMENT—VARIANCE.

1. Code Civ. Proc. § 1187, requires the statement for a mechanic's lien to be essentially true. *Held*, that a notice of lien was insufficient where it stated that the claim was for labor and materials, while only labor was furnished.

2. Where the complaint and claim of lien state that the work was done for an agreed price, and the evidence shows no price was agreed on, there is a fatal variance.

Commissioners' decision. Department 2. Appeal from superior court, San Francisco county; John Hunt, Judge.

Action by Ferdinand Wagner against Margaret Hansen and another to enforce a mechanic's lien. Judgment for plaintiff, and defendants appeal. Reversed.

Morrison & Foerster, for appellants. Henry H. Davis for respondent.

TEMPLE, C. This action was brought to enforce a mechanic's lien. Plaintiff had judgment, and defendant M. Hansen appeals from the judgment and from an order refusing a new trial. In his complaint plaintiff avers that he agreed with defendants "to furnish, and did furnish, the labor, at their special instance and request, in completing the foundation of said premises, build the chimneys, laying wall plates, laying out building, underpinning walls, building scaffolding, carrying brick, completing brick walls and brick foundation upon said dwelling house, upon said lot of land, and for all which said work, labor, and materials said defendants agreed to pay said plaintiff the sum of $163." It is again alleged that plaintiff agreed with defendants to perform the work and labor, and defendants "agreed to pay plaintiff the sum of $163 in the gold coin of the United States, but that no time was specified for the payment other than that said defendants were to pay plaintiff when said work was completed." In the notice of lien which is set out in the complaint, plaintiff, to show compliance with section 1187 of the Code of Civil Procedure, states the terms, time given, and conditions of his contract, as follows: "I, Ferdinand Wagner, am the contractor for the brick work and foundation and extra work, who, on the 9th day of April, 1889, as such contractor for the brick work and foundation, entered into a contract with said M. Hansen and Margaret Hansen, under and by which I completed said foundation and brick work and extra work, and the following is a statement of the terms, time given, and condition of said contract, to wit: 'I, Ferdinand Wagner, was to furnish the labor and materials in completing the foundation of said premises, build the chimneys, laying wall plates, laying out building, underpinning wall, building scaffolding, carrying brick, completing brick walls and brick foundation, for which I was to receive upon said completion of said work the sum of $163 in United States gold coin for said extra work,'"

The complaint was demurred to for insufficient facts and as being uncertain, also for ambiguity, and under each head it was specified that it could not be ascertained from the complaint whether plaintiff was to be paid $163 for work and materials or for work only, nor for what work he was to be paid; also, that the complaint averred that he was to be paid $163 for work only, while his claim of lien stated that he was to be paid $163 for work and materials furnished. The demurrer was overruled, and that ruling is now complained of. I think the demurrer should have been sustained. Such a notice and claim of lien does not contain a true statement of the terms of the contract, as required by section 1187 of the Code of Civil Procedure. There was no other statement as to the nature of plaintiff's demand in the claim of lien. There was no account of services rendered. The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true. See, on this point, Frazer v. Barlow, 63 Cal. 71; Malone v. Mining Co., 76 Cal. 578, 18 Pac. 772; Eaton v. Malatesta, 92 Cal. 75, 28 Pac. 54. Respondent's only reply to this objection is that it is a mere technicality. Plaintiff's claim to a lien is a mere technicality. He is given a right upon condition that he complies with the statute, and there must be a substantial compliance with all these conditions to the right. Wood v. Wrede, 46 Cal. 637.

On the trial, plaintiff testified that, except as to one item, amounting to only $18, there was no agreed price for any work done; that there was no agreement to pay for plaintiff's labor, or for labor and materials, $163, or any other specified sum. No other evidence was given upon the subject. Defendants moved for a nonsuit on the ground that there was a fatal variance between the evidence and the statement in the complaint and in the claim of lien, in both of which it was stated that the work was done under a contract by which he was employed to do specified work at a price agreed upon. The nonsuit should have been granted. This was not only a variance, but it showed that the statute had not been complied with, and that plaintiff had acquired no lien. It is difficult to conceive of any terms of the contract of employment more material than this. In the case of a laborer employed by a contractor, the owner might well venture to pay a claim, where the amount had been agreed upon as between the laborer and the contractor, without further evidence than the lienor's oath. Had the statement shown that the value of the service was left open, the owner would be compelled to agree with the contractor, and perhaps with other lienors, as to the amount, or to pay such sum only as he could undertake to show was reasonable. There was no contractor here between the lienor and the owner, but the statute has made one rule for all, and that must be determined in view of all cases likely to arise under the statute. I think the judgment and order should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

103 Cal. 132

HART v. CARNALL-HOPKINS CO. (No. 15,467.)

(Supreme Court of California. June 16, 1894.)

Justice of the Peace — Jurisdiction—Title to Land—When Put in Issue — Construction of Pleadings—Appeal to Superior Court.

1. Plaintiff alleged that defendant agreed to locate him on vacant government land, which it failed to do. Defendant admitted the contract, and alleged that it did locate plaintiff on vacant government land; "that defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and that defendant alleges that they were not in the possession of some other person at the time of the location of plaintiff thereon." *Held*, that the title and possession of real property was not necessarily put in issue by the pleadings, so as to deprive a justice of the peace of jurisdiction.

2. On appeal from a justice of the peace to the superior court, the latter court, on determining that the justice had no original jurisdiction, because title to land was involved, may properly try such question of title as a court of original jurisdiction.

3. If the issue of title or possession of land is so involved that it must be decided in order to determine the case, although only "incidentally" involved, the superior court has original jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by James D. Hart against the Carnall-Hopkins Company for damages for nonperformance of a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. H. Chapman, for appellant. Edwin L. Forster, Fisher Ames, and S. V. Costello, for respondent.

VANCLIEF, C. This action was commenced in the court of a justice of the peace to recover damages consequent upon the alleged nonperformance of an agreement. It was alleged in the complaint that, in consideration of $100, the defendant agreed "to locate the plaintiff on certain vacant government land in the county of San Benito, state of California; but this plaintiff avers that said defendant failed to carry out and fulfill said contract and agreement, in that they [it] failed and neglected to locate this plaintiff on said or any lands pursuant to their said contract." A copy of the contract is set out in the complaint as follows: "San Francisco, July 22, 1892. Received of J. D. Hart, Esq., one hundred ($100) dollars, in full payment for ten (10) shares of the capital stock of the San Carlos Oil Company, and our services for locating the said J. D. Hart, Esq., on the limit of the number of acres allowed by the homestead law, not to exceed one hundred and sixty (160) acres. Said location to be on vacant government land in San Benito county, California. The Carnall-Hopkins Co., by Gibbs and Zimmerman, Mngs. C. A. Dep."

Those parts of the verified answer of the defendant pertinent to the questions raised on this appeal are substantially as follows: (1) Defendant alleges "that the determination of this action will necessarily involve the question of title and possession to real property, to wit, the title and possession of the northwest quarter of section 27, township 16 S., of range 10 E., county of San Benito, state of California." (2) Admits the execution of the instrument of July 22, 1892, above set out, and the receipt of $100 therein mentioned; and alleges "that defendant did locate plaintiff on vacant government land in San Benito county, Cal., and said location was on the northwest quarter of section 27, township 16 S., R. 10 E., in said county, and said property was at said time open to location, and no other person had any valid claim thereto. * * * That defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and defendant alleges that they were vacant government lands, and not in the possession of any other person at the time of the location of plaintiff thereon; and, in consequence thereof, the determination of this action involves the title and possession of real property. * * * Wherefore defendant asks that judgment be rendered and entered in favor of defendant for its costs, that plaintiff take nothing herein, and that this court suspend all further proceedings herein." The docket of the justice of the peace shows that the action was tried January 3, 1893, the parties being represented by their attorneys; that three witnesses testified on behalf of plaintiff, and that no evidence was offered on behalf of the defendant; and that the cause was submitted by the parties, and that judgment was rendered in favor of the plaintiff for the sum of $165 damages and for costs. From this judgment the defendant appealed to the superior court of the city and county of San Francisco "upon questions of both law and fact." The cause was tried de novo in the superior court, where plaintiff again recovered judgment against the defendant for the sum of $168.85 and costs, from which, and from an order denying its motion for a new trial, the defendant appealed to this court.

Respondent moved in department 1 of this court to dismiss the appeal on the ground that the judgment of the superior court was final. On this motion an opinion denying it was written by Mr. Justice Paterson, concurred in by Mr. Justice De Haven. 35 Pac. 633. Mr. Justice Harrison concurred in the order denying the motion, but, after alluding to the averments of the complaint and answer above set out, said: "From these averments we cannot determine whether the title or possession of real property is necessarily involved. What significance must be given to the term 'locate' must depend upon the sense in which it was used by the parties to the agreement, and whether the property upon which the defendant claims to have 'located' the plaintiff in purported performance of its agreement was 'open to location,' or whether any person had a 'valid claim' thereto, may present questions involving the title or possession of real property. Upon the present motion we are limited to the averments in the pleadings, and cannot look at the evidence introduced in support thereof. If, upon the hearing of the appeal on its merits, it shall appear that the case before the court below did not involve the title or possession of real estate, we can then dismiss the appeal. But upon the matter as now presented the motion should be denied." Upon the whole record, including the evidence brought up in the bill of exceptions on which the motion for a new trial was made, the sense in which the word "locate" was used, understood, and acted upon by the parties is quite apparent. It is that the defendant was to lead or direct the plaintiff to, and point out to him, public land of the United States, which was subject and open to be settled upon and entered as a homestead by any person having the qualifications required by law to settle upon and enter such land. Of course, the settlement and entry were to be made by the plaintiff himself, according to the laws of the United States, which will not permit these acts to be done for him by another, and so the plaintiff understood and acted upon the contract. After the northwest quarter of section 27, township 16 S., had been pointed out to him by defendant, the plaintiff applied at the United States land office "to file upon" that quarter section under the homestead laws, and paid the requisite fees, etc., for that purpose; and it appeared from the evidence on the trial in the superior court that his only complaint was that the land was not subject or open to a homestead settlement or entry, for the reason that one Benvenga had made a prior settlement thereon, and was in possession thereof at the time the land was pointed out to him by defendant, and at the time he applied to the land office to file his application. On the trial in the superior court, it having been proved and admitted that the land had been selected and pointed out to plaintiff by defendant, and that it was government land, the question arose whether or not Benvenga was a settler upon and was entitled to the possession at the time the land was pointed out to plaintiff by defendant; and this question was material for the purpose of determining whether the defendant had complied with its contract to point out vacant public land, and was the principal question contested in the superior court, although it does not appear to have arisen or to have been tried in the justice's court; and I think, as suggested by Mr. Justice Harrison, that the pleadings do not show that title or possession of real property was or would be necessarily involved in the trial. The allegation of the complaint is that the defendant failed to point out ("to locate the plaintiff on") any land pursuant to the agreement; and, had the proof shown that defendant had failed to point out to plaintiff any government land, such proof would have disposed of the case in plaintiff's favor, regardless of any question of title or possession of real property; and, for aught that appears, such may have been the proof in the justice's court, where, as shown by the record, the defendant introduced no evidence whatever. Nor did it appear by the answer of the defendant that title or possession of real property was necessarily involved, but only that it would become involved upon the happening of certain contingent events, namely, if, in case of proof that defendant pointed out to plaintiff government land, the plaintiff should then claim, as defendant was informed and believed he would, that such land was not vacant government land, but was in the possession of some other person. Besides, the answer contained no prayer for a transfer of the cause to the superior court, nor does it appear that either of the contingent events above mentioned happened in the justice's court.

For aught that appears on the face of the record here, the justice of the peace did not exceed his jurisdiction in proceeding to try the case, nor in rendering final judgment, since it does not appear that the predicted contingent events occurred on the trial in the justice's court. Had they occurred during that trial, however, the justice, in obedience to section 838 of the Code of Civil Procedure, should have declined to hear evidence touching the question of possession thereby raised, and should have certified the pleadings (both written and oral), with a copy of his docket, to the superior court; and, if he had failed or refused to do so, the defendant might have appealed on questions of law alone, whereupon, by a statement according to section 975 of the Code of Civil Procedure, he could have shown the occurrence of the contingent events predicted in his answer, and that evidence had been admitted upon the question as to whether the land "was in the possession of some other person;" but in no other way could he have made it appear to the appellate court that the right of possession of real property became involved on the trial in the justice's court, since it did not so appear on the face of the pleadings, nor from the copy of the docket, or any other paper which the justice was required to transmit to the superior court. It is true, however, that if the pleadings had shown that the right of possession of real property was necessarily involved, or if the docket or other papers properly sent up by the justice had shown a want of jurisdiction for any other reason, there would have been no necessity for a statement (Southern Pac. R. Co. v. Superior Court, 59 Cal. 474); but in the case at bar no error appears in the docket or other papers sent up by the justice. Besides, instead of appealing on questions of law alone, the defendant appealed upon questions of both law and fact, thereby necessitating a trial de novo in the superior court; yet, when the case was called for trial in that court, and the plaintiff proceeded to offer evidence, defendant objected to any trial de novo on the alleged ground that the superior court had no jurisdiction, for the reason that the justice's court had not jurisdiction of the subject-matter originally, claiming that it appeared by the answer that a question as to the possession of real property was necessarily involved. The court overruled this objection, and proceeded with the trial, to which the defendant excepted.

The principal point urged here by appellant is that the superior court erred in overruling this objection, and in trying the case de novo, whereas it should have reversed the judgment of the justice's court, and remanded the cause, with instruction to certify a transcript thereof back to the superior court in the mode provided by section 838 of the Code of Civil Procedure. Conceding, for the sake of the argument, that the justice's court had not jurisdiction of the subject-matter, and that the superior court had no appellate jurisdiction to try the issue as to the possession of real property, yet the superior court had original jurisdiction of all questions pertaining to possession of real property, and, having jurisdiction of the parties, properly tried the issue as to whether Benvenga was entitled to possession of the land; that being the only material issue contested in the superior court. City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562. The defendant cannot be heard to deny that the superior court had jurisdiction of the parties, since it not only appealed the case to that court to be there tried on questions of both law and fact, but it voluntarily appeared and moved for judgment of reversal on the record which it had procured to be transmitted to that court, and also made its defense on the merits by offering evidence on the trial; and all this, without even suggesting that its appearance was limited to any special purpose. Nor, as before remarked, did it appear on the face of the transcript transmitted to the superior court that the right of possession of real property was necessarily involved, nor that any issue relating to such possession had been tried in the justice's court. For aught that appears, that issue was first developed in the course of the trial in the superior court, by proof that defendant had pointed out to plaintiff government land, representing it to be vacant, and by evidence on the part of plaintiff tending to prove that the land so pointed out was not vacant. When this issue was thus developed, the superior court was not obliged, as contended by appellant, to reverse the judgment of the justice of the peace, and to remand the case for the purpose of having it transferred to the superior court, according to section 838, Code Civ. Proc., in order to obtain original jurisdiction to try it, since the superior court had such original jurisdiction without this circuitous, dilatory, and vain process. Yet the relief asked here by appellant requires a still more circuitous and dilatory proceeding, which is that this court reverse the judgment and order of the superior court, and remand the cause, "with instructions to vacate the judgment of the justice's court, and order the papers certified to the superior court in accordance with section 838, Id.;" and all this, it is claimed, is necessary to give the superior court original jurisdiction of the subject-matter.

From the foregoing considerations it follows that the superior court obtained original jurisdiction of the issue as to the possession of Benvenga, and did not err in trying the case de novo; and, from this conclusion that the superior court properly exercised original jurisdiction, it further follows that this court has appellate jurisdiction, and should deny respondent's motion to dismiss the appeal. In opposition to this second conclusion, however, it is urged by respondent that possession of real property was only incidentally involved, and, therefore, the superior court had not original jurisdiction, and to this point respondent cites the case of Shroeder v. Wittram, 66 Cal. 636, 6 Pac. 737, in which the opinion of Mr. Justice McKee (in bank) seems to countenance his contention. But that opinion was concurred in by only one of the other justices, while two justices concurred in the judgment only, upon other grounds, and the chief justice wholly dissented. Therefore the opinion of Mr. Justice McKee on this point cannot be regarded as authoritative, and was not so considered in the later case of Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256. It is clear that it was developed by the plaintiff's evidence on the trial in the superior court that Benvenga's prior settlement and right of possession were conditions upon which plaintiff's right to recover depended, and that the court must have decided whether or not these conditions existed, in order to determine the case; and it appears that evidence tending to prove them was introduced by plaintiff. It follows that the possession of real property was necessarily involved, in the sense of section 4, art. 6, of the constitution, which gives this court appellate jurisdiction "in all cases at law which involve the title or possession of real estate," without excepting cases in which the title or possession is only incidentally involved. If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original, and this court appellate, jurisdiction, whether the involution may be said to be merely incidental or not. Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Holman v. Taylor, 31 Cal. 341; Code Civ. Proc. § 838; Const. art. 6, §§ 4, 5, 11.

On the hypothesis that the superior court did not err in trying the case de novo, counsel for appellant contend that the judgment should be reversed for errors occurring at the trial. Only two of these points are sufficiently plausible to merit consideration, one of which is that the court erred in sustaining plaintiff's objection to the introduction in evidence of the following letter, offered by defendant: "San Benito County, July 24, 1892. Gentlemen: I have located upon the N. W. quarter of section 27, T. 16 S., R. 10 E., and am well pleased with my location, and have found everything as represented to me by your agent. James D. Hart." Conceding that the court should have admitted this letter, I think the error was harmless. Plaintiff filed his application in the land office August 1, 1892, 6 days after writing this letter, and 23 days before Benvenga filed his application for the same land and gave notice of his contest, which he did on August 24, 1892. Before the letter was offered by defendant, plaintiff had repeatedly testified that until he received notice of Benvenga's adverse claim he was well pleased and fully satisfied with the land, and there was no evidence to the contrary. The proffered letter would have added nothing to plaintiff's testimoney and admissions on the trial.

It is also contended that there is no finding upon the issue tendered by the answer "as to the land being open and vacant." The finding is: "But that said defendant failed to carry out and fulfill its contract and agreement, in that it failed and neglected to locate this plaintiff on said land, or any land or lands, pursuant to its said contract; nor has said defendant, since the date of said contract and agreement, ever offered to locate said plaintiff on any vacant, unoccupied government land, in said San Benito county or elsewhere." This is a finding that no land upon which defendant located the plaintiff was vacant, and fully disposes of the issue. I think respondent's motion to dismiss the appeals should be denied, and that the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion respondent's motion to dismiss the appeals is denied, and the judgment and order are affirmed.

DE HAVEN, J. I concur in the judgment.

103 Cal. 157

MARTIN v. EDE. (No. 15,360.)

(Supreme Court of California. June 18, 1894.)

STATUTE OF FRAUDS — AUTHORIZATION TO SELL LAND—REAL-ESTATE BROKERS—RIGHT TO COMMISSIONS—INTEREST.

1. An authorization in writing to sell land, signed by the party to be charged, is valid under Civ. Code, § 1624, subd. 6.

2. A broker's right to commissions for procuring a purchaser for land under an agreement therefor is not affected by the fact that he knew the principal had title to only five-sixths of the land.

3. One who is entitled to certain fixed damages, the right to recover which is vested in him on a particular day, is entitled to interest thereon from that day, except during such time as the debtor is prevented by law or by the creditor's act from paying the debt. Civ. Code, § 3287.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Wheeler Martin against William Ede. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. C. Bates, for appellant. Sullivan & Sullivan, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of the plaintiff, Wheeler Martin, for $905.45, and from an order denying a motion by defendant for a new trial. The action was brought to recover the sum of $750 for commissions due to the plaintiff (who is respondent here) as a broker in effecting the sale of certain property belonging to appellant. The authorization under which the former acted is in writing, and in the following language: "San Francisco, August 3, 1887. Mr. Wheeler Martin: As you stated you could get thirty thousand dollars for the place you occupy on Market street, and if you can, we will sell at that price any time before the 1st day of September, 1887, and allow you two and one-half per cent. on said price, and, if no sale is made, no expenses made to us. Yours, truly, William Ede."

This authorization was never revoked by defendant. Subsequent to the execution of said paper, and on the 22d day of August, 1887, plaintiff found a purchaser for said lot of land, who was willing and able and offered to pay to said defendant said sum of $30,000 for said property. At the date of said agreement the legal title to said property stood in the name of defendant, but one Josephine Cory owned an equitable interest therein to the extent of one-sixth thereof, and was, at the date of the agreement, willing to sell. Plaintiff had heard that said Cory had an interest in the property, but was ignorant of the nature or extent of her claim. The testimony showed that Charles Grant was the party offering to purchase the property, and that he afterwards commenced an action for the specific performance of the contract to convey against the defendant Ede, which action was decided in favor of said defendant, appealed to this court, and the judgment affirmed. Grant v. Ede, 85 Cal. 418, 24 Pac. 890. Defendant set up two counterclaims to this action,—one for $261.50, on account of expenses incurred in the defense of the action of Grant v. Ede, which was not allowed; the other for $120, on account of four months' rent of a house, which was allowed by the court.

Appellant assigns the following errors as cause for reversal: (1) The court erred in ruling out the testimony of appellant proving his counterclaim of $261.50 on account of money expended in Grant v. Ede. (2) That plaintiff exceeded his authority in agreeing to sell the whole of the property, and is therefore liable for damages suffered by his principal by reason thereof. (3) Plaintiff exceeded his authority in agreeing to sell the whole of the property, and is not entitled to compensation. (4) The authorization, if valid, would only entitle plaintiff to recover five-sixths of $750, less counterclaims. (5) The alleged agreement authorizing plaintiff to sell the real estate was invalid, because not signed by both the parties to be charged. These contentions are so intimately connected and blended that they may properly be considered together.

The authorization by defendant was in writing, signed by him who is the party charged, and is not, therefore, obnoxious to the provision of subdivision 6 of section 1624 of the Civil Code.[1] The contention of appellant upon which the first error is assigned is founded upon the theory that the plaintiff knew that defendant owned only five-sixths of the property, and exceeded his authority in agreeing to sell the whole property, and is consequently liable for the damages sustained by defendant. A reference to the authorization will show the authority to plaintiff to get a purchaser for the land at $30,000, and, in the language of the agreement, "if you can, we will sell at that price any time before the 1st day of September, 1887, and allow you two and one-half per cent.," etc. As said on the appeal here in Grant v. Ede, 85 Cal., at page 420, 24 Pac. 890: "It does not say that Martin is authorized to sell and convey for the price named, nor is any form of deed or time of payment, or of delivery of possession specified. Martin was authorized simply to find a purchaser who would pay thirty thousand dollars, and if he should succeed in finding such purchaser he was to receive a commission of two and one-half per cent.;" citing Duffy v. Hobson, 40 Cal. 244; Treat v. De Celis, 41 Cal. 202; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758. To entitle plaintiff to recover his commissions under the agreement, it was only necessary to show that in pursuance of his employment, and within the time specified therein, he found a purchaser ready and willing to purchase the property on the terms specified in the authorization. This he did beyond dispute. With the title or ownership of the property he had nothing to do, and his knowledge as to the title or the equitable estate of Josephine Cory therein was of no consequence. These were questions for the defendant to determine when he made the agreement. It is matter of common knowledge that, in the business world, men do frequently obtain what are termed options upon real property,—that is to say, the right to purchase,—and then employ brokers to negotiate a sale at an enhanced price, the title being all the while in others. Brokers sell tons of wheat for future delivery on account of principals who do not or may not own a kernel of that commodity, yet, in the absence of law prohibiting such sales, they are entitled to their commissions, and knowledge of the nonownership of their principals does not defeat their right to recover. A. may possess such knowledge as justifies him, in his judgment, in contracting to sell, or in contracting with a broker to sell for him, or to find a purchaser for, property which he does not own. If he does so without so guarding his agreement as to save himself in case of failure to secure title to the thing he has authorized to be sold, he cannot be heard to complain of the result of his own folly or lack of foresight. If A. is employed by B. to labor at a monthly stipend upon land which they both know B. does not own, and the services are performed in consonance with the contract, a recovery cannot be defeated by such knowledge on the part of A. As was said in Gonzales v. Board, 57 Cal. 225: "The plaintiff did all he was bound to do, under his contract, to entitle him to the remuneration agreed on. He procured a purchaser ready and willing to buy the property at the price for which the defendant proposed to sell it, which purchaser was acceptable to the defendant. The plaintiff could do no more. His right to compensation did not in any way depend, according to the contract, on the validity or invalidity of the defendant's title to the property." Phelps v. Prusch, 83 Cal. 628, 23 Pac. 1111; Phelan v. Gardner, 43 Cal. 311; Smith v. Schiele, 93 Cal. 149, 28 Pac. 857,—as well as many other cases in this court, are to like effect.

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[1] Civ. Code, § 1624, subd. 6, provides that an agreement authorizing a broker to sell land for commission must be in writing, and signed by the party to be charged.

If it be affirmed that the plaintiff acted in excess of his power by giving to Grant an agreement for the sale of the property, the answer is: (1) There is no evidence of such agreement in the record or statement from which its contents can be divined. (2) If we may look to the case of Grant v. Ede, as reported, for its contents, it is there apparent that it was not of such a character as to bind defendant. It follows that plaintiff did not exceed his authority, and was not legally liable for the expenses incurred in Grant v. Ede, and hence that the exclusion of the record in that case and the evidence of those expenses on the part of defendant was proper.

The foregoing reasoning applies equally to the other errors mentioned, except as to the point made that the defendant was entitled to interest on the sum of $120 due him August 1, 1891, on account of rent. When that sum fell due the defendant, there was due to plaintiff, on account of interest on his demand of $750, a sum in excess of $120, hence the court properly applied the $120 on the interest then due the plaintiff. Plaintiff's demand was due September 1, 1887, and was capable of being made certain by computation. It therefore drew interest under section 3287 of the Civil Code.[2] The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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103 Cal. 169

WATSON v. SUTRO et al. (No. 15,213.)

(Supreme Court of California. June 19, 1894.)

REVIEW ON APPEAL.

Where there is a substantial conflict in the evidence the findings of the trial court will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by William C. Watson against Adolph Sutro and others for partition. From that part of the judgment that allows plaintiff $5,000 attorney's fee, defendant Sutro appeals. Affirmed.

Lloyd & Wood and B. McKinne, for appellant. Stanly & Hayes, for respondent.

GAROUTTE, J. This is an appeal by Adolph Sutro from that portion of a judgment in partition proceedings that awards to the plaintiff in the action an attorney's fee of $5,000. In the trial of the action of partition the amount of the respective equitable interests of plaintiff and appellant, Sutro, to the realty involved in the litigation was warmly contested, and as to such matters the litigation resulted adversely to this appellant. At the hearing the report of the referees was acquiesced in by all the parties in interest, and the only contest that was made was as to the amount which should be allowed to plaintiff, under section 796 of the Code of Civil Procedure, for reasonable counsel fees expended by him for the common benefit. The court, after hearing the testimony of 19 witnesses, fixed the fee at $5,000, and determined that defendant Sutro's proportion was $4,828.25, and the propriety of this order is the sole question involved in this appeal.

Section 796 of the Code of Civil Procedure provides that: "The costs of partition, including reasonable counsel fees expended by the plaintiff, or either of the defendants, for the common benefit, fees of referees and other disbursements must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein. * * * When, however, litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto, or any of them." The fees of the referees, and all other costs in the case, except the counsel fee of plaintiff, have been adjudged without dispute, to be paid in proportion to the several interests of the parties. There is a sharp conflict in the evidence as to what would be a reasonable attorney's fee for the labor performed, and under these circumstances we will not disturb the judgment. The amount of the attorney's fee was a question of fact, essentially within the province of the trial court to determine from the evidence; and to disturb the trial court's finding in this regard, where, as in this case, there is a substantial conflict in the evidence, would be a trespass upon well-settled principles long recognized by this court. Thomas P. Stoney, attorney for plaintiff, stated in detail the character and amount of the services he had performed as attorney for plaintiff in the action, and he further testified that such services were reasonably worth $10,000; and this testimony was corroborated by various other eminent members of the bar, as to the value of the services rendered. We think this evidence is amply sufficient to support the judgment. While it is true the witness Stoney did not segregate the value of the services rendered by his firm in furtherance of the personal interests of his client in contesting the claim of title from the value of the services rendered for the common good in the matter of the partition proceedings proper, still the amount and character of labor performed for the common benefit was in evidence before the court; and upon that evidence alone, without the advice of experts, the court had the power to fix the amount of the fee, and we are not prepared to say from the record before us that the amount awarded is too large. It was said in Pennie v. Roach, 94 Cal. 520, 29 Pac. 956, and 30 Pac. 106: "It is true three witnesses for the plaintiff, equally eminent in the profession, testified that his services were worth only $75,000; but it was for the court to decide the conflict, and in such cases its ruling will not be interfered with by the appellate court unless there is a clear abuse of discretion;" citing Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242. We see no abuse of the court's discretion in this case. For the foregoing reasons, it is ordered that the judgment be affirmed.

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[2] Civ. Code, § 3287, provides that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

I concur: VAN FLEET, J.

HARRISON, J. I concur in affirming the judgment. I do not, however, consider that the fact that there was a conflict of evidence upon the subject of compensation is a reason for its affirmance. The court below was authorized to ascertain what services had been rendered by the plaintiff for the common benefit, including those of his counsel, and to determine the compensation which would be proper to allow him therefor. This is a matter, however, which the court is to determine in the exercise of its judicial discretion, and not necessarily in accordance with the testimony of witnesses. It may fix the compensation to be allowed, in accordance with the practice of the court, and its own knowledge of the usual compensation for such services, without calling to its aid the views and experience of other attorneys, or it may ask their aid, as expert witnesses, for its enlightenment. Yet, if it does call them to its assistance, it is not required to make its decision in accordance with their testimony, but may disregard their testimony entirely. Like determining the amount to be allowed for counsel fees in the foreclosure of a mortgage, or in a suit for divorce, the court is called upon to exercise a judicial discretion in consideration of all the circumstances in the individual case; and, even though the testimony of the witnesses whose opinion it may ask will sustain it in the amount which it allows, yet, if it should appear that it had abused the discretion intrusted to it, its action should be disregarded in this court as readily as an abuse of its discretion in any other respect. The action of a trial court in any matter depending upon its discretion is not conclusive, though it is approved by bystanders, or even by witnesses under oath. Judicial discretion—"discernere per legem"—is only the application of rules of law to the circumstances of the case in which the discretion is exercised; and, whenever a question depends upon the exercise of this discretion, it is as open to review as any other question. As error, however, is never to be presumed, the action of the court in the exercise of its discretion must be assumed to have been correct, and the burden is always upon the appellant to make it clearly appear that the court committed error; otherwise, its action must be affirmed. In the present case the court was called upon to determine the amount of labor that had been rendered by the plaintiff's counsel for the common benefit of all parties to the action, and fixed the amount of compensation to be allowed therefor at the sum of $5,000. While this would appear to be an unusual compensation to be allowed in an ordinary action of partition, and while the amount estimated by the several witnesses as proper to be allowed varied from $2,000 to $15,000, it cannot be said, in view of the character of the action, the time occupied in its trial, the questions presented in the case, the value of the property involved, and the services shown to have been rendered by the plaintiff's attorney, that the sum fixed by the court is so grossly disproportionate to its value as to constitute an abuse of its discretion.

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103 Cal. 233

COBURN v. TOWSEND et al. (No. 15,246.)
SAME v. BROOKS et al. (No. 15,247.)
SAME v. JOSSELYN et al. (No. 15,248.)

(Supreme Court of California. June 26, 1894.)

Condemnation Proceedings — Action on Bond —Counsel Fees.

1. No action lies against the sureties on a condemnation bond for damages already recovered in an action of trespass against the principal.

2. Counsel fees cannot be allowed on a general judgment for defendant in condemnation proceedings.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Actions by Loren Coburn against M. D. Towsend and others on bonds. From a judgment for defendants, plaintiff appeals. Affirmed.

Thornton & Merzbach, for appellant. Fox & Kellogg, for respondents.

McFARLAND, J. These cases are substantially alike, and will be considered together. Each action was against the defendants as sureties upon a bond in certain condemnation proceedings. The bond was given in pursuance of an order of the court in the condemnation proceedings that the plaintiff therein might, at the commencement of said proceedings, take possession of lands claimed by plaintiff in these present actions and sought therein to be condemned, upon giving an undertaking as provided by section 1254 of the Code of Civil Procedure as it stood prior to 1880. The court in each case rendered judgment for defendants, and plaintiff appeals in each case from the judgment, upon the judgment roll alone.

The judgments must be affirmed. In the first place, the provision of the Code, and of the statute which preceded the Code, under which the orders for possession were made in the condemnation proceedings, was held to be and was unconstitutional, and the bonds or undertakings here sued on were void. Water Works v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266; Vilhac v. Railroad Co., 53 Cal. 209. In the second place, it is found by the court that plaintiff commenced a certain action against Charles Goodall and others, in which he recovered damages in the sum of $10,000, which was paid; and "that the said damages so recovered by the said plaintiff, Coburn, and so paid as aforesaid, cover all the alleged damages sued for in this action and other damages (except the counsel fees hereinbefore stated), and that the alleged possession and trespass in said action of Coburn vs. Goodall covers and includes all the alleged possession and trespass for which recovery is sought to be had in this suit, and that said damages were recovered by the said plaintiff upon the claim that the said alleged use and possession named in the complaint herein as being held against said Coburn was really and in fact the possession of said defendants in said suit of Coburn vs. Goodall." This being so, appellant cannot again recover from the sureties what was paid by the principals. As to the counsel fees, in the first place, it does not appear that they were withdrawn or were not litigated and determined in the case of Coburn v. Goodall; and, in the second place, we do not know of any law that allows counsel fees in a general judgment for a defendant in a proceeding for condemnation. Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833. We see no reason for a reversal of the judgment. The judgment appealed from in each of the above cases is affirmed.

DE HAVEN and FITZGERALD, JJ. We concur in the judgment on the second ground discussed in the opinion of Mr. Justice McFARLAND.

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103 Cal. 264

McDOWELL'S ESTATE v. HIS CREDITORS. (No. 18,227.)

(Supreme Court of California. June 26, 1894.)

HOMESTEAD—WHAT CONSTITUTES.

A building used primarily as an hotel cannot be regarded as a homestead, though the owner and his wife reside there for the purpose of carrying on the business. 35 Pac. 1031, affirmed.

In bank. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

In the matter of the estate of J. E. McDowell, an insolvent debtor. From an order refusing to set apart to him an hotel as a homestead, he appeals. Affirmed.

For prior report, see 35 Pac. 1031.

Warren & Taylor (T. M. Osmont, of counsel), for appellants. L. F. Coburn, for respondent.

PER CURIAM. Upon further consideration of this cause in bank, we are satisfied with the conclusion reached by department 1 in its opinion filed March 2, 1894 (35 Pac. 1031), and, for the reasons stated in said opinion, the judgment and order appealed from are affirmed.

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103 Cal. 223

PEOPLE et al. v. MARIN COUNTY et al. (No. 15,426.)

(Supreme Court of California. June 26, 1894.)

DEDICATION OF HIGHWAY—EVIDENCE—EASEMENT AND SERVIENT ESTATE—MERGER IN STATE—DIRECTORS OF STATE PRISON—POWERS.

1. The fact that the board of directors of the state prison have, by the constitution, charge of the prison, does not authorize them to close a public highway passing through the prison grounds because it facilitates the escape of prisoners.

2. Evidence that the owner of land petitioned the county supervisors to declare a road over his land a highway; that the board did so, though without following the statutory requirements; and that the road was used and worked by the public for 25 years as a public highway, —will sustain a finding that there was a dedication and acceptance of the road.

3. The easement which the public has in a highway does not merge in the fee of the servient estate when acquired by the state.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by the people of the state of California on the information of the attorney general and others against the county of Marin and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Atty. Gen. Hart (Aylott R. Cotton, of counsel), for appellants. Jas. W. Cochrane and Hepburn Wilkins, for respondents.

SEARLS, C. This action is brought by the people of the state of California upon the information of the attorney general, and by W. E. Hale, warden of the state's prison at San Quentin, Cal., and the board of state prison directors, as plaintiffs, against the county of Marin, the supervisors of said county, and J. Edwards, as road master, defendants, to restrain them from interfering with certain gates and obstructions placed by plaintiffs upon a certain road running to, upon, and across the state prison grounds, and alleged to be a private road. A restraining order issued in the case. Defendants answered, averring that the road from San Rafael to Point San Quentin is a public highway, and runs across and over the premises described in the complaint, viz.

the state prison grounds, and admit their intention to remove gates and obstructions therefrom. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment entered thereon in favor of the defendants, from which judgment, and from an order denying a motion for a new trial, plaintiffs appeal.

The court found, among other things, that the state of California is, and ever since the 25th day of August, 1869, has been, the owner in fee of the tract or parcel of land described in the complaint, subject, however, to the easement or right of way in the public of the public road and highway known as the "County Road," leading from San Rafael to Point San Quentin, which said road runs across said tract of land, and which said road is now, and has been for over 35 years last, a public road and highway of the county of Marin, and during all of said times has been used and traveled by the public as a public road and highway by all persons traveling from the town of San Rafael to the village of San Quentin, in the county of Marin, except that in the year 1891 and January, 1892, when W. E. Hale, warden of the state prison at San Quentin, Cal., placed gates and obstructions across the same; that the said county road is not, and never was, a private road, but that the same has been, ever since the year 1854, one of the public county roads of Marin county.

The first point made by the learned counsel for the people seems an extraordinary one. It is, in substance, that, conceding the road in question a public highway, running through the prison grounds, still, as the state prison is, by virtue of section 1573 of the Penal Code, under the charge, control, and superintendence of a board of directors, consisting of the governor, lieutenant governor, and secretary of state, which board, under section 2 of article 10 of the constitution, it is provided shall have charge of the state prison, they may, when they deem it expedient in the control of the prison, authorize the closing of the road; and the board having, by resolution, ordered the highway closed, it ceased to be a public road. The record shows that the state is seised in fee of a tract of land consisting of say 150 acres, bounded in part by the Bay of San Francisco, upon which the state prison is constructed, with necessary buildings and walls for the detention of prisoners, and with dwellings, guard houses, etc., for the accommodation of officers, guards, and attachés, across which tract of land the highway in question runs. Under the allegations of the complaint there was evidence tending to show that a portion of the prisoners perform labor and render services outside the prison walls, and that the proximity of the highway, and the right of the public to travel thereon, enables evil-disposed persons to secrete arms, ammunition, citizens' clothing, opium, etc., upon the grounds, where there are procured by prisoners, and by means whereof the escape of prisoners is facilitated, and the good order and discipline of the prison endangered. Conceding all these objections, and it is not perceived how it strengthens the case of the appellant. If the road in question is a public highway, it is so by virtue of having been dedicated to the public, and abandoned as such by B. R. Buckelew, the owner of the land (under whom, by sundry mesne conveyances, the state holds title), about 1854, and by reason of having been accepted by the public and used as a highway long before any title vested in appellant. The authority to close up, and alter public highways outside of municipalities is conferred upon the board of supervisors of the several counties of the state, and can only be exercised through the instrumentalities and in the mode prescribed by law. The easement of the public in and to a public highway is as sacred as any other property right, and cannot be divested by the action of the owner of the servient tenement in which it exists. No power is given, either by our constitution or laws, to the board of prison directors, to abolish public highways. The Bay of San Francisco and the highway in question may each afford opportunities for evil-disposed persons to come within proximity to the prison for nefarious purposes; and the prison authorities had as much authority to interdict travel upon the one as the other; in other words, it can do neither. It follows that the judgment is supported by the findings. We think the motion for a new trial was properly overruled.

The only question of practical importance relates to the sufficiency of the evidence to sustain the findings of dedication of the road as a public highway by B. R. Buckelew, the owner of the land over which it passed, and its acceptance by the public, or by the constituted authorities of Marin county. Dedication is the setting apart of land for the public use, and an essential requisite to its validity is that it must be of such a character as to conclude the owner. There are two kinds of dedication, viz. statutory and common-law dedication. Of statutory dedication nothing will be said beyond stating the general rule, which is that, in order to constitute a valid statutory dedication, the provisions of the statute, whatever they may be, must be substantially complied with. Common-law dedications are, for convenience of description, frequently subdivided by law writers into two classes,—express dedications and implied dedications. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent.

In Waugh v. Leech, 28 Ill. 488, it was said: "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested." And it may be said generally: "If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." Elliott, Roads & S. p. 92. The question of intent is paramount, and, without such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid dedication. Turning to the evidence set out in the record, and it appears that in 1854 B. R. Buckelew owned the land described in the complaint, and had a sawmill at Point San Quentin; that he needed a road to get to it, and that this road was laid out and graded from the town of San Rafael to Point San Quentin in 1854 or earlier, and was the only traveled road between the two points, and was used by the public generally. The widow of B. R. Buckelew testified as follows: "My husband always intended it for a public road. He said so before the year 1855." And again: "He always intended a road there, and he was obliged to have one to get to the sawmill. * * * He wanted it as a public road, so that every one could travel on it." William Patton testified, in substance, that in 1858 the road was a good wagon road, over which the stages from Point San Quentin ran to San Rafael; that it was graded so that two teams could pass, and was called the "County Road." A number of other witnesses had known the road since 1870 as a public highway in charge of the county officers, who kept it in repairs, built bridges, culverts, etc. Convicts from the prison worked on it under the road overseer, working out the poll tax of the officers and attachés of the prison. There was also evidence tending to show that prior to August 6, 1855, B. R. Buckelew filed with the board of supervisors a petition asking that the road be declared a public highway. This petition was lost or mislaid. On the 6th day of August, 1855, an order appears in the record of the board of supervisors reciting the petition of Buckelew for this road from Point San Quentin to San Rafael as being presented. On February 4, 1856, the board of supervisors of Marin county entered an order in their records, which recites that, in pursuance of the petition of a large number of the citizens of Marin county, praying for a public road between the town of San Rafael and the state prison in said county, etc., it appearing that a public road is necessary and important for the convenience of the citizens of said county, "it is hereby ordered by said board of supervisors that the road now leading from San Rafael to said state prison be and the same is hereby declared to be one of the public roads and highways of said county." The order required the county surveyor to survey the road, and appointed viewers; also that a copy of the order be served upon said Buckelew forthwith, "to ascertain whether he has any objections to the above road." The road was surveyed by the county surveyor, who shortly afterwards saw Buckelew, and told him what he had done, whereupon the latter said it was all right. The field notes of this survey were recorded in the office of the county surveyor, but, so far as appeared, no plat was ever recorded. That the general public used the road as a public highway is established by the evidence beyond reasonable doubt. It is said that all of this testimony fails to establish a statutory dedication of the highway. This may be conceded, but "in many instances a dedication invalid as a statutory one will be a good common-law dedication." Elliott, Roads & S. pp. 85, 86. When Buckelew petitioned the board of supervisors to declare the road a highway, it was evidence of an intent on his part to dedicate it to the public use; and when the board of supervisors so declared it, although the proceeding was not accompanied by all the forms required by the statute to constitute it a highway in a statutory sense, still it was evidence of an acceptance by the board for the public as such highway; which evidence, coupled with its uses for a highway, and its improvement as such by public authority, is ample to support an acceptance. Elliott, Roads & S. pp. 115-118. Section 2619 of the Political Code, as it existed prior to February 28, 1883, provided that "all roads used as such for a period of more than five years are highways." In Bolger v. Foss, 65 Cal. 250, 3 Pac. 871, this court said, alluding to the section quoted supra: "This is more than a declaratory law to the effect that the fact of use of a road as a public road for more than five years shall be evidence, prima facie or conclusive, of dedication by the owners of the lands through which it runs. It is in the nature of a statute of limitations, which gives to the public the right to use the road as a highway, in case it has been so used." Since 1883, section 2618 of the Political Code reads as follows: "In all the counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." In any view we take of the case, the evidence in support of the findings establishes the fact that the road in question, as early as 1856, was dedicated as a public highway and accepted by the public as such, and by their agents, the supervisors of the county of Marin, and ever since has remained, and now is, a public highway.

The objection that it is not shown to have any specific width is without force in this action, which involves no question as to its width, or of encroachment upon it as a highway, but the simple question whether it is in fact a highway. It may be said, however, that where the right of the public is acquired by user, the boundaries of the road are generally ascertained by reference to the user. Where there is a statute fixing the width of all highways, it has been said that the dedication to the purpose of a highway will be presumed to be the width fixed by the statute; and, where discretion is given to certain officers to determine the width of a highway, such discretion will not be interfered with, except in cases of fraud or oppression. Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. 710.

So, too, the theory is advanced that when in 1869 the state became the owner of the land over which the road is located, the easement, if any, which previously existed therein being in the state, was merged in the estate which the state acquired to the land. As applied to the law of real property, it may be stated as a general rule that where a greater estate and a lesser coincide and meet in one and the same person in the same right, without any intermediary estate, the lesser is immediately annihilated, or, in the law phrase, is said to be merged—that is, sunk or drowned—in the greater. In equity the rule is different. Rumpp v. Gerkens, 59 Cal. 496. If a trustee holds a leasehold estate in a piece of land in trust for A., or in trust for a specific purpose, and should receive a conveyance of the reversion in the same land in his own right or in trust for B., it could not be said the leasehold estate was merged, because they would not vest in the same right. In the present case, if it can be said the state holds the easement to all the highways within its boundaries, which, under our statutes, cannot, we think, be upheld, still, if it does so hold, it is as the representative of the people, and in trust for the objects of their creation, viz. to enable the people to pass and repass over such roads at will; and such easements are not held in the same right as the title of the state to lands which it has purchased. To attempt to apply the doctrine of merger to such a case is to wrest it from the objects of its creation and existence. In strictness, all public highways belong to the state, which holds them for public use subject to legislative control. In this commonwealth their custody and control outside of municipalities is confided to the supervisors of the several counties in which they are located. The legislature may, by general statute, legislate in reference to them. It has provided, by section 2621 of the Political Code, that "a road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located." This statute is binding upon the state as well as individuals. The general rule is that "whoever takes an estate upon which a servitude has been imposed holds it subject to the same servitude, and in the same manner, as it was held by his grantor." Washb. Easm. p. 7. In Flagg v. Flagg, 16 Gray, 175, it was said that a private way, established under a Massachusetts statute for the use of one or more individuals of a town or proprietors therein, is not discontinued by the unity in one person of title to and possession of all the land through which the road is located. The reasons for a like doctrine in case of a public highway in which the general public has an interest are even stronger.

The objections to evidence are either untenable or relate to testimony which, upon the finding that the road in question was and is a public highway, are wholly unimportant.

The question of costs need not be considered, for the reasons: (1) The record fails to show any objection to costs, if any were allowed by the court, either before or after judgment; and there is no bill of exceptions showing any ruling upon the question of costs. (2) While the court below found as a conclusion of law that the defendants were entitled to costs, the judgment does not include costs, and it may well be that defendants waived the recovery thereof. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(103 Cal. 355)

In re HUNT. (No. 21,143.)

(Supreme Court of California. July 3, 1894.)

Custody of Children.

The father and mother being the natural guardians of a child, can only be deprived of the custody of its person by a proceeding under Civ. Code, § 203.

In bank.

Application for habeas corpus by Henry Hunt in behalf of Henry Hunt and Lizzie Hunt, his minor children. Granted, and children discharged from custody.

John R. Aitken, for petitioner. Mr. O'Grady, for respondent.

PER CURIAM. The children above named having been brought before the court by writ of habeas corpus, and, the court being fully advised as to the matter, it is hereby ordered that said minor children be discharged from the custody of Frank Kane, and restored to the custody of the petitioner. The father and mother, being the natural guardians of a child, can be deprived of the custody of its person only by a proceeding under section 203 of the Civil Code. The proceeding by which the superior court has committed these children to the custody of a stranger is wholly unauthorized.

GAROUTTE, J. I concur in the judgment, but am not prepared to coincide with the majority of the court upon the important question stated in the last clause of the foregoing opinion without an opportunity for further examination.

103 Cal. 357

DULIN v. PACIFIC WOOD & COAL CO. et al. (No. 19,251.)

(Supreme Court of California. July 6, 1894.)

CORPORATIONS—ELECTION OF PRESIDENT.

Since Civ. Code, §§ 307, 312, provide that in a corporation election every stockholder must vote his shares in person, or by proxy in writing, a president of a corporation cannot enforce a verbal agreement by the stockholders that he shall continue as president for two years longer, the agreement providing no way for its enforcement. Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by E. G. Dulin against the Pacific Wood & Coal Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

For opinion in department, see 35 Pac. 1045.

D. L. Withington and Works & Works, for appellants. V. E. Shaw and Conklin & Hughes, for respondent.

PER CURIAM. Upon further consideration of this case in bank, we are satisfied with the opinion rendered in department (35 Pac. 1045), and, with the conclusion therein reached, and for the reasons given in said opinion, the judgment is affirmed.

BEATTY, C. J. I dissent.

103 Cal. 67; 4 Cal. Unrep. 676

LANCASTER et al. v. MAXWELL et al. (No. 15,017.)

(Supreme Court of California. June 12, 1894.)

NOTICE OF APPEAL.

Under Code Civ. Proc. § 940, providing that notice of appeal must be served on every "adverse party," an appeal (in an action by a subcontractor against the original contractor and the landowner to enforce a mechanic's lien) by the landowner from a judgment ordering the sale of the land (any deficiency to be docketed as a personal judgment against the contractor) will be dismissed where no notice thereof is served on the contractor.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. R. Lancaster and others against Thomas Maxwell and C. B. Gregory. There was a judgment for plaintiffs, and defendant Gregory appeals. Dismissed.

Ash & Mathews, for appellant. Wickliffe Matthews and A. D. Lemon, for respondents.

McFARLAND, J. This is an action to foreclose certain mechanics' liens. Defendant Gregory is the owner of the buildings involved, and defendant Maxwell was the original contracter. Both defendants suffered default. The liens sued on grew out of labor and materials done for and furnished to the contractor, Maxwell. By the judgment it was decreed that the land, buildings, etc., of Gregory be sold, and the porceeds appropriated to the payment of the amounts found due upon the liens, and that if such proceeds should not be sufficient to pay all the liens "the deficiency thereof shall be docketed as a personal judgment against said defendant Thomas Maxwell." The defendant Gregory appeals from the judgment, and also from an order denying her motion to set aside her default, made upon the grounds of surprise, excusable neglect, etc. The notice of appeal was not directed to or served upon the codefendant, Maxwell, and, for that reason, respondents move to dismiss the appeal.

The court did not abuse its discretion in refusing to set aside the default; and while we have looked through the transcript and briefs, and see no reason why the judgment should, under any view, be reversed, it is not necessary to discuss the other points suggested, because we think that the appeal should be dismissed. A notice of appeal must be served on every "adverse party." Section 940, Code Civ. Proc. And adverse parties are those who are "interested in the judgment, and would be affected by its reversal." O'Kane v. Daly, 63 Cal. 319. "Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." Senter v. De Bernal, 38 Cal. 637. And it is quite clear that in the case at bar the interest of Maxwell would be "affected by the reversal" of the judgment. Appellant seeks particularly a reversal of that part of the judgment which decrees her property to be sold to satisfy the liens, and it is apparent that such reversal would be adverse to the interest of Maxwell. The appeal is dismissed.

We concur: DE HAVEN, J.; FITZGERALD, J.

103 Cal. 193

PEOPLE v. STOKES. (No. 21,068.)

(Supreme Court of California. June 23, 1894.)

CRIMINAL JURISDICTION — DIVISION OF COUNTY — EFFECT ON PENDING PROSECUTION—MISCONDUCT OF JURY—READING NEWSPAPER ARTICLES.

1. Where, after a prosecution is commenced, the part of the county in which the offense was committed is organized into a new county, such new county has jurisdiction of the offense, the prosecution in the old county having been dismissed.

2. Where the jury, after retiring to delib-

erate on a verdict, read newspaper statements that two men will hang the jury, that their identity is known to the public, and that attemps were made to corrupt the jury, the verdict will be set aside.

In bank. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Elta Stokes was convicted of grand larceny, and appeals. Reversed.

Horace L. Smith, for appellant. W. H. H. Hart, Atty. Gen., and M. L. Short, Dist. Atty., for the People.

GAROUTTE, J. The defendant was charged with robbery, alleged to have been committed at Armona on March 2, 1893. He was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial. Upon March 2, 1893, the date of the alleged crime, Armona was in Tulare county. On May 29, 1893, the county of Kings was organized out of a portion of Tulare county, and Armona is now, and has been since that time, in the county of Kings. The defendant contends that the superior court of Kings county had no jurisdiction over the alleged offense, and for that reason the judgment of conviction is void. He raised the question in the court below upon motion to dismiss the prosecution for want of jurisdiction, and, on the hearing of his motion, supported it by evidence showing that before the organization of Kings county there was commenced in the superior court of Tulare county a prosecution for the identical offense charged in this case, which prosecution was pending in said court at the date of the organization of said Kings county. The prosecution in Tulare county was dismissed prior to the inception of criminal proceedings against the defendant, upon which he was subsequently convicted in Kings county. Has the accused been tried and convicted in the proper county? We find no case directly in point upon the question here involved. The authorities all agree that the newly-created county has jurisdiction of a defendant charged with the commission of an offense prior to the creation of the new county, and upon territory within its boundary lines. But the question of jurisdiction seems never to have arisen where a prosecution was actually pending at the time the new county was created. As supporting the general principle above stated, see McElroy v. State, 13 Ark. 708; Murrah v. State, 51 Miss. 675; State v. Bunker, 38 Kan. 737, 17 Pac. 651; State v. Jones, 9 N. J. Law, 357; State v. Donaldson, 3 Heisk. 48; Bish. Cr. Proc. § 49. We do not think that the fact of an existing prosecution against the defendant in Tulare county at the date of the creation of the new county of Kings causes any exception to the general rule declared in the foregoing authorities. At the time the accused was tried and convicted, no proceedings were pending against him in Tulare county, and we are unable to see that he occupied any different position than if there had never been any prosecution begun in that county. Possibly, a judgment of conviction under the first prosecution would have been a valid and legal judgment. U. S. v. Dawson, 15 How. 467, but, even conceding such to be the fact, it does not follow that the mere circumstance of the existence of a pending prosecution at the date of the creation of the new county (which was subsequently dismissed) is a bar to a second prosecution. Why should it be? In the absence of the first prosecution, it is conceded that the new county was the proper county for trial; yet, under the first prosecution, it is not claimed that the defendant was either acquitted or convicted, for it is perfectly apparent that jeopardy did not attach. He now stands before the court exactly as if no proceedings were ever taken against him in Tulare county. If the superior court of that county had no jurisdiction to try the defendant, then, beyond question, the prosecution and conviction were properly had in Kings county; and, if the superior court of Tulare county had jurisdiction of the offense and the defendant, it had jurisdiction for all purposes, and consequently it had the power to dismiss the prosecution and discharge the defendant. The fact that the court may have made the order upon insufficient grounds, and thus have committed error in so doing (which is not conceded), is foreign to the question. The dismissal of the case was a matter within the power of the court, and the order of dismissal, as far as the defendant is concerned, was as effectual as though made upon the most incontestible ground. We see no cause of complaint upon his part. He has been deprived of no constitutional right. He has had a speedy and public trial by an impartial jury selected from the county including the territory upon which the crime was committed. Indeed, the defendant is favored in this respect, for he has been tried by a jury selected from a vicinage much more restricted than if the trial had been had in the county where the original prosecution was begun.

2. It is insisted that a new trial should have been granted because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct.

A juror is not allowed to say: "I acknowledge grave misconduct. I received evidence without the presence of the court. But those matters had no influence upon my mind when casting my vote in the jury room." The law, in its wisdom, does not allow a juror to purge himself in that way. It was said in Woodward v. Leavitt, 107 Mass. 466: "But where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decisions. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." There are intimations in the cases of People v. Goldenson, 76 Cal. 328, 19 Pac. 161, and People v. Murray, 85 Cal. 350, 24 Pac. 666, tending to oppose the foregoing views, but they do not express the law. The article of which complaint is made had the following heading: "The Stokes Case—Third Day of the Armona Robbery Trial—Undersheriff Hall Testifies about the Fifty-Dollar Silver Certificate—A Condensed Report of the Trial—A Hung Jury Intimated — Colonel Mazuma's Presence." The article concludes as follows: "It is currently reported on the streets that the jury will fail to bring in a verdict, and that two men will hang the jury. It is also believed that the two men are known, and that the whereabouts of 'Colonel Mazuma' are also known." It is exceedingly unfortunate that a newspaper should publish such an article pending the trial of an important criminal case. Newspaper comments of this character are well calculated to interfere with the due and proper administration of justice. The jurors should not have read the article. The newspaper should not have published it. The publication of such articles during the pendency of important trials serves no good purpose, but, on the contrary, tends to impede and adulterate the stream of justice. This article results in giving a defendant a new trial in an important case, for we discern no other ground for a reversal of the cause, save the one now under consideration.

We will now pass to an examination of the law. In speaking to this question, Mr. Hayne, in his very valuable work upon New Trials and Appeals, after an exhaustive review of both principle and authority, at section 27, says: "The rule laid down by the foregoing cases, viz. that, where an irregularity is shown which may have influenced the result, it is for the successful party to show that as a matter of fact it did not, rests upon sound principles. Corrupt and other improper actions are usually done in secret, and are carefully covered up; and it would always be difficult, and in many cases impossible, for the moving party to show that the irregularity was in fact followed by some corrupt or otherwise improper influence, while it is comparatively easy for the juror to explain an apparently doubtful act, if it be innocent. * * * The rule above stated is sustained by high authority. The views of such jurists as Shaw, Sharkey, Field, and Clifford are not to be lightly put aside. In California the cases of People v. Backus, 5 Cal. 276, and People v. Brannigan, 21 Cal. 337, and People v. Turner, 39 Cal. 370, seem to conclusively settle the matter. The rule, however, like every other rule, is to have a reasonable, and not a forced, application. It does not apply where there is only a bare possibility of the result having been affected. The case must be such that the court cannot determine with any reasonable certainty whether the result was affected or not." As directly supporting the author's text and the views of this court, we cite Com. v. Roby, 12 Pick. 519; Hare v. State, 4 How. (Miss.) 193; McCann v. State, 9 Smedes & M. 468; Keenan v. State, 8 Wis. 138; Wormley's Case, 8 Grat. 714; State v. Prescott, 7 N. H. 288; People v. Backus, 5 Cal. 276; People v. Brannigan, 21 Cal. 337; People v. Turner, 39 Cal. 370; People v. McCoy, 71 Cal. 395, 12 Pac. 272.

The remaining question presented is, was the article not calculated to prejudice the result of the trial? Is it apparent that it could have had no influence upon the verdict? If not, the defendant should be awarded a new trial, for he has not yet had that fair and impartial trial to which he is entitled by constitution and statute. It is said in People v. McCoy, supra: "There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act will constitute ground for a motion for a new trial. * * * If it be proved as a fact, or may be presumed as a conclusion of law, that the verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial." See, also, Carter v. State, 9 Lea, 440. Without considering that portion of the article containing a misrecital of the evidence, we pass to the extract quoted above. That extract, in effect, states that two men will hang the jury, and that their identity is known to the public. If there were men upon the jury who were wavering as to the character of their verdict, it is impossible for this court to say that this article, when read in the jury room, did not have the effect of directing their final action. We cannot say from an inspection of the record that the reading of it by the jurors had no effect upon the character of the verdict rendered. We cannot say that the verdict of guilty is based wholly upon the evidence introduced at the trial. The article goes to still greater lengths, and intimates that attempts are being made to corrupt the jury. It appears that the term "Colonel Mazuma" not only does not indicate some gentleman with a military title, but it does not even refer to a person at all. We fail to find the term mentioned by our lexicographers, but understand it to be a modern provincialism, probably emanating from the daily press, and used when referring to the corrupt application of money in the accomplishment of certain ends. If these jurors understood this term with the signification thus attached to it, it of itself furnished ample material to demand a retrial of the case. We see no other error in the record. As was said in People v. Mitchell, 34 Pac. 698: "It is unfortunate for the jury system, and for the cause of justice, that such episodes should occur in the trial of causes; but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances." It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, J.; HARRISON, J.; McFARLAND, J.; VAN FLEET, J.

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103 Cal. 71

CASTLE et al. v. SIEGFRIED et al. (No. 15,092.)

(Supreme Court of California. June 13, 1894.)

TRADE-MARK—INFRINGEMENT.

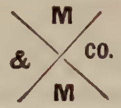
The labels on packages of tea imported by plaintiffs stated that their firm was the importer, and this was followed by an X-mark with the firm's initials in the angles, and a statement of the kind of tea, and that it was imported from Japan, where the packages were put up. Defendants' tea was put up in the same size packages, and the labels were identical, except that the name of the importing firm and the initials in the X-mark were different. It appeared that this kind of a label had been used by tea importers for 20 years, and it did not appear that plaintiffs invented it. The quality of defendants' tea was the superior, and it appeared that persons purchasing tea were influenced merely by the initials in the X-mark. *Held*, that there was no infringement of plaintiffs' trade-mark.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Michael Castle and others, partners under the firm name of Macondray & Co., against John C. Siegfried and Max Brandenstein, partners under the firm name of Siegfried & Brandenstein. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Galpin & Zeigler, for appellants. Mastick, Belcher & Mastick, for respondents.

HARRISON, J. Action for the infringement of a trade-mark. The plaintiffs, a mercantile house in San Francisco, under the name of Macondray & Co., have been for many years engaged in importing teas from Japan, which are put up for them in that country in pound and half-pound packages, on each of which is affixed a label, the lines of which are printed in different colors, designating them as the importers, and containing also a characteristic mark or brand, as follows:



—the whole surrounded with a gold border. The defendants are also importers of teas into San Francisco from Japan, and have for many years imported teas put up in pound and half-pound packages, marked with labels containing an X-shaped character similar to that used by the plaintiffs, but with different initial letters in the angles thereof. The plaintiffs brought this action, alleging that the acts of the defendants are an infringement of their right to a trade-mark, and praying that they be enjoined from its further use. The court below held that the marks used by the defendants do not infringe upon any trade-mark of the plaintiffs, and are not a colorable or any imitation of any trade-mark of the plaintiffs, and rendered judgment in favor of the defendants, dismissing the complaint. The plaintiffs moved for a new trial, upon the ground that the decision of the court was not sustained by the evidence. This motion was denied, and the plaintiffs have appealed.

A trade-mark may be appropriated by any one dealing in an article of commerce, "to designate the origin and ownership thereof;" but such dealer cannot exclusively appropriate any designation or part of a designation which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced or the business is carried on. Civ. Code, § 991. There is a marked distinction between the appropriation by an individual of some mark or symbol, coined or invented by him, to designate an article or proprietary compound which he manufactures, and his appropriation of a mark to designate an article of commerce dealt in by him in common with others. There can be no exclusive right to put up or sell tea in packages of any particular form or size, or to designate the packages by any particular arrangement of words, which indicate no more than the name or amount or quality of the tea, or the place where it is produced or sold. The plaintiffs did not give any evidence in the court below tending to show that they had invented or devised the trade-mark called by the witness the "sawbuck" or "cross-bar" mark or brand, but merely that they had made use of it, with their initials in the angles, for many years; nor did they show that they were the first who had made use of this brand as a distinguishing mark for their goods; and there was evidence before the court that this mark had been used by dealers in tea long anterior to the time when the plaintiffs claim to have first made use of it, and that it had been used in San Francisco as a brand or mark upon packages of tea for upwards of 20 years by other persons who were dealing in tea in San Francisco and on the Pacific slope. The court finds that the only parts of the labels which were invented or designed or solely used by the firm of Macondray & Co. are the combination of the X-shaped character with the letters "M. M. & Co.," and the name "Macondray & Co." This is, indeed, all of the label that could be appropriated by the plaintiffs as a trade-mark, and is what is claimed by them in the complaint to be their trade-mark, and to which the evidence at the trial was directed. It was also shown that the packages in which both the plaintiffs and the defendants, as well as other importers, are accustomed to have the tea imported, are of the shape and size in which it is usually put up and sold; that the paper in which it is wrapped is manufactured in Japan, and that the labels thereon are printed there; that these labels are in the usual form of type used upon tea labels, and are printed in alternating colors, such as are commonly used in that country, and are surrounded with a gold border; that the only distinguishing mark of the several importers is their own name printed upon the label, or their initials in the angles of the X. It was also shown, and the court found, that the defendants had sold to dealers tea put up in packages marked with labels containing the names of such dealers, instead of the names of the plaintiffs, and having their initials in the angles of the X, instead of the initials "M. M. & Co.," and having also the same descriptive name of the tea; that the size and shape of the packages and the labels thereon were similar to those on the packages of tea sold by the plaintiffs, and were of the form and character in common and general use in the tea trade, and used by most importers and dealers in tea; that all of these teas were so packed and marked at the direction of the dealers to whom they were sold, and the initial letters placed in the angles of the X were in each case the initials of the name or firm name of such dealer. The teas thus put up and sold by the defendants were of a quality equal, if not superior, to those put up and sold by the plaintiffs; and the court finds that the defendants acted in good faith, and were free from any fraudulent intent, in their dealings in the teas. It was also shown that persons wishing to buy tea were governed by the initials within the X, or by the name of the importer stamped upon the packages, and that the different colored letters on the labels had no significance with those purchasing teas; and the court found that no person had been, or was likely to be, deceived by any resemblance between the packages of tea sold by the defendants and those sold by the plaintiffs. We are of the opinion that the evidence fully sustains the findings of the court, and that its judgment is correct. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.

103 Cal. 125

RUGGLES v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,682.)

(Supreme Court of California. June 15, 1894.)

CONTEMPT—WHAT CONSTITUTES — EFFECT OF APPEAL.

Where the superior court makes an order for family allowance from which an appeal is taken, an administrator is not guilty of contempt for not paying said allowance pending an appeal. Beatty, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by James Ruggles for a writ of prohibition against the superior court of the city and county of San Francisco, and J. V. Coffey, judge thereof. Writ allowed.

M. T. Moses and Chas. A. Sumner, for petitioner. Garret W. McEnerney and Stanley, Hayes & Bradley, for respondents.

VAN FLEET, J. Application for prohibition. Petitioner is the administrator of the estate of one Henry Welch, deceased, in course of administration in the department of said respondent superior court presided over by said Hon. J. V. Coffey, judge thereof. On February 16, 1894, an order was made and entered in said estate directing petitioner, as such administrator, to pay to the widow of said deceased $7,375, as accrued and unpaid family allowance. From this order the administrator on February 20, 1894, perfected an appeal to this court. Thereafter the widow moved this court to dismiss said appeal, which motion was subsequently, on the 5th day of March, denied, and the appeal is still pending and undetermined. Subsequent to the denial of said motion, the respondent judge, on the 7th day of March, at the instance of the widow, caused a citation to be issued and served upon petitioner, requiring said petitioner to show cause before the respondent superior court, on the 8th day of March, 1894, why he should not be punished for contempt in failing and refusing to obey the order of February 16th requiring him to pay said family allowance. On the last-mentioned date petitioner, in obedience to the citation, appeared before said court, and in response thereto brought properly to the attention of the court the said appeal and the order of this court denying the motion to dismiss the same, and then objected that neither the superior court nor the judge thereof had any power or jurisdiction to proceed with or hear said matter of contempt, or to enforce said order for the payment of family allowance, by reason of the pendency of the appeal. But notwithstanding the showing so made by petitioner, and disregarding his objections, said superior court and the judge thereof, respondents, threatened to proceed in said matter, and to punish petitioner for his refusal to obey said order; whereupon this application for prohibition was made.

The sole question arising is as to whether the superior court is acting in excess of its jurisdiction in the premises. Under the facts stated, we are constrained to hold that it is. The appeal from the order in question operated as a supersedeas, and stayed all further proceedings in the court below in the particular matter involved in the order appealed from. By the appeal the order or decree is set at large, and the subject-matter removed from the jurisdiction of the lower court until the appeal has been determined and the matter remitted back from the appellate court. In the case of Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617, the lower court made an order for family allowance, from which an appeal was taken. Pending the appeal, the lower court made an order directing the administrator to pay the money allowed by the previous order. The latter order was annulled by this court on certiorari, upon the ground that the appeal had removed the subject-matter of the order from the jurisdiction of the superior court, and it had not authority to further proceed with its enforcement pending the appeal. And in the recent case of Ex parte Orford (opinion filed in department 2 of this court, June 8, 1894), 36 Pac. 928, the same question arose. An administratrix of an estate in probate had been ordered to pay a certain claim against the estate; she appealed from the order, but, notwithstanding her appeal, the lower court proceeded against her as for a contempt in refusing obedience to its order, and punished her by imprisonment until she should comply with the order. This court discharged her on habeas corpus, holding that "the petitioner, having appealed and stayed all proceedings upon the order which she is charged with violating, cannot, pending her appeal, be punished for a failure to obey it." It is urged here by the respondents, however, as it was on the motion to dismiss the appeal, that the appeal attempted to be taken by petitioner herein is ineffectual to stay the hand of the lower court, because no appeal lies from an order such as the one under consideration. But that question does not arise in this proceeding. An appeal from the order has been taken to this court, and this court has refused to dismiss it; this determination is as effectual for the purposes of this case as if determined for all purposes. Its effect is that this court is thus far entertaining the appeal, and while it does so the respondents are not at liberty to proceed in the matter. Whether the order in question shall be ultimately held appealable is a question that will properly arise in the matter in which the appeal is pending, but, for the reason stated, it is not involved here.

The proceedings complained of being in excess of the jurisdiction of respondents, a peremptory writ should issue as prayed. It is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; FITZGERALD, J.

On Rehearing.

(July 17, 1894.)

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and, having concurred at the time in the decision heretofore pronounced by the court, I desire to state the grounds of my present conviction that said judgment was erroneous. When the superior court has made an order or judgment from which there is no appeal, and which is therefore a final adjudication of the rights of the litigants, the prevailing party is entitled to demand the enforcement of such order or judgment; and it is not only the right but the duty of the superior court to accord the proper relief by the appropriate process. That court is not relieved of such duty by the fact that the defeated party has attempted to appeal to this court, and thereby to stay the proceedings. When asked to enforce its order, and the fact is brought to its knowledge that an appeal has been taken or attempted, a question is then presented as to its jurisdiction to proceed, dependent for its solution upon the further question whether the order is final and unappealable or not; and this question it must decide. If it should erroneously decide that the order is not appealable when it is appealable, then alone has this court the power to interpose by prohibition and arrest its process. No one denies the truth of this proposition, as applied to a case where there has been no motion made in this court to dismiss the appeal upon the ground that the order is nonappealable; but because in this case the prevailing party in the superior court raised the question here by a motion to dismiss, which was disposed of without any decision of the question involved, a distinction is made, and it is held that the superior court is exceeding its jurisdiction in enforcing the order in question, whether it is final and nonappealable, or not; in other words, that it is exceeding its jurisdiction in enforcing an order which it holds to be final, and which we have never held, do not now hold, and may never hold to be appealable. For it should be understood—a fact which does not clearly appear from the opinion of the court—that the order overruling the motion to dismiss the appeal was made expressly without prejudice, which, whatever else it may or may not mean, certainly does mean that the question involved in the motion was left open and undecided. That is to say, the motion was disposed of, and taken as completely out of the case, for all purposes, as if it had never been made, but the question whether the order of the superior court is final or appealable was left at large; neither party was estopped; nothing was foreclosed. Such being the case, the party claiming the benefit of the order, having been turned out of this court without a decision of a question which undoubtedly he could have presented in the first place to the superior court, returned to that tribunal and demanded the enforcement of its order, a right to which he is clearly entitled if it is final. I can see nothing in the proceedings here which relieved the superior court of the duty of hearing and determining the question so presented. The fact that we were "entertaining the appeal" is no answer to this proposition. It might just as truly, and with as much meaning, have been said that we were "entertaining the appeal" if no motion to dismiss it had ever been made. We are always entertaining appeals in cases in which no motion to dismiss has been made, and in which there is a question whether the order or judgment of the lower court is appealable or not. In all such cases, the question of our jurisdiction is pending and undetermined in the same sense and to the same extent that it is pending and undetermined in this case. But no one would contend for a moment that in such a case we could properly prohibit the enforcement of the order appealed from without determining that it was appealable, for unless we did hold it appealable we could not say that the lower court was exceeding its jurisdiction. If a proposition so plain needed authority to support it, such authority is found in the case of Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414.

In every appeal in which a question may be raised as to the finality of the order or judgment of the lower court, that question must be ultimately decided here, but, upon the question of enforcing the order or judgment pending the appeal, the lower court not only can, but must, decide in the first instance whenever its decision is properly invoked. This court may decline to decide the question upon a preliminary motion, and in the absence of a full record, as was done in this case, but when it chooses to take that course (disposing of the motion, but reserving the right upon the final submission of the cause to consider the question of jurisdiction then, and meantime leaving it undetermined) the case is put in precisely the same condition as if the motion had not been made, and no valid distinction can be raised by the suggestion that we are "entertaining the appeal."

For these reasons I am of the opinion that, until we are prepared to say that an appeal lies from the order of the superior court, we have no right to prohibit its enforcement.

WARNER v. F. THOMAS PARISIAN DYEING & CLEANING WORKS. (No. 15,266.)

(Supreme Court of California. July 9, 1894.)

Motion to set aside judgment, and to reinstate cause. Granted.

For original opinion, see 37 Pac. 153.

PER CURIAM. The appellant's brief in this cause having been heretofore stricken out by the court, by reason of objectionable matter contained therein, and appellant having been thereafter, upon application, granted permission to file a brief in said cause, omitting such objectionable matter, and the opinion in said cause having inadvertently been filed, and judgment entered, before appellant had opportunity to file said brief, it is ordered that the judgment herein, and the submission of said cause, be, and the same are hereby, set aside, and said cause restored to the calendar; that appellant have 10 days from this date within which to file brief; and that, thereupon, said cause stand submitted.

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103 Cal. 187

VALLENS et al. v. TILLMAN et al. (No. 15,458.)

(Supreme Court of California. June 23, 1894.)

BREACH OF CONTRACT—DAMAGES.

Defendants, being indebted to plaintiffs, agreed to buy from them 50,000 cigars per month until the profits thereon paid the debt; cigars to be of specified brands, and to correspond to samples. After defendants received a part of the cigars, they wrote plaintiffs they were not according to sample, and that they would take no more. Plaintiffs replied that if the cigars were not according to sample they would send them some that were, which defendants refused to accept. *Held*, plaintiffs could recover the debt, less the profits on the cigars accepted by defendants.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Eugene Vallens and another against Frederick Tillman and others for damages for breach of contract. Judgment for defendants, and plaintiffs appeal. Reversed.

Edmund Tauszky, for appellants. Daniel Titus, for respondents.

PER CURIAM. The plaintiffs are manufacturers of cigars at Chicago; the defendants, wholesale dealers at San Francisco.

Prior to February 4, 1889, defendants had purchased goods from plaintiffs, and, differences having arisen between them, a compromise was made through an agreement in writing of that date. In that agreement, among other things, it was stipulated that the plaintiffs claimed to have lost in the settlement $2,983.75, which defendants were willing "to assist in making up to them," and therefore agreed to purchase from plaintiffs 50,000 cigars per month for two years, "or until said party makes up said loss." The contract then proceeds to specify the brands to be furnished, which were to correspond to samples, and it was agreed "that the goods shall be equal in size, shape, and quality to said samples." The profit per 1,000 upon each brand was fixed in the agreement. It then states: "Should said party of the second part [defendants] conclude to go out of business of vending cigars at any time hereafter, or for any other reason, it may be released from its agreement to buy 50,000 cigars per month by paying to the said party of the first part the said sum of $2,983.75, or such part thereof as may remain unpaid at the time of so electing to discontinue such purchases." It is alleged by plaintiffs in their complaint that, since this agreement, the defendants have purchased from plaintiffs 180,000 cigars, the profits on which amount only to $380, and that defendants have refused to purchase any more, wherefore plaintiffs demand judgment for the sum of $2,603.75, which is the said sum of $2,983.75, less the said profits. The answer admits the contract; denies that plaintiffs have performed its conditions, that defendants have failed to perform, or have refused to purchase any more cigars from plaintiffs, or that plaintiffs have been willing to sell cigars in accordance with said agreement. Defendants aver that they performed the conditions of said contract in good faith until the plaintiffs committed a breach thereof by sending goods inferior in quality to the samples; that the defendants bought 180,000 cigars, but the goods were not like the samples, nor equal in size, shape, or quality; that defendants called plaintiffs' attention to the breach of the contract, and required them to furnish goods of the quality, size, and shape of the samples, which plaintiffs refused to do. The cause was tried with the aid of a jury, and the verdict and judgment were for defendants. Plaintiffs appeal from the judgment, and from an order refusing a new trial. Appellants contend that the court erred in admitting certain testimony over their objections, in giving instructions asked for by defendants, in refusing instructions asked for by plaintiffs, and in the instructions given of its own motion. Also, that the verdict is against the evidence.

It appears from testimony which is not disputed that, under the contract, defendants continued to take cigars from plaintiffs until July 18, 1889. At that time they had received 160,000 and had paid for 120,000. There had been no complaint in regard to the goods furnished. On that day, however, they sent a telegram to plaintiffs, as follows: "Do not ship any more cigars. Will write particulars." July 29th plaintiffs received at Chicago a letter from defendants explaining the telegram. They complained of the cigars sent as not being like the samples in quality or shape, and say they had suffered heavy loss, and add: "Although by rights we should hold the goods subject to your order, we will keep them and bear the loss ourselves, rather than have any more trouble with you; but at the same time positively withdraw from the contract, and terminate it right here, and will not receive any more cigars from you. Our transactions with you thoroughly satisfy us not to have any more to do with you whatsoever. Our statement as regards the quality of the goods can be substantiated by any reliable and square dealer or manufacturer of cigars who understands his business. Please return contract on receipt of this, and we will withhold payment of bill of June 25th until we hear from you." Two days later Tillman wrote another letter, reiterating the complaints in regard to the goods, and concluding: "Under the circumstances will not receive or purchase any more goods from you, as I certainly shall not deal with parties that I cannot trust." July 27, 1889, plaintiffs replied to the two letters, asserting that the goods sent were according to contract, but admitting that defendants had a right to retire from the contract upon paying the sum of $2,983.75, upon which they admitted defendants were entitled to a credit of $380. They demanded payment of the bill acknowledged to be due and the balance of the $2,983.75. August 7th plaintiffs received a reply to this letter from defendants, in which defendants say that they wish no further argument in the matter, and that they hold the goods not paid for subject to plaintiffs' order. November 29th plaintiffs replied, saying: "If you have any goods which you claim we did not make in accordance with the contract now existing between us, you can return them to us, and we will make others in place of them. We firmly insist upon the completion of this contract, and will either furnish the goods to you as specified in said contract, or you may pay us the amount in cash which is due us on the contract." December 13th defendants replied, taunting the plaintiffs for not having sued, but at the same time consenting to pay for all the cigars they had received, and also to accept 20,000 others which had been stopped in transitu, although not up to the contract. They add: "In withdrawing from the contract which you did not keep we are fully justified, and think that in paying for all the goods that you sent us, at your own price, we are treating you with liberality." This must be held a refusal to accept more goods, even though they were like the samples. Respondents' counsel admits here that the fact that plaintiffs had furnished cigars which did not come up to the samples, which defendants had taken and paid for, did not justify defendants in abrogating the contract and in declining to accept goods thereafter, provided plaintiffs would furnish such goods as were called for in the contract; but he contends that plaintiffs should have tendered other goods, which did come up to contract standard, and that defendants would have been liable only when they declined to accept and pay for such goods. He says defendants have never declined to accept and pay for any goods which were in accordance with the contract. In this, however, defendants' counsel is clearly in error. The correspondence above quoted shows that defendants declined to take any goods from plaintiffs, and notified them that they would receive no more. There were no conditions in this notice. Besides, there were a number of brands, and defendants had the privilege of ordering any of them, and in the absence of such orders plaintiffs could not furnish the goods. The evidence shows that none were ordered. Furthermore, plaintiffs did offer to furnish other goods, and the defendants declined to receive them. And yet, further, under the contract, defendants had the right to discontinue taking the goods upon paying the $2,983.75. Plaintiffs therefore could not force them to accept and pay for goods, even if they had corresponded with the samples. Their remedy was to bring suit, as they have done, for the balance of the $2,983.75.

The evidence was not conflicting upon any material point, but the court instructed the jury, at request of the defendants, as follows: "If you should find from the testimony that the cigars furnished by the plaintiffs were not of the size, shape, and quality of the samples left by them with the defendants, then the defendants were not bound to continue buying cigars of plaintiffs, nor were they bound to pay the amount sued for, nor any part thereof, and your verdict should be for the defendants." The court also refused to instruct the jury, at the request of plaintiffs, in accordance with the views of the law which are now admitted to be correct. This was, of course, error. In fact, as the evidence was not conflicting, or the inference from it doubtful, the court should, if requested, have instructed the jury to find for plaintiffs. The court also gave further instructions of its own motion, and at the request of the jury. These instructions are not excepted to in such way that they can be reviewed here, but may be referred to for the purpose of determining if the errors above alluded to were there corrected. If a different view of the law had been there laid down, it would only have been in conflict with the instruction given at the request of defendants. But, referring to it, we find that the jury were then told: "I think it was an entire contract; that is to say, it was a contract with plaintiffs to purchase cigars. If any portion of them were not up to sample, my instruction to you is that it is a defense, and that defendants need not take them or pay for them." In the oral charge this idea is repeated again and again. There was no question as to whether defendants should take and pay for any cigars which had been furnished. They had all been paid for. The instruction could have had no bearing upon any other question than whether the defendants had a right to abrogate the contract because the cigars furnished, and which had been paid for, were not like the samples. It is now admitted that they had no such right. It is true some portions of the oral charge seem to favor the present contention of the appellants, but the errors in giving the instructions asked for by defendants and refusing the instructions asked for by plaintiffs, which correctly stated the law, are not cured by these confusing and contradictory statements. It is not necessary to consider other alleged errors. The order and judgment are reversed.

PEOPLE v. VITAL. (No. 20,957.)

(Supreme Court of California. June 23, 1894.)

In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Antone Vital was convicted of murder in the first degree, and appeals. Affirmed.

A. D. Splivalo and J. A. Spinetti, for appellant. W. H. H. Hart, Atty. Gen., and A. E. Putnam, Dist. Atty., for the People.

PER CURIAM. The defendant, Antone Vital, has been convicted of the crime of murder in the first degree, and sentenced to be executed. No motion for a new trial was made in the lower court, and the case is now before us upon a direct appeal from the judgment. We have given the record a very careful examination, and find nothing there that would justify a reversal of the judgment. There is not only no substantial and prejudicial error disclosed by the record, but we perceive nothing that borders upon technical error.

Counsel who appear for defendant upon this appeal complain bitterly because counsel who represented the defendant in the trial court did not make a motion for a new trial. The record is entirely silent as to the reasons why such a step was not taken, and such a course, in the exercise of the greatest care for a client's interests, would certainly have been proper, especially in a case involving such grave consequences. But, as far as this court knows, the course adopted may have been pursued for the best of reasons. Counsel do not make any showing, even informally, as to any events or circumstances occurring during the progress of the trial which would justify the granting of a motion for a retrial, if one had been made in the regular course of procedure, and the case was now before us upon a record involving that question. We have examined with great care all the matters discussed in counsel's brief, regardless of the question as to whether they were properly before us or not, and find them without merit. On the appeal from the judgment we can only say that the information is full and complete, and that the charge of the court to the jury as to the law of the case is such as to be without legal exception or objection. The defendant, by his notice of appeal, states that he appeals from an order denying a motion for a new trial; but no motion for a new trial is found in the record; neither is there any order found therein denying the same. His counsel, in their briefs, concede that no such motion was ever made; hence his appeal in that regard is of no avail, and must be dismissed. The judgment is affirmed.

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103 Cal. 178

TAYLOR v. KELLY. (No. 15,218.)

(Supreme Court of California. June 23, 1894.)

Constructive Trust—Agreement as to Land—Action to Compel Conveyance—Rulings on Evidence—Review on Appeal.

1. Plaintiff verbally contracted with defendant to join him in the purchase of certain land which defendant had contracted to purchase by a certain time. On plaintiff's failure to pay his share of the money, defendant purchased the land in his own name. *Held*, that defendant could not be compelled to convey half the land to plaintiff on the ground that there was a constructive trust in favor of plaintiff.

2. In such case, evidence that a demand by defendant's son on plaintiff to pay his share of the purchase price was made by defendant's authority, and that plaintiff then refused to pay, is sufficient to show that plaintiff was given an opportunity to carry out his agreement.

3. Evidence of the value of the property at the time of the purchase is inadmissible in an action to compel defendant to convey to plaintiff half of the land.

4. Where, from the question, it is not apparent that a witness' answer will be material, the exclusion of the same will not be ground for reversal, unless the facts which are expected to be proved are made a part of the record, so as to show the materiality of the evidence.

5. A doubt whether a finding by the court was justified by the evidence is not sufficient cause for setting it aside.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by J. W. Taylor against Annie A. Kelly. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Dorn & Dorn and Joseph P. Kelly, for respondent.

HAYNES, C. This action was brought by Taylor against Michael Joseph Kelly to compel the conveyance to him of an undivided interest in certain real estate situate in the city and county of San Francisco. M. J. Kelly died before the cause was tried, and Annie A. Kelly, to whom he had conveyed the land after the commencement of the action, was substituted as defendant. The defendant had judgment, and the plaintiff appeals from an order denying his motion for a new trial. A brief outline of the facts, as found by the court, is as follows: That on April 9, 1887, Michael J. Kelly entered into an agreement in writing with one Driscoll to purchase the lands in question for the sum of $6,100, and paid thereon $25; the purchaser to have 30 days for examination of the title. That on or about April 15, 1887, Kelly made a verbal agreement with the plaintiff, whereby the plaintiff should pay one-half of the purchase price on or before the expiration of the time allowed for examination of the title, and thereupon should be equally interested with Kelly in the purchase. That on May 7, 1887, the title being satisfactory, Kelly demanded from Taylor the payment of one-half the purchase money, but Taylor neglected to pay it. On May 9, 1887, Kelly paid in full for the land, and took a conveyance in his own name, and on the same day had the deed recorded. On August 29, 1887, the plaintiff inclosed in an envelope a check payable to Kelly or order for $3,050, and caused the same to be delivered to Kelly, who refused to accept it. That at the time the check was drawn, and offered to Kelly, plaintiff had in the bank on which it was drawn $2,947.46, and no more, and that this was the only offer of payment he ever made. The court further found: That certain allegations of the complaint, viz. that plaintiff had paid $10 for a search of the title; that the deed was taken by Kelly for the mutual benefit of both; that he reposed confidence in Kelly; and that by reason of such confidence, and the promises of Kelly, the contract and deed were taken in Kelly's name,—were untrue. That Kelly did not at any time admit that the purchase was for their mutual benefit. That he did not act in bad faith, or fraudulently, towards the plaintiff. And that plaintiff neither paid nor gave any consideration for the verbal agreement made by Kelly with him. Appellant specifies several particulars in which he claims that the findings are not justified by the evidence. Several of these may be considered together.

It is insisted that the verbal agreement mentioned in the findings was made before the written agreement between Kelly and Driscoll was made; that the purchase was in fact made for the joint benefit of Kelly and the plaintiff; that, therefore, it was not a subsequent agreement by Kelly to share his purchase or to sell to plaintiff a half interest in the property, and that the plaintiff negotiated the purchase from Driscoll pursuant to the verbal agreement; that "there is no evidence that it was only on Taylor's payment on or before the time the purchase money would become due and payable that Taylor should become equally interested in the property." The only finding, about which there is any doubt as to its being justified by the evidence, is the one which finds that the verbal agreement between appellant and Kelly was made on or about April 15th, which was after the date of the contract between Kelly and Driscoll. But a doubt will not authorize us to set aside the finding. But, if the finding was that the verbal agreement was made with Kelly before the date of the contract with Driscoll, it would not avail the appellant.

Defendant, as one of her defenses, pleaded the statute of frauds. It is also conceded that appellant did not pay for his interest, and, treating his check as a tender, did not tender payment until some three months after the purchase had been consummated and the whole of the purchase price paid. The agreement alleged in the complaint was that plaintiff and Kelly should purchase; not that Kelly should purchase, and upon payment by Taylor to Kelly of one-half the purchase money, at some time in the future, Kelly would convey. It is not claimed by plaintiff that Kelly agreed to purchase for their joint benefit, though it is claimed that he did so purchase. The only agreement alleged in the complaint, and which appellant, by his exception to the findings, insists was made before the contract of sale between Driscoll and Kelly, required appellant to join in the purchase (not necessarily in the contract of purchase), by furnishing his porportion of the purchase money at the time the purchase was consummated. This was not done. The contract with Driscoll having been made by Kelly alone, he was bound to fulfill it, whether Taylor kept his verbal agreement to join in the purchase or not. If Taylor declined to join in the purchase, and pay his proportion of the purchase money, it was not in Kelly's power to compel him to keep his verbal agreement. A tender of a deed to Taylor for an undivided half of the property, and a demand of payment of one-half the purchase price, the whole of which Kelly was obliged to pay, would have been fruitless, as Taylor could have successfully pleaded the statute of frauds to any action brought to compel payment. Certainly, Taylor is in no better position, for he must rely upon a verbal contract, and that contract one that he had himself failed to comply with.

It is insisted by appellant that Kelly became a trustee of the interest in the land in question for his benefit; that "a trust arises when personal confidence is reposed in one, and accepted by the other." But there was no relation of trust or confidence between these parties, unless the verbal agreement itself created such relation. Here there was no trust or confidence, other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance. There was in this case no reason for the confidence reposed, other than the opinion entertained by appellant that he could rely upon Kelly. "It is not every case where parties trust each other that the law recognizes as confidential." Brison v. Brison, 75 Cal. 528, 17 Pac. 689, and cases cited. Appellant, however, states his proposition in another form, thus: "A person who gains a thing by fraud, * * * in violation of a trust (that is, confidence reposed), or other wrongful act, is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." In support of this proposition, he cites Civ. Code, § 2224, and Greiner v. Greiner, 58 Cal. 122. The section of the Civil Code referred to is as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or confidence or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." We have seen that there was no violation of a trust or confidence; nor is it alleged, found, or claimed that Taylor made the verbal agreement with Kelly through the fraud or other wrongful act or the undue influence of the latter, or that it was the result of accident or mistake. Taylor never asked or suggested that the agreement be reduced to writing; nor is there any finding, or any evidence upon which a finding could be based, that Taylor was in any manner prevented from joining in the purchase, or that Kelly, at the time the verbal agreement was made, or the time when the contract was made with Driscoll, did not intend to perform that agreement with Taylor. The whole basis of appellant's contention is that Kelly did not, after he had been compelled to pay the whole of the purchase price, instead of one-half, accept payment from appellant, and convey to him the interest in question. The case of Greiner v. Greiner, supra, is not in point. There the husband redeemed certain notes and mortgages belonging to him from a pledgee, with his wife's money, which he had in his possession, and, with intent to defraud the wife, assigned them, without consideration, upon a secret trust in favor of himself; and it was held that, by using her money to redeem the notes and mortgages from the pledgee, he became a trustee for his wife, and that she was entitled to be subrogated to the lien of the pledgee. Comment upon the distinction between that case and this is unnecessary. In Pomeroy's Equity Jurisprudence (section 1056), the learned author says: "In order that the doctrine of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal; otherwise, the statute of frauds would be virtually abrogated. There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute. It endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." In Sandfoss v. Jones, 35 Cal. 488 (a case cited by appellant), it is said: "Doubtless, the general current of authorities upon this subject is that a dry, verbal promise to purchase lands for the benefit of another is within the statute of frauds, and cannot, therefore, be proved by parol." The facts of that case, however, took it out of the statute, upon well-settled equitable principles, and it is therefore not an authority for appellant. Rose v. Hayden, 35 Kan. 106, 10 Pac. 563, cited by appellant, was where an agent, employed to purchase for his principal, bought in his own name, and paid with his own money; and it was held that the weight of authority was, he could not retain the property so purchased. That, however, is not this case. A parol agreement that another shall be interested in a purchase, or parol declarations by a purchaser that he buys for another, without an advance of money by that other, will not raise a resulting trust, but will be inoperative under the statute of frauds. Bland v. Talley, 50 Ark. 71, 6 S. W. 234.

Appellant further contends that there is no evidence that a demand was made upon him to furnish his part of the purchase price to be paid to Driscoll; that the only evidence of such demand was that of Joseph P. Kelly, who had no power to convey any interest in the property. Joseph P. Kelly testified that his father, M. J. Kelly, left the city a few days before the time expired for the performance of the contract with Driscoll, and instructed him to attend to the payment and securing a conveyance, and for this purpose gave him a check for his part of the purchase money and instructed him to call on Taylor for the remainder; that he did call upon Taylor and asked him to put up his half of the money; that Taylor replied, "Well, there was an arrangement of that kind, but that he would not do it; that he did not propose to go into the thing at all, and did not propose to have anything to do with it." This was denied by Taylor. The fact that Joseph P. Kelly could not make a deed to him did not affect Taylor's duty to pay the money, nor, indeed, was any demand upon Taylor necessary, as Taylor was one of the purchasers under the terms of the agreement, as alleged by him. The conflict between these witnesses will not permit the appellate court to interfere with the findings objected to; and it is clear that, if Joseph P. Kelly's testimony is true, M. J. Kelly gave Taylor a full opportunity to carry out the agreement, and that Taylor declined to do so. Whatever merit there might be in appellant's specifications of insufficiency of the evidence to justify the findings (and I think there are none), if the findings were changed to meet his suggestions, the judgment was right, and the order denying a new trial should be affirmed, unless the court erred in matters of law to the prejudice of appellant.

Appellant was a witness in his own behalf, and was asked by his counsel the following question: "State the fact,—the reason the transaction was done in Mr. Kelly's name, and not in your joint names?" Defendant's objection was sustained. If, by the question, it was intended to call from the witness a statement of the mental operation by which he concluded to have the contract in the name of Mr. Kelly alone, it was clearly incompetent. That this was what he called for is, I think, quite clear from the record. All the facts appear to have been fully testified to by the witness. It is not alleged or claimed that any fraudulent devices or means were resorted to by Mr. Kelly to induce appellant not to appear in the contract with Driscoll. It is not apparent, therefore, that the answer to the question would have been material; and in such case counsel should have stated the fact he expected to prove, and made an offer to prove it by the witness, and thus put in the record the facts which would show whether it was material. In the absence of such statement in the record, we cannot say that the facts expected to be stated in answer to the question were material, or, if material, that appellant was prejudiced by the ruling.

Appellant was also asked the value of the lots at the time of the purchase. Defendant's objection was properly sustained. The value of the property could not in any way affect the validity of the agreement upon which appellant sought to recover.

The other alleged errors of law are covered by what has been said on the principal question. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

DE HAVEN, J. I concur in the judgment.

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103 Cal. 204

EDWARDS v. HELLINGS et al. (No. 15,230.)

(Supreme Court of California. June 25, 1894.)

JUDGMENT BY DEFAULT — ENTRY BY CLERK — GROUNDS FOR SETTING ASIDE—ACTION AGAINST PARTNERS.

1. Where defendant was personally served with summons, a judgment by default will not be set aside because the attorney he requested to defend the action, after a demurrer to the complaint was overruled, failed to answer, especially when defendant states that he did not

read the complaint, and does not state that he told the attorney of facts which would be a defense, and it appeared that he left the state two days after the service of summons, and did not communicate further with his attorney.

2. An execution on a default judgment will not be quashed because the complaint was defective, as the remedy therefor is by appeal.

3. Code Civ. Proc. § 414, provides that when an action is against two or more liable on a contract, and the summons is not served on all, the plaintiff may proceed against those served as if they were the only defendants. Section 585 provides that, if the defendant fail to answer, the clerk may enter judgment against one or more of several defendants in the cases provided for in section 414. Section 636 provides that on the overruling of a demurrer the plaintiff may proceed as in section 585. *Held*, that on the failure of defendant to answer after the overruling of a demurrer in an action against copartners, he being the only one served, judgment may be entered by the clerk against him.

4. Under Code Civ. Proc. § 585, providing that, in case of defendant's failure to answer, "the clerk, on application of plaintiff, may enter the default, and immediately thereafter enter judgment," the clerk may enter judgment eight years after entry of default, as the word "immediately" is merely directory.

5. The statute of limitations begins to run on a judgment by default from the entry of the judgment, and not from the entry of the default.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by T. C. Edwards against W. B. Hellings and Edward Hellings, traders under the name of W. B. Hellings & Co. There was a judgment of default against W. B. Hellings, and from a judgment denying his application to set aside the same, and quash an execution issued thereon, he appeals. Affirmed.

Henry I. Kowalsky and T. J. Crowley (T. M. Osmont, of counsel), for appellant. H. C. Firebaugh, for respondents.

HARRISON, J. The plaintiff commenced an action against the appellant and another defendant February 16, 1884, for the purpose of recovering from them the amount of a judgment that had been previously rendered in the fifteenth district court for the city and county of San Francisco. The summons in the action was served upon the appellant alone, and was given by him to an attorney, with instructions to defend the action. This attorney filed a demurrer to the complaint, which was afterwards overruled for want of prosecution. Notice of such overruling was served upon the appellant's attorney, and, no answer having been filed, his default was entered by order of the court March 14, 1884. Judgment was not entered against him upon this default until January 18, 1892. An execution was issued upon this judgment March 19, 1892, and levied upon certain real property of the appellant, which was advertised by the sheriff to be sold on the 21st of April, 1892. On the 18th of April, upon the application of the appellant, the court in which the judgment had been entered made an order that the plaintiff show cause why the order of default and judgment theretofore made and entered therein should not be set aside, and the defendant allowed to file an answer; and also made an order staying proceedings in the meantime. Upon the hearing of this order to show cause the court denied the application, and at the same time denied a motion by the appellant to recall and quash the execution that had been issued. From these orders he has appealed, bringing the matters here by a bill of exceptions.

The court properly exercised its discretion in denying the application to set aside the default and judgment against the appellant, and refusing to relieve him therefrom. The summons in the case had been regularly served upon the appellant, and the appearance of the attorney in his behalf was authorized by him. His instructions to the attorney to defend the action were of no avail to relieve him from the judgment, even if his attorney had failed to carry out his instructions. Although he says in his application that he firmly believed that his attorney would defend the action upon its merits, he also says that he did not examine the complaint to ascertain the exact nature of the action; nor does he say that he gave his attorney any statement of the facts in the case, or which would constitute any defense thereto, or that he ever from that time communicated with him in reference to the action. That within two days after the service of the summons upon him he left the state, and it does not appear that he returned to it until December, 1891.

Neither did the court err in refusing to recall and quash the execution. The judgment upon which the execution was issued was regular in form, and was rendered after the appellant's default had been taken for failure to answer in a case in which he had been personally served with the summons, and his demurrer to the complaint had been overruled. The judgment was not void, and the execution had been regularly issued thereon within a few months after its rendition. The defendant did not claim that anything had transpired since its entry to authorize the court to suspend or prevent its execution. If the court had erred in overruling the appellant's demurrer thereto, or if there was any infirmity in the judgment by reason of a defective complaint, the remedy of the appellant was by an appeal from the judgment, and upon such appeal he could have caused a stay of the execution; but these reasons would not authorize the court to stay the execution of the judgment, so long as it remained in force and of record.

The entry of judgment against the appellant, without at the same time entering judgment against his codefendant, who had not been served, was in accordance with the statute. Section 636, Code Civ. Proc., provides that upon the overruling of a demurrer the plaintiff may proceed as prescribed in section 585, upon the failure of the defendant to answer; and in section 585 it is provided that, if the defendant fail to answer, the clerk may enter judgment against one or more of several defendants in the cases provided for in section 414; and section 414 provides that when the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. The provision that the clerk must enter the judgment "immediately" after entering his default is merely directory. His failure to do so may render him liable to an action by the judgment creditor, but does not render void the judgment subsequently entered upon such default; nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. The statute of limitations upon the judgment runs from the time of its entry, and not from its rendition. Trenouth v. Farrington, 54 Cal. 273. See, also, Franklin v. Merida, 50 Cal. 289. If the appellant had desired to set the statute of limitations running, he could himself have caused the judgment to be entered at any time after its rendition. The orders are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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103 Cal. 208

SPENCE v. SCHULTZ. (No. 15,137.)

(Supreme Court of California. June 25, 1894.)

NEGLIGENCE—DANGEROUS PREMISES—EXCAVATIONS.

Where a building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lots is liable to persons injured by falling therein, though the work is being done by an independent contractor.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Andy T. Spence against Louis Schultz. From a judgment for plaintiff, defendant appeals. Affirmed.

Alex. D. Keyes, for appellant. Henley, MacSherry & Herrmann, Henley & Swift, and J. W. Oates, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. This is an action to recover damages for personal injuries sustained by respondent, and caused by his falling into a deep excavation in a sidewalk on a lot and premises owned by appellant, and situated on the corner of Washington and Kearney streets, in the city and county of San Francisco. At the time of the accident appellant was constructing a building on said lot, and an excavation about 14 feet deep had been made in the sidewalk, and left unprotected by any barricades or lights around it. About 10 o'clock p. m. of the evening of November 19, 1889, the respondent, a stranger in the city, while walking along Washington street, fell into said excavation and was seriously injured. He was not guilty of contributory negligence. The main ground upon which appellant contends for a reversal is that he had made several different contracts with several different parties, by which each of said parties was to do the work and to furnish materials necessary to the completion of particular parts of said building; that said parties were independent contractors, and not servants of appellant; and that, therefore, the doctrine of respondeat superior does not apply, and the parties who made said excavation under said contracts are alone answerable for any injury which respondent may have sustained in the manner alleged in the complaint. Counsel on both sides have argued the case in their briefs with great industry and ability, and have cited many authorities. This was highly commendable in counsel, and has aided the court to see the case from many points of view; but damage cases of this class come here quite frequently, and we cannot be expected in each case to elaborately review the whole field of authorities applicable to such cases.

Counsel for respondent argues with much force that the contracts relied on by appellant have so many conditions and reservations, and give to appellant so much revisory and controlling power over the contractors as to the employment of workmen, choice of materials, etc., as to take the case entirely out of the rule invoked by appellant as independent contractors. But, without passing upon that point, we think that the contention of appellant must be decided against him, upon the authority of the cases of Colgrove v. Smith (Cal.) 36 Pac. 411, and Barry v. Terkeldsen, 72 Cal. 254, 13 Pac. 657. In the first place, the maintenance of the excavation was unlawful, because there was no compliance with a certain ordinance of the city on that subject, and appellant could not relieve himself of the duty of complying with said ordinance by shifting it onto a contractor. Colgrove v. Smith, supra. In the second place, an excavation like the one in the case at bar in the sidewalk of a populous street in a city is "so dangerous a pitfall as to be, in its character, of the nature of a nuisance;" and he who causes it to be done, knowing beforehand its nature and character, cannot escape liability to one who innocently falls into it, upon the ground that he let out the job of creating the nuisance to a contractor. Barry v. Terkeldsen, supra. Most of the specific points made by appellant are involved in the above propositions. We think there was sufficient evidence upon the point of the nature of respondent's injuries to warrant the court in instructing the jury that they might consider "how far permanent and lasting his injuries may be in their character;" and we see no error in the instructions to the jury in any other respect. It was not error to admit the ordinance of the city, offered by respondent. There are a number of minor points made by appellant under the head of "Miscellaneous Exceptions," but we do not think that either of such exceptions was well taken, or that either of them needs special mention. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

CITY AND COUNTY OF SAN FRANCISCO v. WANGENHEIM et al. (No. 15,537.)

(Supreme Court of California. June 25, 1894.)

TAXABLE PROPERTY — SEAT IN STOCK EXCHANGE.

A seat in a stock exchange, which is a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates, is not taxable property. City and County of San Francisco v. Anderson (Cal.) 36 Pac. 1034, followed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the city and county of San Francisco against S. Wangenheim & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

J. E. O'Donnell and Jones & O'Donnell, for appellant. Garber, Boalt & Bishop, for respondents.

PER CURIAM. This is an action to recover money alleged to be due from defendants for city and county and state taxes which were assessed for the fiscal year ending June 30, 1890, upon personal property of defendants, to wit, a seat in the San Francisco Produce Exchange. The court below found as a conclusion of law that the said "seat" was not such property as is subject to taxation under the revenue laws of this state, and gave judgment for the defendants, from which the plaintiff appeals on the judgment roll. The case is in all material respects like that of City and County of San Francisco v. Anderson (just decided) 36 Pac. 1034, and upon the authority of the decision in that case the judgment is affirmed.

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4 Cal. Unrep. 682

ADAMS v. FARNSWORTH et al. (No. 15,312.)

(Supreme Court of California. June 25, 1894.)

REVIEW ON APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE.

1. Findings by the court will not be disturbed on appeal where there is evidence to justify them.

2. Error in refusing to permit the maker of a note to testify on cross-examination as to the circumstances under which he signed the note—the witness having been called by plaintiff for the purpose simply of proving his signature—is cured by his testifying in his own behalf in regard thereto.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Charles Adams against A. D. Farnsworth and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Kennedy, for appellants. Wm. H. Jordan and S. F. Leib, for respondent.

PER CURIAM. This action was brought by plaintiff to recover on the following promissory note: "$2,000.00. San José, Feb. 4, 1888. Thirty days after date, for value received, we, jointly or severally, promise to pay Chas. Adams the sum of $2,000 (two thousand dollars), with interest thereon from date until payment at the rate of —— per centum per annum, payable in thirty days, and, if not so paid, then to be added to, and become a part of, the principal, and bear a like interest; said principal and interest to be paid in United States gold coin only. If any interest on this note be not paid within a month after it becomes due, then the whole of the principal and interest shall, at the option of the payee, become and be immediately due and payable. A. D. Farnsworth. D. R. Martin. G. Wendt." The defendants Martin and Wendt, in their answer, deny that they executed the note for value received, and aver that their signatures thereto were procured by fraudulent and false representations made to them by plaintiff and their codefendant Farnsworth. It is further averred that plaintiff duly released them from all liability on said note, and that the same has been fully paid and discharged. Plaintiff had judgment against the defendants Martin and Wendt. Farnsworth, the other defendant, who was never served with process, made no appearance. From which judgment, and the order denying their motion for a new trial, the defendants Martin and Wendt appeal.

The court, in its decision, found that all the allegations of the complaint were true, and also found adversely to the defendants upon all of the defenses set up in their answer; and, as these findings are fully justified by the evidence, they will not, under the well-established rule of this court, be disturbed.

It is claimed by appellants that the court erred in sustaining plaintiff's objection to the following question propounded on cross-examination by counsel for the defense to the defendants Martin and Wendt, while upon the stand as witnesses for plaintiff, who introduced them as such solely for the purposes of proving the signatures to the note: "Q. State under what circumstances you signed that paper" (referring to the note in question). Conceding, for the purpose of this case only, that the court erred in making the ruling complained of, the error was cured by these witnesses subsequently testifying in their own behalf as to the circumstances under which they signed the note.

As the remaining errors complained of are either untenable or immaterial, it follows that the judgment and order should be affirmed, and it is so ordered.

103 Cal. 200

PEOPLE v. LEONARD. (No. 21,096.)

(Supreme Court of California. June 25, 1894.)

CORPORATIONS—FALSE RECORD ENTRIES—INDICTMENT.

1. An indictment of a corporation officer, under Pen. Code, § 563, for making false entries in a record with intent to defraud, if it set out the entries in haec verba, and allege them to be false, need not state wherein they are false.

2. The indictment alleging that the entries were made with intent to defraud the corporation need not set out how they could have effected the result, if they are such that the court cannot say from their face that they could not possibly have done so.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Indictment of H. M. Leonard, under Pen. Code, § 563, for making false entries on the books of a corporation with intent to defraud it. Demurrer to indictment sustained. The state appeals. Reversed.

V. A. Scheller and E. E. Cothran, for the State. Morehouse, Tuttle & Richards, for respondent.

GAROUTTE, J. This is an appeal by the people from an order of the superior court sustaining defendant's demurrer to the indictment. The indictment charged that the defendant was a director, officer, manager, and servant of the Bank of Santa Clara County, a corporation, etc., and as such officer, etc., "there then and there came and was under his control and possession a certain record known as a 'note register,' which said record was then and there the property of and kept by the said corporation; and the said H. M. Leonard, while said record was so in his possession and under his control by virtue of his trust as such director, etc., then and there, to wit, on the 31st day of October, 1892, with intent in him, the said H. M. Leonard, to defraud the said corporation in the sum of three thousand dollars, did willfully, unlawfully, and feloniously make in the said record the following false entries, to wit:

Number.	Date.	Maker.	Amount.
275	Oct. 31, 1892.	Sloan.	$3,000.00.

Section 563 of the Penal Code provides: "Every director, officer or agent of any corporation * * * who, with intent to defraud, * * * makes any false entries in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than ten years. * * *" The indictment in this case was framed under the foregoing section, and we see no objection that can be made to it. It is urged by respondent that nothing is shown by its face indicating wherein the entry is false. There is no merit in this contention, for the indictment sets out in haec verba the entries made by the defendant, and alleges that they were false entries. If they were false, that is, unauthorized by any existing facts, then they were each and all false, and the allegation is exactly in line with the statute. It is claimed that, conceding the entry to be false, still it was not such an entry as could result in defrauding the bank. The indictment clearly shows that no honest man guided the pen that made these entries. They were made through no mistake of fact. They were not only false, but criminally false, for they were made with intent to defraud. It is not necessary to set out how these entries could have resulted in defrauding the bank. That is purely a matter of evidence. In all penal statutes, where the offense is one requiring the act to be done with a certain intention, as burglary, forgery, and obtaining property by false pretenses, it is only necessary in the accusing paper to set out what the defendant actually did, and that he did it with a certain intent. It is not necessary, therefore, to state facts showing how he could have successfully carried out his nefarious schemes and intentions of defrauding some one. If those matters are material to the case, they are only material as evidence tending to support the charge made.

The case of People v. Ah Woo, 28 Cal. 211, is in direct support of these views. That was a case of forgery, and the court said: "So far as it is claimed that the indictment fails to show in what manner Ah Woo was or could be defrauded by the transaction, it is sufficient to say that all that is matter of evidence. The charge is direct. The transfer was made with intent to defraud Ah Woo, which is sufficient, so far as the indictment is concerned. It may have been passed as security for a loan. All this is to be proved, but need not be alleged." In People v. Palmer, 53 Cal. 615, if the indictment had stated in terms the false entry made by the defendant, it then would have been similar to the one here involved, and would have been sustained by the court, as is clearly evidenced by the opinion in that case. If it was apparent from the face of this indictment that these entries were such that under no possible state of circumstances could they have resulted in a fraud upon the corporation, respondent's contention would have force; but such is not the fact. If these entries were quotations of scripture or poetry, it would be evident the indictment could not stand, for the case would then be in the same position as if it had been attempted to make a nudum pactum the subject of forgery. But by inspection of these false entries we cannot say that they could not have resulted in defrauding the bank, and hence we cannot say they are not sufficient to form the basis of a charge of the character here involved. This question is quite fully discussed in People v. Monroe, 100 Cal. 664, 35 Pac. 326. In conclusion, we say the defendant has no cause of complaint against the indictment. He cannot be misled by it, for it is so direct and certain that he knows exactly the charge he will be called upon to meet at the trial of the case. The indictment charges him with falsely making certain entries in the books of the corporation with a fraudulent intent. The entries are set out in terms. He knows exactly what the prosecution will be required to prove, and what defense he should be prepared to make. We think the indictment sufficient to put him upon his trial.

For the foregoing reasons, the order sustaining the demurrer is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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103 Cal. 249

TEVIS et al. v. BUTLER. (No. 15,031.)

(Supreme Court of California. June 26, 1894.)

Review on Appeal—Removal of Trustee.

In an action for the removal of a trustee under Civ. Code, § 2283, granting the superior court jurisdiction when the trustee is unfit, where the trial court did not abuse its discretion, a judgment removing such trustee will not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Lloyd Tevis and others against C. C. Butler. From a judgment for plaintiffs, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

Arthur Rodgers, for appellant. Pillsbury, Blanding & Hayne, for respondents.

McFARLAND, J. This is an action brought by three trustees to obtain a judgment for the removal of defendant as a fourth trustee. Judgment went for plaintiffs, and defendant appeals from the judgment and from an order denying a motion for a new trial.

A corporation called the San Francisco & Point Lobos Road Company went out of existence in 1882 by expiration of the term of its charter, and, by the statute under which it was organized, its directors at the time of its dissolution became trustees for the purpose of collecting and paying its debts, settling all its affairs, and dividing its assets among its stockholders. Comp. St. 1850–53, p. 290. It had five directors, and at the time of its dissolution the directors were the three plaintiffs and the defendant herein, and one Alpleus Bull, who died before the commencement of this action. In the complaint certain acts and conduct of the appellant are alleged, which, it is contended by respondents, constituted a violation by appellant of the trust, and show his unfitness to execute it; and this action was brought to have him removed under section 2283 of the Civil Code, which provides that "the superior court may remove any trustee who has violated or is unfit to execute the trust." Findings were waived, and the court entered two decrees. The first decreed that appellant be removed as trustee, and that he account for any moneys and property in his hands; and the second, after reciting the first decree, and also the fact that a referee had been appointed to take an account of the moneys, etc., in appellant's hands, and had made his report, confirmed said report and the former decree, and again decreed that said appellant be removed as trustee, etc., and that he pay over a certain sum of money found to be due, and also deliver a safe and certain books of account. Appellant appeals from both judgments.

Appellant contends for a reversal upon the ground that the evidence is insufficient to sustain the judgment, and argues that it is insufficient to show either that he violated the trust, or that he is unfit to execute it. As findings were waived and no facts were found, a discussion of the question whether the evidence, upon any theory, was sufficient to sustain the judgment, would open a wide field of inquiry, and would make necessary a statement of nearly all of the testimony. We do not deem it needful to enter upon that discussion here; nor do we think that it would subserve any useful purpose to state what facts may be considered sufficiently proved, or to detail the evidence tending to prove them. It is sufficient to say that we have carefully examined the evidence contained in the transcript, and that, in our opinion, the court below did not abuse its discretion in coming to the conclusion, from the evidence, that the appellant should be removed as trustee. There are no other questions involved in the case. Respondents contend that the first decree was interlocutory, and that the appeal from it should be dismissed; but we apprehend that, in this case, it is of no consequence whether such appeal be dismissed, or the judgment affirmed. The judgment appealed from, and also the order denying the motion for a new trial, are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(4 Cal. Unrep. 697)

SUTLIFF v. CLUNIE. (No. 15,346.)[1]

(Supreme Court of California. June 26, 1894.)

Assignment for Creditors — Attorney of Assignee — Purchase of Claims Below Par — Payment by Assignee—Notice.

1. Where an attorney, employed by an assignee to settle claims with the creditors, compromises the claims, giving his own notes in settlement at the rate of 50 cents on the dollar, with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and after seeing that the estate is in fact solvent, have the claims assigned to a third person, who advanced to him the money to pay the notes, and collect the full amount of the claims for the benefit of such third person.

2. Where, in such case, the attorney is the law partner of the assignee, the latter will be chargeable with constructive notice of all the facts in the transaction coming to the knowledge of the former, so as to render him liable for payments in excess of what the attorney paid for the claims.

3. Where an assignee employs counsel to uphold the validity of an unjust claim against the estate, which he paid, he cannot, in case of defeat, charge the estate with the counsel fees.

Department 2. Appeal from superior court, city and county of San Francisco; C. W. Slack, Judge.

Action by Henry Sutliff against Andrew J. Clunie to compel an accounting by defendant as assignee. From a judgment denying defendant credits for certain items, he appeals. Affirmed.

James G. Maguire and Robt. Y. Hayne, for appellant. Ben Morgan, for respondent.

PER CURIAM. In this case defendant appeals from the final judgment, and from an order denying a motion for a new trial. Plaintiff also appeals from the final judgment. The two appeals are presented upon a single record, consisting of the judgment roll and a bill of exceptions prepared and filed by defendant in support of his motion for a new trial.

Henry Sutliff, the plaintiff herein, was a retail tobacconist in the city and county of San Francisco. On the 1st day of July, 1887, supposing himself to be insolvent, and unable to pay his debts, plaintiff consulted the law firm of Clunie, Young & Clunie, of which the defendant, A. J. Clunie, was a member, and on the advice of Thomas J. Clunie, who was also a member of said law firm, and a brother of the defendant herein, he made and executed to the defendant an assignment of all his property, real and personal, for the benefit of his creditors, which assignment defendant accepted, filed a bond for the faithful performance of his duties as such assignee, upon which bond Thomas J. Clunie was a surety, and thereupon entered upon a discharge of his duties as such assignee. On the 20th day of July, 1887, plaintiff filed his inventory and schedule of his creditors, etc., as required by section 3461 of the Civil Code, in the office of the county recorder. This action was brought to compel an accounting by the defendant of his transactions as assignee, etc. An account was rendered by the defendant, and the main controversy on this appeal relates to the action of the court below in disallowing portions of two items in the account with which defendant had credited himself. Soon after the assignment, the plaintiff and Thomas J. Clunie, his attorney and friend, conceived the idea of settling with the creditors of plaintiff at 50 cents on the dollar, and with that object in view arranged with Rosenbaum Bros., who held a claim for $5,558.80, and Joseph Brandenstein, who had a claim for $9,156.27, to accept 50 cents on the dollar for their claims, to be paid by said Clunie, and the further sum of 10 cents on the dollar to be secured by plaintiff's notes, payable when the whole estate was settled. Clunie gave his note to Rosenbaum Bros. for 50 per cent. of their claim. Brandenstein was satisfied with the verbal promise of said Thomas J. Clunie. These agreements, the court finds, were made for the benefit of plaintiff, and, as is apparent, with the expectation that he would raise the funds to pay the demands. Defendant professed to have found a man who would advance sufficient funds to pay off all demands due from plaintiff if the latter would pay a bonus therefor of $2,500. Plaintiff revolted at this, but offered to pay $2,000, which was rejected. About this time plaintiff discovered that upon a settlement of his estate he would be able to pay all his creditors in full, and so represented to Rosenbaum Bros. and Brandenstein, and requested them to cancel the note and promise of Thomas J. Clunie, and assured them he would pay them dollar for dollar. They declined to do so. Clunie had taken assignments of these claims against plaintiff to his friends. Before Thomas J. Clunie paid either of the claims, it was arranged between plaintiff, defendant, and Thomas J. Clunie that defendant should deposit with Thomas J. Clunie all the moneys of the estate as realized by defendant, which was done from that time forward. Thomas J. Clunie paid his 50 per cent. obligation to Rosenbaum Bros. about July 30, 1887, and the like obligation to Brandenstein on or about August 26, 1887. Up to the date of payment to Brandenstein, Thomas J. Clunie had received and had in his hands funds of the estate, say $6,000. Subsequently, and by January, 1888, there had come into the hands of said Thomas J. Clunie funds of said estate more than sufficient to pay both of said claims at their face value, viz. $14,715, and thereupon the defendant authorized him to pay himself from said funds the whole face value of said two claims, which was done, and the amount thereof charged by defendant in his account against the estate of plaintiff. There are some other points bearing upon the case, but it is not deemed necessary to set them out here.

The court below decided the case upon the theory that Thomas J. Clunie was the agent of the defendant in the transaction of the business, and that, as defendant could not, in his fiduciary capacity, make a profit inuring to himself out of the administration of the trust estate, so he could not, by the appointment of an agent, accomplish a result which, as a principal, he was precluded from attaining. Appellant's counsel concede, in effect, that the settlement of the claims below their par value was at the date thereof in the interest of and for the benefit of the plaintiff. Their contention, however, is that plaintiff, having failed to raise the money to meet the obligations which Thomas J. Clunie had incurred on his behalf, the latter was at liberty to borrow the money of Turtin to meet his obligations, take an assignment of the claims to Turtin, or for his benefit, and to collect from the assignee the full face value thereof; and hence that the defendant was authorized to make such payment, and to charge plaintiff with the amount thereof. Thomas J. Clunie was a member of the law firm of Clunie, Young & Clunie, and was attorney for plaintiff. He knew, before he took an assignment in favor of Turtin, that the estate of plaintiff was solvent, and able to pay in full all it owed. Under such circumstances he had no equitable right to purchase demands against his client at a reduced rate, and then charge the latter, or, what is the same thing, his estate, with the par value of the claims. When, under such circumstances, an attorney purchases a claim against his client at less than its face value, he cannot be permitted to make a profit thereby against the principal whose agent he is, and more especially where, as in this case, he has in his custody funds in which the client has a beneficial interest to an amount nearly equal to the amount paid out, with an almost certain prospect of receiving the balance in a short time. Thomas J. Clunie was, it is true, the agent of the assignee, A. J. Clunie, who is defendant here. As such agent he received all the moneys of the estate, and paid its debts so far as they were paid. It is also true that this action is against A. J. Clunie, the assignee. But he was the law partner of Thomas J. Clunie, and as such is chargeable with constructive notice of all facts in relation to the transaction coming to the knowledge of his copartner. It is also quite apparent that he had actual notice of most of the facts, and, whether we treat him simply as a principal authorizing his agent, Thomas J. Clunie, to pay himself in full from the funds of the estate, or as the copartner of Thomas J. Clunie, and hence as the attorney of the plaintiff, seems to make little difference. In either situation he had no right, as against plaintiff, to pay or authorize the payment to Thomas J. Clunie of a greater sum on account of the claims than the amount advanced by the latter on account thereof.

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[1] Rehearing granted.

The claim of a counsel fee by defendant was properly denied. The main use which defendant appears to have had for counsel in the proceeding was to contest the two items in question, and, as the decision is against him, he is not entitled to counsel fees for setting up an unjust claim in his own behalf and against the estate.

The appeal by the plaintiff is, so far as appears from the record, without merit. The judgment appealed from by the plaintiff and the defendant, and the order appealed from by the defendant, are affirmed.

103 Cal. 297

TAPSCOTT v. LYON. (No. 18,239.)

(Supreme Court of California. June 27, 1894.)

CONVERSION BY RECEIVER—WHAT CONSTITUTES—ACTION FOR DAMAGES.

1. Where a receiver is directed by the court to take possession of property in the possession of a third party, and he demands possession thereof as receiver, and possession is given to him as receiver, he is not personally liable for conversion.

2. In an action for conversion, where defendant claims possession of the property as receiver, and a disposition thereof by order of the court, defendant may introduce the petition for a receiver, the petition for permission to sell, the order of sale, the report of the sale, and the order approving the sale, even though plaintiff admits the receivership.

3. Where an insolvent, with the intent to prefer one creditor over another, sells his property, a few days before filing a petition in insolvency, to one who knows such intent, the sale is void, though the purchaser pays full value, and the proceeds are applied to the payment of an honest debt.

Commissioners' decision. In bank. Appeal from superior court, Tehama county, E. A. Davis, Judge.

Action by Ernest N. Tapscott against D. B. Lyon for conversion. Judgment for plaintiff, and defendant appeals. Reversed.

L. V. Hitchcock and L. T. Hatfield, for appellant. N. P. Chipman and Jackson Hatch, for respondent.

TEMPLE, C. Action for the wrongful taking and conversion of personal property. The complaint contains two counts charging distinct trespasses. The answer, besides general denials, sets up affirmative matter in defense of each cause of action. It shows that on the 10th day of December, 1889, J. T. Wight & Co., a firm composed of J. T. Wight and J. A. Wight, was engaged in trade at Kirkwood, Tehama county, as retail dealers in general merchandise; that they owed divers persons $15,000 in the aggregate, and were insolvent; that to prevent their property from coming into the hands of an assignee in insolvency, and to prevent the proceeds of the same from being ratably distributed to their creditors in accordance with the provisions of the insolvent act, and to delay and hinder the operation of that act, they secretly and fraudulently, in the nighttime, transferred to plaintiff their whole stock of goods, which was reasonably worth $5,000, and, except their book accounts and notes taken in their business, was their entire assets, all of which together were not worth more than $8,000;

that the goods were sold in bulk, and not in due course of business, to plaintiff for $2,000, plaintiff at the time well knowing of the insolvency of the vendors, and that their purpose was to defraud their creditors and prevent their assets from being distributed ratably to their creditors, as required by the insolvent act. The answer then shows, by proper averment, the institution of proceedings in insolvency by the creditors of J. T. Wight & Co. to force them into insolvency, and that in such proceedings a receiver was appointed to take charge of the assets of said insolvents, under the sixty-third section of the insolvent act of 1880. The receiver was authorized to bring, prosecute, maintain, and defend all actions and legal proceedings necessary to take and hold possession of such property, money, and effects, and "especially relating to that certain stock of goods, wares, and merchandise alleged to be the property of the said J. T. Wight & Co., and heretofore forming and constituting the stock in trade of the said J. T. Wight & Co. at Kirkwood, Tehama county, state of California, and the proceeds thereof." The answer avers the due appointment and qualification of defendant as receiver, and that as such receiver he proceeded to demand from plaintiff, —who was in possession, claiming as vendee of J. T. Wight & Co.,—said goods, exhibiting to him the order showing his appointment and proof that he had qualified. That thereupon said plaintiff voluntarily surrendered and delivered to defendant the goods, wares, and merchandise described in the first count of plaintiff's complaint. That defendant took said goods in his capacity of receiver as and for the property of the insolvents and held the same by virtue of his said office as receiver. That plaintiff thereafter served upon defendant, as receiver, a written notice as follows: "To L. V. Hitchcock and C. A. Garter, attorneys for petitioning creditors: You are hereby notified that Ernest Tapscott will, on the 27th day of December, 1889, at 10 o'clock a. m., move the superior court of Tehama county for an order directing D. B. Lyon, receiver, to deliver to him all the stock of goods, wares, and merchandise situate at the town of Kirkwood, in this county, and by the said receiver taken into possession on the 19th day of December, 1889. Said motion will be made on the following grounds: (1) That said affiant was, prior to the commencement of these proceedings, the owner of and in possession of all of said property. (2) That at the time said receiver took possession of the same this affiant was the owner of and in possession of all of said property, claiming the same adversely to said firm of J. T. Wight & Co., and to all the world. (3) That said receiver was never authorized by this court to take possession of said property. (4) That this court had no power to authorize or order said receiver to take possession of said property. (5) That said receiver is not entitled to the possession of said property, and this affiant is entitled to such possession. Said motion will be made upon all the papers on file in this proceeding, upon affidavit, copy of which is herewith served, and upon oral testimony to be adduced at said hearing. Yours, etc., N. P. Chipman and John F. Ellison, Attorneys for Ernest Tapscott." That on the 27th day of December, 1889, the application of plaintiff, according to said notice, came on to be heard in the superior court, when evidence was taken on the part of plaintiff, and also for the receiver representing the creditors of the insolvents, and after a full hearing the court made an order denying the application, which order is still in force, unreversed, and is a final adjudication of the rights of said plaintiff in the matter. That afterwards, to wit, January 20, 1890, said J. T. Wight & Co., and the individuals composing the firm, were adjudged insolvent, and on March 7th an assignee was appointed, who duly qualified. In the meantime the goods had been sold by defendant, as receiver, under the express order of the court. After the appointment and qualification of the assignee, all the property and money in the hands of the defendant as receiver were turned over to the assignee, under the direction of the court, and all of such funds had been distributed to the creditors of such insolvents, under the orders of the court, except fees, costs, and commissions duly allowed prior to the commencement of this suit, and, except such fees and commissions, the defendant had in his hands no part of the goods sued for, nor the proceeds thereof. That plaintiff delayed bringing his action for more than one year after his said demand for a redelivery, and until the property had been sold and the proceeds distributed to the creditors.

The second count is to recover for goods which were not in the store when the receiver took possession, and which, therefore, were not then delivered to the defendant as receiver. In answer to this count, defendant avers that, finding that a portion of the merchandise received by plaintiff from J. T. Wight & Co. had been removed, he demanded possession of it, and, upon a refusal, instituted against plaintiff, in his, defendant's character as receiver, an action of replevin, in which he caused a provisional writ to be issued as authorized by law, by virtue of which such goods were taken by the sheriff and eventually delivered to defendant as receiver; that the plaintiff—defendant in the action of replevin—filed an answer in that action in which he denied the receiver's right to the property, but did not claim a return of the property or its value, but simply asked to recover his costs, and thereupon this defendant as receiver—plaintiff in that action—dismissed the action and paid the costs; that the judgment of dismissal is still in force, unreversed, and is a bar to this action. The case was tried by a jury, which rendered a verdict for plaintiff, and defendant appeals from the judgment and from an order denying him a new trial.

It can hardly be said that appellant has filed his points as required by the rules of this court. He has put in, however, an elaborate brief, in which he discusses certain legal questions, but generally without specifying any rulings to which his argument is applicable. Sometimes, however, the application is sufficiently obvious, and such I propose to notice.

1. It is contended that the defendant, holding the goods as receiver, is not responsible as a trespasser, and that the order refusing to direct the defendant as receiver to deliver the property to plaintiff is conclusive as to plaintiff's right. Naturally, the first consideration in regard to this matter is as to the nature of defendant's possession. Did he take the property from the plaintiff as a trespasser? Was his possession personal or official only? Were the goods in the custody of the court? The order did not expressly direct him to take these specific goods. It did direct him to take into possession all the assets of the insolvents, and authorized him to institute suit to recover these specific goods. It is well settled that under such circumstances he had no right, as receiver, to seize the goods in the possession of the plaintiff, however manifest the fraud through which they were acquired. His duty was to demand them, and upon a refusal to bring suit for their recovery. If he takes the property from one not a party to the proceedings in which he received his appointment, against the will of such party, he does so at his personal risk. He is not acting for the court, and will not ordinarily be protected by it. But if he is lawfully in possession of property claimed to belong to the insolvent, he will be regarded as the servant of the court, and even adverse claimants will not be justified in disturbing his possession without leave of the court. Nor can he be made responsible in an action for the value of such property by such person. The custody is that of the court. The receiver has no right to deliver such property to an adverse claimant without leave of the court, and therefore cannot be held responsible for not doing so. The receiver, contemplating an action to recover these goods, made due demand, expecting a refusal, which would place him in a position to sue. He showed his authority, and the plaintiff, fully advised as to the facts, although, as he claims, misunderstanding the nature of the proceeding, surrendered possession to the receiver. The receiver could not refuse to accept them. He would have had no right of action if he had, provided he was rightly advised that a demand was required, for there must be a demand and a refusal. Probably he would have been liable on his bond had he refused. He was expressly authorized—perhaps it should be said directed—to sue for the recovery of these very goods. Plaintiff, with a knowledge of this fact, voluntarily gave them up. Had the receiver sued for and recovered them, he would then have held them as custodian of the court. I think he did, as it was.

I think the cases cited by both parties are upon questions not here involved. They are cases where it is sought to recover the goods in the possession of the receiver, or to establish some right or interest in the property, as the property of a party to the action, or they are claims arising against the receiver in his management of the property or a business by the receiver. Here it is not sought to interfere with the property. The purpose of the receivership had been accomplished, and, according to defendant's allegations, the property all sold and the proceeds distributed. The defendant is sued as a trespasser, and his plea is that in taking the goods he acted as receiver; that his acts were lawful, and that he cannot therefore be held as a trespasser. As he did not take the goods as a trespasser, and has disposed of them under express direction of the court, I think this position must be sustained. He was then but a servant, executing the commands of the court. The possession of a receiver has been likened to that of a sheriff who has levied upon goods by virtue of an execution, and in many important respects the cases are similar. High, Inj. § 2. But the case of a sheriff in possession of goods under a writ of attachment, and a receiver of goods which he is expressly ordered to take, are not in all respects analogous. If the sheriff, under a writ, seizes property which is in the possession of the defendant in the suit, and therefore presumptively his, third persons claiming such property can ordinarily, after demand, sue the sheriff and recover it if they can show title. But when a receiver is in possession of property which he is specifically directed by the court to take, and which is claimed to belong to the party whose goods are sequestered, and such possession has been acquired without the commission of a trespass, the receiver cannot be held personally responsible as a trespasser by a third party upon demand and refusal to give up the property. The sheriff is the agent of the creditor. He commits no contempt if he refuses to levy upon goods which he has reason to believe do not belong to the debtor. He may release them to a claimant without being guilty of a contempt. He simply takes the responsibility. The receiver has no such discretion. If the goods are described and are in the possession of the party whose property he is directed to take into possession, or are voluntarily delivered to him by the person having them, he must take them, on pain of incurring a contempt, and, having thus taken them, he cannot surrender them to an adverse claimant without leave of the court, which is the real custodian. High, Rec. §§ 139-145; Gluck & B. Rec. § 92; Beach, Rec. 304. Parker v. Browning, 8 Paige, 388, was an appeal by the receiver from an order allowing an action against him for taking, as receiver, goods belonging to third persons. The complaint was that the receiver had forcibly taken goods from the claimants which did not belong to the defendant, whose goods he was directed to take. The chancellor says the receiver is not required to place himself in the position of a wrongdoer, and need not take property from third persons unless under an express order to that effect; that suit should be brought to recover property in the possession of adverse claimants, but, "where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law, so that a third person claiming the same may be compelled to come in and ask to be examined pro interessse suo, if he wishes to test the justice of such claim." In that case, it will be seen, the suit was by permission brought against the receiver in his official character. That is the usual and proper mode of presenting such claims, and permission can always be given on such terms as will protect the receiver, while affording full opportunity to the claimant to test his right. Furthermore, it brings the claimant into a court of equity, where he will be required to present his claim without unnecessary delay. In such case the claim of the plaintiff here would have been lost by laches, if the facts alleged in the answer were established. Barton v. Barbour, 104 U. S. 126, is a case in which a receiver was sued for an alleged tort while acting within the scope of his duties as receiver, to wit, operating a railroad. The whole subject is reviewed, and it is held that, while a receiver will be liable as a trespasser if he goes outside of his authority as receiver, still all claims of adverse parties against him arising out of his acts within his authority must be first submitted to the court from which he receives his appointment, and that such court may either try the matter itself or authorize a suit against the receiver. The judge answers the objection which had been urged by some state courts that parties are thereby deprived of trial by jury in cases in which such right is guarantied. The case is all the more decisive because of a vigorous dissenting opinion by Justice Miller, in which he very graphically describes the enormous power which a judge draws to himself by appointing a receiver for a railroad, which may be operating thousands of miles of road and having transactions with thousands of people every day, who in case of disagreement are compelled to submit their suits to the chancellor or seek relief under such conditions and limitations as he may impose. I think these cases and others cited by the respondent are all consistent with the views above expressed, and that the defendant cannot be held responsible for the goods surrendered to him by the plaintiff. This being so, it does not appear to be necessary to hold that the order refusing to direct a redelivery of the property to plaintiff is a bar to plaintiff's right. The court undoubtedly had the power to grant the relief sought in that proceeding. Hulme v. Superior Court, 63 Cal. 240. Whether conclusive or not, the proceeding inaugurated by plaintiff was a recognition and admission that defendant then held the property as receiver.

2. The first point has reference only to the first cause of action, and to the goods found in the store formerly occupied by the insolvents. The second cause of action was for goods not then delivered to the receiver. As stated in the answer, the purport of which has already been set out, these goods were the subject of a further demand, and for them it is charged the defendant, as receiver, brought his action of replevin, which was dismissed, as stated. At the trial the judgment roll in that action was offered in evidence by defendant, and was ruled out on the objection of plaintiff. This ruling is assigned as error. Defendant contends that the judgment of dismissal is a bar to plaintiff's claim. After carefully reading appellant's brief upon this point, I am still at a loss to comprehend upon what this contention is based. Certainly there was no pretense of an adjudication. Appellant says that, as the defendant in the replevin suit set up no claim, the plaintiff had a right to dismiss the action. Conceding that he had such right, he then elected to dismiss without obtaining an adjudication upon his right. He obtained a provisional remedy on condition that he would prosecute his suit and obtain a final adjudication determining his right. Section 512, Code Civ. Proc. He failed to perform this condition. He thereby made himself a trespasser from the beginning, unless he can show title. True, it was a breach of the condition of his undertaking, and the defendant might then have sued upon the bond for such damages as he sustained by the taking. Manning v. Manning, 26 Kan. 98. But that remedy was not exclusive. Plaintiff was not compelled to sue on the undertaking. As to the second cause of action, therefore, the defendant must be considered a trespasser if plaintiff succeeds in establishing his title. Defendant, however, was in fact a receiver, and authorized to represent creditors. As to them, it has often been held in this state that a sale made to hinder, delay, or defraud them is

absolutely void, and not merely voidable. Grum v. Barney, 55 Cal. 254; Humphreys v. Harkey, Id. 284; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213. It is therefore necessary to consider some other alleged errors.

3. The defendant was allowed to put in evidence the proceedings in insolvency up to and including the adjudication, but the court excluded: (1) The petition upon which defendant was appointed receiver; (2) the petition of the receiver for permission to sell the property and the order of the court directing the sale; (3) the report of the sale; (4) an order approving the sale; (5) the appointment of an assignee and orders directing payment to creditors. To each ruling the appellant excepted. There can be no question that all this evidence should have been admitted, at least down to and including the appointment of the assignee. It was necessary, to show the jurisdiction and power of the court to appoint a receiver, that a proper petition should have been presented. Of course, the defendant could not show that his acts were all official unless he could show his official character. The court recognized this, and suggested that the plaintiff admit that a proper petition was presented. This admission plaintiff's counsel made, but defendant refused to accept it. The court, however, insisted upon it, and persisted in its ruling. A party legally entitled to certain evidence cannot be compelled to accept an admission in lieu of the evidence to which he is entitled unless the admission be as good for him as the evidence. Here it evidently was not. The petition explained the duties and power of the receiver by showing why he was appointed and what he was expected to do, and especially it showed that the reason why a receiver was appointed was to pursue these very goods, the value of which plaintiff seeks to recover. It explains the language of the order, and shows to what it applies. It was important and proper for defendant to show that he was directed to pursue these very goods, as showing that in taking them he was acting under the direction of the court. It was also proper to show that the property was disposed of under the direction of the court, and that the defendand did not apply it, or any portion of it, to his own use. To do this all the evidence above alluded to was material. A radical mistake of the learned judge of the trial court was that the only question involved was as to the title of the plaintiff. This is not so. Though plaintiff's title be admitted, still the defendant cannot be held in this proceeding as a tort feasor for any act within the scope of his duties as receiver and done under the express order of the court.

4. Appellant complains of the instructions that they are conflicting and confusing, and says: "The defendant, appellant, instead of receiving the benefit of doubts, was treated as an offender, and the fact of his being the 'hand of the court' pretty thoroughly ignored." He says the specifications in his statement sufficiently indicate the instructions objected to, and he will not repeat them in his points. The statement contains 72 specifications of errors which occurred at the trial. I do not think this a compliance with the rule which requires an appellant to file and serve his points. In his points the appellant should at least specifically point out the errors he relies upon, and briefly state why he deems the rulings erroneous. The instructions are numerous and voluminous, and we cannot be expected to hunt through them to find those which the general discourse of appellant may apply to. A reading of the instructions given at the instance of the respondent shows failure to make one distinction in a matter material to appellant. For instance, the fifteenth is: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Now the property in question here was taken by a receiver appointed to aid proceedings against J. T. Wight & Co. as insolvent debtors under the insolvent act. The transfer was made only seven days before the petition by the creditors. It was contended that the plaintiff, when he purchased, knew of the insolvency, and that the sale was made to enable J. T. Wight to pay a debt due his wife, in preference to the other creditors, and to prevent the property from going to an assignee in insolvency and being ratably divided among the creditors of J. T. Wight & Co. The insolvency was admitted. Granted the intent to prefer one creditor over another, and knowledge on the part of the vendee, the law is exactly the converse of that stated. If it can be said that the defendant also contended that the sale was void because made to hinder, delay, and defraud creditors, the instruction would still be erroneous, for it is not so qualified as not to have application to both questions. In several instructions this failure to discriminate between a claim that the sale was void because made to hinder, delay, and defraud creditors, and a fraudulent preference under the fifty-fifth section of the insolvent act, is manifest. The instruction is sound law as applied to one case, but is almost the opposite of sound law as applied to the other. Defendant's claim was founded almost if not entirely upon the proposition that the sale was a fraudulent preference under the insolvent act. In such case the insolvent cannot within one month before filing the petition prefer one creditor to another; and if he makes a sale for the purpose of doing so, and the vendee is aware of the intent, the sale is void as against the operation of the insolvent act, even though the purchaser paid full value for the property and the proceeds were applied to the payment of an honest debt. Furthermore, the sale to plaintiff was not in the usual and ordinary course of business, and this fact appeared from the testi-

mony of plaintiff himself. When a retail merchant, while he is engaged in business as such, and has a large stock of goods exposed for sale in that mode, transfers the entire stock in one trade, such transfer is not, and cannot be, in the usual and ordinary course of his business. The above fact, taken in connection with the other circumstances in proof, was sufficient to bring the case within the rule laid down in the insolvent act. The evidence on the subject was not conflicting. But one rational conclusion could be drawn from it upon this point, and there was no question as to the credibility of witnesses. Thereby, on the question of fraud, the burden was shifted from defendant to plaintiff, and it was misleading, without explanation or qualification, to tell the jury that the burden was upon the defendant. Under the circumstances, the court would have been justified in charging the jury that the defendant had prima facie made out his defense.

Other instructions I do not deem it necessary to discuss, because of the failure of sufficient specifications. I think the judgment and order should be reversed, and a new trial had.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and a new trial granted.

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103 Cal. 213

WYMAN v. MOORE et al. (No. 15,223.)

(Supreme Court of California. June 26, 1894.)

GAMBLING CONTRACTS BY AGENT—RIGHTS OF PRINCIPAL.

Where a principal engages an agent to purchase wheat, who, instead, employs a broker to buy "futures," and the principal, with knowledge of the transaction, accepts the benefits, she thereby ratifies the agent's act, and cannot recover the money from the broker in case of subsequent losses, as she is in pari delicto.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Cora B. Wyman against James Moore and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

George D. Collins, for appellant. W. S. Goodfellow and Otto Tum Suden, for respondents.

McFARLAND, J. This action is, substantially, to recover money alleged to have been given by plaintiff to defendants, who were brokers, to be used by the latter for the former in buying and selling wheat. The business seems to have been profitable for a while, but afterwards ended in a loss. The court found that all of the allegations of the complaint were untrue, and all the allegations of the answer true, and rendered judgment for the defendants; and plaintiff appeals from the judgment, and an order denying her motion for a new trial.

We think that the judgment and order should be affirmed. Waiving the question of the alleged illegality of the transactions about wheat,—upon which illegality appellant rests her claim to a recovery,—it appears that the appellant was not an innocent party to such transactions, but took part in and ratified them. Being, therefore, a party in pari delicto, the law leaves her where it finds her. The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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103 Cal. 352

Ex parte CLARKE. (No. 21,085.)

(Supreme Court of California. June 30, 1894.)

EXAMINATION OF INSOLVENT—PRIVILEGE OF WITNESS—FRAUD.

Const. art. 1, § 13, provides that no one shall be compelled, in any criminal case, to be a witness against himself. Section 154, Pen. Code, provides that every debtor who fraudulently sells or conceals his property with intent to defraud or delay his creditors is punishable by fine or imprisonment, or both. Petitioner was adjudicated an insolvent, and was cited to appear before the court and be examined regarding his disposition of his property. *Held*, that he was not obliged to answer questions relating to his fraudulent disposition of his property.

In bank. Petition by Alfred Clarke for habeas corpus. Prisoner discharged.

Frank M. Stone, for petitioner. Warren Olney, for respondent.

BEATTY, C. J. The petitioner having been duly adjudicated an insolvent debtor, his assignee in insolvency filed a petition charging him with having concealed, smuggled, conveyed away, and disposed of property which should have been turned over to said assignee for the benefit of his creditors, upon which a citation was issued commanding him to appear before the superior court to be examined touching the matters alleged in the petition. In obedience to the citation, the petitioner came into court and was sworn, but declined to answer the questions put to him upon the ground that his answers might be made the foundation of a criminal action against him. Section 154 of the Penal Code reads as follows: "Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both." It is evident that any answers the petitioner might have made tending to support the allegations of the petition upon which he was cited for examination would also have had a tendency to convict him of the crime or public offense defined in the section quoted, and therefore he could not be subjected to compulsory examination. No person can be compelled, in any criminal case, to be a witness against himself. Const. art. 1, § 13. To bring a person within the immunity of this provision it is not necessary that the examination should be attempted in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a provision that, if he submits to the examination, and answers the questions, he shall be exempt from any criminal prosecution for the offense to which the inquiry relates. All these propositions are decided by the supreme court of the United States, upon an exhaustive review of the authorities in the case of Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195,—a case in every essential particular identical with this. There is no law of this state which would have exempted the petitioner from a criminal prosecution for fraudulent concealment of his property if his answers to the questions put to him had tended to convict him of the offense, and therefore we repeat he could not be compelled to answer. But the superior court held otherwise, ordered him to answer the questions, and, upon his persistent refusal to answer, committed him to the county jail for contempt of court. The imprisonment is illegal, and the prisoner must be discharged. It is so ordered.

We concur: McFARLAND, J.; VAN FLEET, J.; FITZGERALD, J.; GAROUTTE, J.

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102 Cal. 633

HOLLAND v. ZOLLNER. (No. 15,281.)

(Supreme Court of California. July 7, 1894.)

MENTAL CAPACITY—OPINION EVIDENCE.

Testimony of one who is neither an expert nor an intimate acquaintance (Code Civ. Proc. § 1870, subd. 10), that a person's appearance was "irrational," though of doubtful competency, is not necessarily prejudicial when the witness also details the facts on which said conclusion was based. 36 Pac. 930, affirmed.

In bank. Appeal from superior court, city and county of San Fracisco; John Hunt, Judge.

Action by Augusta Holland, administratrix, etc., against Alfred Zollner. Decree for plaintiff affirmed in department. See 36 Pac. 930. On petition for hearing in bank. Petition denied.

Naphtaly, Freidenrich & Ackerman, J. W. Jellett, and A. Ruef, for appellant. Lloyd & Wood and A. Heyneman, for respondent.

PER CURIAM. The petition for hearing in bank is denied. Conceding that the last question asked of the witness Mrs. French on direct examination, and the answer given thereto, were erroneous under the decision of this court in Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101, still, considering the cross-examination of the witness, and all the other evidence in the case, we do not think the error of sufficient importance to warrant a reversal of the judgment. The same may be said of the witness McKisick, and, furthermore, his testimony was not of a character to prejudice appellant.

GAROUTTE, J. (concurring). While concurring in the order denying a rehearing in this case, I am unable to concur in the views of the department holding that the question addressed to the witness upon the appearance of Holland, as to his being rational or irrational, was unobjectionable. At common law any one was entitled to give his opinion as to the mental condition of a party, while under the Code of Civil Procedure only intimate acquaintances are allowed to so testify. At the same time this provision should have a liberal construction, and a wide discretion as to such matters is vested in the trial court. In the present case a week's acquaintance and association of the character indicated in this record, in my opinion, furnished a foundation sufficient to support the admission in evidence of the witness' opinion as to Holland's mental soundness; and for this reason the evidence of which complaint was made was properly placed before the jury. But upon any other hypothesis the question addressed to the witness, to wit: "From the appearance of Mr. Holland at that time, with reference to his being rational or irrational, what is your opinion?" is objectionable. It is held in Marceau v. Insurance Co. (Cal.) 35 Pac. 856, that only experts and intimate acquaintances are entitled to give opinions upon this ultimate fact. And from whatever standpoint of vision you view this question it calls for the opinion of the witness. Indeed, it calls for it in direct terms. A witness who is neither an expert nor an intimate acquaintance may testify as to the acts and language of the party, and no further. To say that in your opinion a party appears to be a rational or irrational, sane or insane, is but saying in another form that, from what you have seen of him, you think his mind sound or unsound. The distinction between the two forms of expression is too refined and attenuated to be discovered, even by the most powerful search light. It is but a play upon words, and, if the practice of asking a question of this character be approved, all persons who have met the party, however unsatisfactory and fleeting that meeting, will be allowed to give their opinions as to his sanity, and thus the provision of the Code will become useless legislation upon the statute books. It is said in Estate of Carpenter, 94 Cal., at page 416, 29 Pac. 1101, that the form of question we are here considering is even more objectionable than if the ordinary and direct interrogatory had been addressed to the witness. It is perfectly apparent to my mind that it is but doing indirectly (and the indirection is hardly perceptible) what the statute and the decisions declare cannot be done directly. People v. Lavelle, 71 Cal. 351, 12 Pac. 226, is the only case, to my knowledge, since the adoption of the Codes, that supports a contrary view. The case is not well considered, and no authority of any court is there cited to support the principle declared.

103 Cal. 372

SMITH v. WAITE. (No. 19,362.)

(Supreme Court of California. July 17, 1894.)

Action on Note — Allegation of Delivery — Action for Services — Complaint — Sufficiency.

1. In an action on a note, an averment that defendant "duly made" the note implies a delivery, and is sufficient as against a general demurrer.

2. In an action for services, a complaint which alleges that defendant is indebted to plaintiff in a certain sum on account of work, labor, and services performed at the request of defendant, and that he has not paid therefor, is sufficient as against a general demurrer.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Clark, Judge.

Action by S. M. Smith against R. P. Waite on a promissory note and for services performed for defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Appel and A. M. Stephens, for appellant. R. G. Adcock and Wm. A. Ryan, for respondent.

BELCHER, C. This is an appeal by the defendant from a judgment entered against him by default, after a general demurrer to the complaint had been overruled; and the only question is, did the complaint state facts sufficient to constitute a cause of action? The complaint contained two counts,—one upon a promissory note, and the other for work, labor, and services performed for defendant. In the first count it is alleged that on a certain day "the defendant duly made a certain promissory note in writing, bearing date on that day, which said promissory note was in words and figures following." A copy of the note is then set out in haec verba, showing that it was payable to the order of the plaintiff. It is further alleged that plaintiff is now the owner and holder of said note, and that no part thereof has been paid. In the second count it is alleged that the defendant is indebted to the plaintiff in a certain sum of money "on account of work, labor, and services * * * performed at the request of the defendant," and that the defendant has not paid the same nor any part thereof. The objections are: (1) That there is no averment that the note was ever delivered by the defendant to the plaintiff, or that the defendant made it to the plaintiff; and (2) that it is not stated by whom the work was performed,—whether by plaintiff or some other person. And it is said: "If it was performed by another person, then there should be an allegation of the assignment of the account. The demurrer was properly overruled. Each count in the complaint sufficiently stated a cause of action, when tested only by a general demurrer. The averment that the defendant "duly made" the promissory note implies a delivery. "It is not necessary to aver the delivery of a bill or note, for the averment that a bill was drawn or note made includes the idea of a delivery, without which the drawing or making is not complete." 1 Daniel, Neg. Inst. § 63. And see Churchill v. Gardner, 7 Term R. 596; Russell v. Whipple, 2 Cow. 536; Prindle v. Caruthers, 15 N. Y. 425; Hook v. White, 36 Cal. 302. The judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 268

COSGROVE v. PITMAN et al. (No. 15,189.)

(Supreme Court of California. June 26, 1894.)

Injury to Employe — Incompetency of Fellow Servant—Drinking Habits — Evidence — Administratrix—Disqualification by Marriage.

1. In an action for personal injuries resulting from the negligence of a fellow servant, on the ground that his habit of using intoxicating liquors was of such notoriety that defendant must have known it, a recovery cannot be had where there is no evidence that he was intoxicated when the accident happened.

2. An instruction that if the fellow servant's habits of drinking had impaired his "standing" among engineers of his class, and among employers of engineers, and defendant knew or should have known thereof, plaintiff should have a verdict, is erroneous, as the engineer's "standing" among engineers or employés is immaterial if he did not have the habit of drinking.

3. Occasionally taking a drink or occasionally being under the influence of drink does not constitute such a habit of drinking as would authorize a finding that one was thereby rendered incapable of managing an engine.

4. The marriage of an administratrix does not of itself deprive her of authority to sue as such.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Helen Cosgrove, as administratrix of the estate of James Cosgrove, against H. C. Pitman and another for damages for the death of her husband. Judgment for plaintiff, and defendants appeal. Reversed.

Pringle, Hayne & Boyd, for appellants. Henry E. Highton, for respondent.

HARRISON, J. The defendants are stevedores, and in August, 1885, were engaged in discharging a cargo of coal from the vessel Henry Hyde, then lying at one of the wharves in San Francisco. The plaintiff's intestate was in their employ, and, while so engaged, a tub of coal, which was being hoisted from the hold of the vessel, swung around so that it might be emptied into another vessel alongside, and struck him with such force as to cause injuries from which he died. The plaintiff, as the administratrix of his estate, brought this action against the defendants to recover the damages sustained by his death, alleging that it was caused by reason of their negligence. The coal was hoisted by means of a donkey engine on the wharf, which was in charge of an engineer named Murphy, who, at signals from another employé, started and stopped the engine; and it is claimed by the plaintiff that the injury to the deceased was caused by the negligence of this engineer; and, in order to avoid the rule of law which exonerates the employer from liability to an employé for an injury resulting from the negligence of a fellow servant, the plaintiff sought to show that Murphy was addicted to the habit of drinking intoxicating liquors, and that this fact was of such notoriety that it must have been known to the defendants, and that therefore they were guilty of negligence in having him in their employ. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. The defendants have appealed.

Murphy's capacity as an engineer, aside from the impairment of such capacity by reason of this alleged habit, does not seem to have been questioned by the plaintiff, and there was ample evidence of such capacity shown at the trial. The plaintiff did not attempt to show that Murphy was intoxicated at the time of the accident, nor was there any evidence of that purport before the jury. Murphy himself testified, and there was no evidence tending to contradict his statement, that he was not intoxicated on the day of the accident, and had not taken any intoxicating liquors either on that day or for a year prior thereto. The testimony of Nagle that in the morning of that day, while Murphy was fixing his engine, and seemed to be in a hurry, some one remarked, "I guess he is drinking a little," is not entitled to any consideration as evidence that he had in fact been drinking. Upon the theory of the plaintiff that the injury resulted from the negligence of Murphy, if she would charge the defendants with the results of this negligence, by reason of their having him in their employ, with knowledge of his intemperate habits, it was necessary for her to show that the injury was in some respect the result of such intemperate habits. Unless the accident was in some way connected with such habit, or resulted from intemperance, the habit was not the cause of the negligence, and the defendants could not by reason of this habit be rendered liable for the negligence of Murphy produced by any other cause. If the fact of Murphy's habit of intemperance at or about the time of the accident had been shown, the jury might have inferred that he was in that condition at the time of the accident, and that his negligence was the result of this condition. Proof of his being under the influence of liquor at the time of the accident would be presumptive of his negligence, and, if it had appeared by direct evidence that he had a habit of intemperance, it would throw upon the defendants the burden of showing that he was not then in that condition; but proof that he had at some previous time the reputation of having the habit is not proof of the fact that he did have the habit. To allow the proof of his reputation for drunkenness to be equivalent to establishing the fact that he was addicted to drunkenness, and from that to make the further inference that from his habit he was so at this time, would be to draw an inference from a presumption. Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer, arbitrarily and without evidence, that there was negligence. When a fact is established, some other fact may be justly inferred therefrom, but when the plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. See Douglass v. Mitchell's Ex'r, 35 Pa. St. 443.

For the purpose of establishing this habit in Murphy, the plaintiff offered evidence of his reputation in the matter of drinking, and also the testimony of certain witnesses that they had at times seen him "under the influence" of liquor. None of the witnesses testified that they had ever see him intoxicated, or that he was in fact accustomed to habitual drinking. It was shown that he would occasionally drink, "to be sociable and pleasant," and also that it was quite common for engineers to drink. One witness, when asked about his habits with respect to drink prior to the day of the accident, said: "I have seen him take a drink once in a while. I have seen him when he was pretty full." And when asked how frequently said: "Well, not very often. It might be once a week, or something like that." Another witness, when asked with reference to his habits of drink, said that "for some months prior to 1885" he would take a drink frequently, and that quite a number of times he had known of his drinking to excess; that for four, five, or six years before the trial (March, 1891) he had not conducted himself so well with respect to drink, and a great many would not employ him. The witness did not, however, state when or how frequently he had known of his drinking to excess. Another of the plaintiff's witnesses testified that the "standing" of Murphy "along about 1885" was bad, on account of drinking, and that among the pile drivers for four or five years prior to the trial he was not thought to be a "safe" man. Another, who had seen him drink in 1883, said that since that time "I have considered that he drank too much whisky to take care of an engine." He does not, however, state that he had had any knowledge of Murphy's habits or conduct for two years prior to the accident. This was substantially all the evidence that was given by the plaintiff for the purpose of showing that Murphy was addicted to the habit of drinking.

When the evidence was offered, the defendants reserved the right to move to strike it out, if the plaintiff failed to bring it home to them, or should fail to show that Murphy was under the influence of liquor at the time of the accident; and at the close of the plaintiff's case they made this motion, and it was denied by the court. This motion should have been granted. It cannot be said that to take an occasional sociable drink, or even to be occasionally "under the influence" of drink, constitutes a habit of drinking, or that a jury would be authorized to infer from such evidence that the man had been rendered incapable of properly managing his engine, when he had not been drinking for a year prior thereto. Proof of specific acts is not equivalent to proof that Murphy had either this reputation or the habit. "Character for care, skill, and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. 1 Greenl. Ev. §§ 461-469. Character grows out of special acts, but is not proved by them, though, indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established, and sometimes the very frailties that are proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character." Frazier v. Railroad Co., 38 Pa. St. 110. The instruction of the court upon this proposition, given at the request of the plaintiff,—that "if an engineer should be proved skillful and competent to run a dummy engine by reason of his intelligence, skill, and experience, and yet should be unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he would not be a competent engineer, within the meaning of the law,"—should not have been given. There was no evidence before the jury from which they were authorized to find that Murphy had the habit of drinking intoxicating liquors to excess, or that he was unsteady or unreliable at the time of the accident. While proof that Murphy had a general reputation for drunkenness might be held to impute to the defendants knowledge of such reputation, and, consequently, impose upon them the necessity of making inquiry with reference to the fact, and charge them with the consequences of not doing so, yet such proof would not establish the fact that he was in reality so addicted, and it might be that the inquiry by the defendants, after being informed of the reputation, would show that the reputation was without foundation; otherwise, the defendants would be charged with the consequences of a trait that never existed. Upon this proposition the court instructed the jury as follows: "If you believe from the evidence that, under the law as explained to you by the court, James Cosgrove was injured without contributory negligence on his own part, through the negligence of the engineer, James Murphy, and that the said James Murphy was a man whose habits of drinking had impaired his standing among engineers of his class, and among the employers of such engineers, and was not a safe man to be employed to run a dummy engine in connection with stevedoring work in discharging ships, and that the defendants knew, or by reasonable inquiry might have known, these facts, and that, nevertheless, they employed him on August 25, 1885, to run the engine in discharging coal from the Henry Hyde, and that said James Cosgrove did not know, and had no means of knowing, of the engineer's drunkenness and unfitness, then your verdict should be for the plaintiff." This instruction should not have been given. Aside from the statement implied therein that the drunkenness and unfitness of Murphy was a fact in the case, the "standing" of Murphy among engineers or employers was an immaterial element in determining his capacity or negligence. It was relevant only for the purpose of putting the defendants upon notice that such was his reputation, and they were bound by the consequences, if the reputation was founded upon fact. The knowledge by the defendants of Murphy's standing among engineers did not charge them with any negligence, if he did not in reality have the habit of drinking, and, as we have seen above, there was no evidence before the jury of any drunkenness of Murphy at the time of the accident, or from which they could draw the inference that at that time he had a habit of drinking.

It appeared at the trial that the plaintiff was the wife of the deceased, and that after the commencement of the action, and before the trial, she had remarried. The defendants objected that by her remarriage her authority as administratrix was extinguished. and she could no longer maintain the action. It has been held, however, that the marriage of an executrix does not, eo instanti, deprive her of her power to act, but is merely ground for a proceeding for her suspension and removal. Schroeder v. Superior Court, 70 Cal. 343, 11 Pac. 651; McMillan v. Hayward, 94 Cal. 357, 29 Pac. 774. The same principles apply in the case of an administratrix as an executrix, and there was therefore no error in this ruling of the court. As the case is to be remanded for a new trial, we do not deem it proper to indicate any opinion concerning the weight of evidence upon the issues of negligence or contributory negligence. The judgment and order are reversed.

McFARLAND, J. I concur.

FITZGERALD, J. I concur in the judgment.

GAROUTTE, J. It is claimed that the accident occurred by reason of the negligence of the engineer, a servant of the defendants and a fellow servant with the deceased. To support plaintiff's case under this state of facts, it was not only necessary to prove that the engineer was intoxicated at the time of the accident, but that defendants were guilty of negligence in employing him. It was proven that his general reputation for sobriety was bad, and it may be conceded, for the purposes of this case, at least, that defendants were lacking in the exercise of due and proper care in hiring such a man. But there is no evidence in the record that he was intoxicated at the time of the accident, and nothing therein from which we are justified in drawing an inference to that effect. I concur in the judgment.

DE HAVEN, J. I concur in the opinion of Mr. Justice GAROUTTE.

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4 Cal. Unrep. 714

MILLBRAE CO. v. TAYLOR et al. (No. 15,039.)

(Supreme Court of California. June 27, 1894.)

USE OF TRADE NAME—INJUNCTION.

Defendant, the owner of land known as "Millbrae Station," formed a copartnership with plaintiffs to keep cows on said land, and sell the milk therefrom under the trade name of "Millbrae Dairy." Afterwards the partnership was dissolved, plaintiffs taking the milk routes and business of selling milk, and defendant, who remained the owner of the land, agreeing to supply them with milk therefrom. Later plaintiffs terminated the contract with defendant, and took no more of his milk, but still conducted a milk business under the name of the "Millbrae Dairy," and formed a corporation under the name of the "Millbrae Company," to carry on the business. *Held*, that plaintiffs could not ask for an injunction to restrain defendant from using the name "Millbrae" in a competing business, since their own use of the name was a fraud on the public.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Wm. T. Wallace, Judge.

Action by the Millbrae Company against H. H. Taylor and others to enjoin the use of a trade name and for damages. Judgment for defendants. Plaintiff appeals. Affirmed.

Wheaton, Kalloch & Kierce, for appellant.
Maxwell & McEnerney, for respondents.

HAYNES, C. Action to enjoin the defendants from using a "trade name," which it is alleged belongs to the plaintiff (a corporation), and for damages. Findings and judgment were against the plaintiff, and this appeal is taken from the judgment and an order denying its motion for a new trial. An outline of the facts, condensed from the findings, may be thus stated: Some time prior to 1865, the defendant D. O. Mills became and still is the owner of a tract of land in San Mateo county, at the railroad station now, and ever since 1865, known as Millbrae station. From 1865 until August, 1883, A. F. Green and defendant Mills were copartners, engaged in the business of raising and keeping cows of superior quality and breed upon said land, and selling the milk therefrom in the city of San Francisco, said business being conducted, at least since 1875, under the trade name of "Millbrae Dairy;" the word "Millbrae" being compounded of the name of the owner of the ranch (omitting the "s") and the Scotch word "brae." In August, 1883, F. H. Green purchased a one-third interest in the cows and other personal property and business, and the firm as thus constituted continued the business until September 1, 1886, under the same trade name. At the date last named the copartnership was dissolved by mutual consent, and in the settlement A. F. and F. H. Green took the milk routes and business of selling the milk in San Francisco, with the wagons, horses, and appurtenances, and defendant Mills, who was at all times the sole owner of the land, took all the dairy implements, supplies, cows, and other personal property at the ranch, and on the same day entered into an agreement with said A. F. and F. H. Green whereby he agreed to sell to them and they agreed to buy, not less than 270 nor more than 390 gallons of milk per day, at a price therein specified, the milk to be thus furnished by defendant Mills to be exclusively from his own dairy, and this agreement was to continue for at least one year. A similar agreement was made each year, the last being dated September 1, 1889, the quantity named therein being not less than 360 and not exceeding 410 gallons per day. This contract stipulated that it should be in force for at least one year, and thereafter until one of the parties should give the other three months' notice of his intention to terminate it. About July 1, 1890, A. F. and F. H. Green organized a corporation under the name of the Millbrae Company (the plaintiff herein), and conveyed to it their said business, property, and good will, they being the principal stockholders therein, and practically owning and carrying on said business through said corporation, and on the 1st of August, 1890, ceased to take milk from defendant Mills under said contract, and thereafter the plaintiff procured from Marin county the milk with which it supplied its customers. Until the formation of the corporation, the business continued to be conducted by A. F. and F. H. Green under the name of the "Millbrae Dairy," and their delivery wagons were so marked, and that name was printed upon their bills and receipts, upon which it was also stated that the milk was "produced on Millbrae farm, San Mateo county." After the organization of the corporation, the name on the wagons and bills was changed to "Millbrae Company," and on the bills it was stated simply "pure country milk, produced from rich pasture, wholesome feed, healthy cows;" without any indication as to the locality except the word "country.' On September 1, 1890, the defendant D. O. Mills commenced the business of selling milk from his said dairy in the city of San Francisco, and engaged defendant Taylor as agent for that purpose, and employed defendant Cole to manage the sale and distribution of the milk in the city; and in this business adopted and used upon his wagons and upon his bills the original trade name, "Millbrae Dairy," but specified upon his bills and advertisements that the milk sold was from the Millbrae dairy, in San Mateo county, and added: "Do not confound it with the Millbrae Company." At the time of the dissolution of the copartnership, a valuation was put upon all the property, and among other items of the city branch of the business, which was taken by A. F. and F. H. Green, was "100 cans' trade, $4,000."

The foregoing facts are not disputed, and are sufficient to present the principal question in the case. There are several specifications of the insufficiency of the evidence to justify certain findings, but these can be more briefly disposed of after deciding the principal question, since if the findings excepted to were framed as appellants suggests they would not change the result. It is insisted by appellant that the "trade name" is a part of the good will sold by defendant Mills to Green & Green, and for which they paid a large sum of money; that such name is an important element in such good will, and that plaintiff has the exclusive right to its use. Appellant is in error as to the facts to which he applies the law, and hence is wrong as to his conclusions. The findings upon this subject are not only supported, but are made clear by the testimony of F. H. Green, who was one of the parties to the contract under which it is claimed the good will of the business and the right to use the trade name was sold by defendant Mills. He said: "Prior to that time (referring to his purchase of an interest in 1883) the business had been carried on by D. O. Mills and my father, under the name of the 'Millbrae Dairy.' I think they gave it the name of the Millbrae dairy in 1875 or 1876. In 1883 the business was in the name of the Millbrae dairy. I continued in business with them some three years. In 1886 we entered into an agreement to divide the business up. Mr. Mills took the interest in the country, and my father and myself took the interest here. Since that time my father and myself conducted the business under the name of the Millbrae dairy." It will also be observed that on the day of the dissolution of the partnership the contract was entered into for the sale by Mills to the Greens of the milk produced at Millbrae, and by which the Greens agreed to sell the same in San Francisco, and that defendant Mills has ever since continued the business of keeping cows and producing milk at the same place and under the same name. There was nothing said in the contract about the sale or transfer of the good will, or of the use of the name under which the business had been conducted. It was not a sale of the entire business with which the name was connected, but a "division" of the business, and the name was equally applicable and equally important to each part. So long as the Greens or their successors continued to sell Millbrae milk, there was no conflict of interest in the use of the name, nor was there any agreement, covenant, or obligation that the Greens should have the right to use it longer than they continued to sell Millbrae milk. On the contrary, the fair and reasonable implication was that the name should only be used in connection with the sale of milk produced by the owner of the ranch and dairy familiarly known by that name, and which name was even more important to be retained by the owner of the ranch than by one whose right to sell the milk depended upon a yearly contract. Nor was this contract terminated by defendant Mills, but plaintiff, for its own advantage, voluntarily terminated it by a three-months notice, under the terms of the contract, and now insists that it may deprive defendant Mills of all use and benefit of the well-established name in disposing of his milk, while using the false name of "Millbrae" for selling the milk of a competing producer.

It is not necessary to review the cases cited by appellant, for the question involved is no longer an open one. In the case of Joseph v. Macowsky, 96 Cal. 521, 31 Pac. 914, it was said: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured. Browne, Trade-Marks, §§ 71, 474; Palmer v. Harris, 60 Pa. St. 156; Fetridge v.

Wells, 13 How. Pr. 385; Hobbs v. Francais, 19 How. Pr. 571; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436. In Siegert v. Abbott, 61 Md. 284, the court said: 'It is a general rule of law in cases of this kind that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels.'" If, at the time the partnership was dissolved, D. O. Mills had sold to his copartners the ranch and dairy, as well as his interest in the business of selling the milk there produced, the property in the trade name and the exclusive right to use it would have passed to the purchasers, and Mills could not have applied the name to another ranch or dairy and used it in the like business to the injury of the plaintiff. By the division of the partnership property and business, coupled with the contracts for the sale of the same milk, the Greens acquired the right to use the trade name so long as they sold Millbrae milk; but they could not rightfully use it after they ceased to sell that milk, without wronging both Mills and the public. It does not aid the plaintiff's case that Marin county milk, which it now sells, is as good or even better than Millbrae milk. As was said in a similar case, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." Prince Manuf'g Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 993. For a full discussion of the questions principally involved in the case at bar, see the case last above cited, and, also, Pepper v. Labrot, 8 Fed. 29, and Huwer v. Dannenhoffer, 82 N. Y. 499. In Atlantic Milling Co. v. Robinson, 20 Fed. 217, it was held that the right to the symbol is inseparable from the right to make and sell the commodity which it has been appropriated to designate. Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645, is entirely consistent with Joseph v. Macowsky, supra, and is against appellant.

It is claimed that the second finding is, in effect, that defendant Mills first used and adopted the name "Millbrae" before his partnership with A. F. Green, and that this is not justified by the evidence. Whether this name was adopted before or after is wholly immaterial. It had certainly been used many years before the dissolution, and was well known. It was the name of a locality, and attached thereto, no matter by whom nor when it was originated. Whether Millbrae farm is or is not shown by the evidence to be "peculiarly" fitted and adapted to the purpose of producing milk, or that it is not shown to produce better milk than other farms or dairies, is also immaterial. The name used to indicate milk produced on that farm had become valuable, and the question here is not one of comparison with other milk or other ranches, but whether defendant Mills shall be deprived of the use of a name that is valuable to him. The finding that "D. O. Mills never sold nor conveyed to A. F. Green and F. H. Green nor to either of them, the good will of the business of selling milk in the city of San Francisco," is, I think, supported by the evidence. The evidence shows that at the time of the dissolution of the copartnership four milk routes were operated. Those routes were not defined in the evidence. There was no agreement that Mills should not engage in that business in the city. Whatever might be said of the "routes" then operated, there is nothing in the evidence to indicate that he intended to exclude himself from the business of selling milk in the city, unless during the continuance of his contracts with his former partners. Besides, so far as the use of the trade name is concerned, the good will of the milk routes is an immaterial factor. It was found by the court that Green & Green "were to take from D. O. Mills all the milk which might be necessary to carry on the said business;" and this, it is said, is not justified by the evidence. The agreement, as we have seen, specified a minimum and maximum quantity, and, while they did not contract not to buy or sell other milk, and the evidence shows that they sometimes did so, yet the finding is substantially true. It was a division of the business, and during the continuance of these contracts they advertised no other milk, and there is no evidence tending to show that it was not usually sufficient to supply their customers. The finding that the use of the word "Millbrae" was a representation to the public that the milk sold was produced at Millbrae farm or dairy is incontrovertibly supported by the evidence, as is also the finding that the use of the same word by the plaintiff after it ceased to sell Millbrae milk was a false representation. The assurance given by plaintiff to its customers that it was selling them Marin county milk could not have been necessary if the use of the word Millbrae did not imply that it was selling milk from Millbrae dairy.

It was further alleged in the complaint that defendants Taylor and Mills entered into a scheme which had for its object the going into the business of selling milk in said city, and of obtaining customers by enticing away the customers of the plaintiff; that in pursuance thereof they induced the defendant Cole, who had been in the employment of the plaintiff and its predecessors for 15 years, and had full knowledge of their milk routes, to leave the plaintiff and enter into their service, and were thus able to impose upon the customers of the plaintiff and sell them milk while such customers believed they were purchasing from plaintiff; that defendants' wagons closely resembled plaintiff's, and had painted on them the words "Millbrae Dairy," and were run under the personal charge of defendant Cole, and by these means, and particularly by using the name "Millbrae," and having the same painted upon their wagons, and having them in charge of defendant Cole, have been drawing away plaintiff's customers, and allege damages in the sum of $500. Upon these issues the court found that no scheme was entered into; that none of plaintiff's customers were imposed upon, or bought milk from defendants when they supposed they were buying from plaintiff; that the wagons used by defendants do not resemble plaintiff's wagons; that none of plaintiff's customers have been drawn away, except by fair and open competition; that none of said customers were misled by the defendants' use of the trade name "Millbrae," and that plaintiff has not sustained any damage. Appellant claims that none of these findings are supported by the evidence. That defendants sold milk to a very considerable number of the former customers of plaintiff is not disputed. Whether defendants obtained these customers by improper means is a mixed question of law and fact; the means used being a question of fact, but whether such means were improper is a question of law, depending upon the relation of the parties, and their rights and duties towards each other. There is no doubt that plaintiff has sustained loss by the competition of defendants, but whether such loss is a legal injury, entitling the plaintiff to recover damages, is quite another question. The use of the trade name, so long used by plaintiff and its predecessors, must necessarily aid the defendants in securing custom, but, having the right to use it, plaintiff cannot complain. The circulars used by defendants for advertising their business were headed "Millbrae Dairy, of Millbrae, San Mateo County," and informed the people that they would sell their own milk, and further said, "Do not confound it with the Millbrae Company." We think these findings are fully justified by the evidence, notwithstanding the evidence shows that plaintiff suffered loss in consequence of what defendants did. Some of these findings, taken by themselves, are mixed conclusions of law and fact, and necessarily so. But they must be read in connection with the other findings, showing the relations of the parties and their rights and duties toward each other. Appellant contends that "a person who sells the good will of a business will be enjoined from again setting up business at such a place and in such a manner as to destroy or diminish the business of which he had sold the good will; that the sole issue is between D. O. Mills, the vendor of the good will of a business, and appellant, successor to his vendees." We think that the only good will that was sold by Mills was the good will of the routes then operated for the sale of Millbrae milk; that it was not the intention of Mills to shut himself out from them, nor from any part of the city, if his vendees should cease to sell his milk. His vendees might have exacted other conditions, but they did not do so. In the language of F. H. Green, it was a "division of the business" theretofore carried on by the so-called vendor and vendees as partners, and that business was the sale of Millbrae milk. Mills did not sell the good will of the business of selling any other milk, as no other milk was sold, and his vendees could not divert the place where that business was conducted to the sale of a competing article, and shield themselves from his competition by claiming that the good will continued, not only as to the place, but as to the place used for selling a different and competing article. This conclusion makes it unnecessary to consider the cases cited by appellant in support of the proposition that the vendor of the good will of a business "must do nothing to impair or injure it" (a proposition which certainly requires material qualifications), or those other cases which undertake to specify with more or less particularity what the vendor who again enters upon a similar business may or may not do in furtherance of it.

I think the evidence justifies the findings, and that the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 367

MERRILL et al. v. CLARK et al. (No. 18,284.)

(Supreme Court of California. July 16, 1894.)

PUBLIC LANDS—TRANSFER BEFORE RECEIVING PATENT—WHEN PERMISSIBLE.

Under Rev. St. U. S. § 2263, providing that before any notice is made under section 2259 proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land districts in which the lands lie, and that all assignments and transfers before the issuing of the patent shall be void, one who has delivered the final proof of his pre-emption claim, the affidavit required by statute, and the money for the land to the register may transfer the land, though he has not received a patent therefor.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Ejectment by W. C. Merrill and another against Mary Clark and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Shinn & Shinn and S. Solon Holl, for appellants. Spencer & Raker, for respondents.

GAROUTTE, J. This is an action of ejectment to recover possession of 120 acres of land in Lassen county, in this state. The respondents had judgment in the court below, and from this judgment, and an order overruling appellants' motion for a new trial, this appeal is taken. Both parties are claiming title from one W. H. Clark. The facts material to a disposition of this litigation may be briefly stated as follows: W. H. Clark, the husband of respondent Mary, upon the 5th day of November, 1881, made final proof upon his pre-emption claim to this tract of land before a deputy county clerk of Lassen county. He also at the same time made the affidavit provided by section 2262 of the Revised Statutes, and paid for the land, with all legal costs and charges. The final proof, affidavit, and money were delivered to the register of the land office at Susanville, and, by reason of the neglect or dishonesty of the said register, no further action towards the securing of a patent was taken for many months. Shortly subsequent to the date of final proof, W. H. Clark, by bargain and sale deed, transferred the land to the respondent Mary Clark. Subsequent to this event the certificate of purchase was issued, and the patent to Clark followed in due course thereon. Clark thereupon sold the land to appellants, and, basing their rights upon said transfer, they have brought this action in ejectment. The deed from Clark to his wife was recorded in the recorder's office of Lassen county prior to the making of the second deed to the aforesaid plaintiffs.

It is not necessary to determine the character or amount of interest in this realty that passed to the wife under the deed from her husband. Whether he had any title at that time that could be transferred is immaterial, for his deed was such as to convey all after-acquired title, and when his right eventually ripened into a perfect title, by the issuance of the patent, such title passed to his grantee, regardless of any intervening deed given by him to other grantees with notice by them of the prior deed. The application of this elementary principle of law to the facts before us disposes of the entire case, unless Clark's deed to his wife was made in violation of section 2263 of the Revised Statutes. That section provides: "Prior to any notice being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie agreeably to such rules as may be prescribed by the secretary of the interior; and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." It is upon the last clause of this section that plaintiffs stand, and insist that the deed to Mary Clark was void and carried no title.

Do the facts of this case bring it within the prohibition above stated? We think clearly not, especially in view of the construction given this provision of the statute by the supreme court of the United States. The case of Myers v. Croft, 13 Wall. 291, in all respects is similar to the case at bar, and this provision of the statute was there construed with a view to carry out the legislative intention, and in disregard of its strict letter. In accordance with this principle, it was held that the interdiction found in the statute was only intended to apply to a transfer of the right of pre-emption. The court there said: "The object of congress was attained when the pre-emptor went with clean hands to the land office, and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and conserve no important purpose of public policy." And again: "Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject." Measured by this construction of the statute, the present case discloses no violation of its terms; and Clark had the legal right to make the transfer to his wife at the time he made it. At that time he had done all that the law demanded of him, and had done nothing prohibited by the law. He had made the affidavit required by the statute, and had made it truthfully. He had paid the purchase price, and in all respects had made his final proof. The law demanded no further act from him, and the government had but one duty to perform, and that was to issue his certificate of purchase and the patent based thereon. That such is the fact is evident, for subsequently Clark did nothing more; and the patent was issued upon the original proof and affidavit. It is thus apparent that at the date of the deed to Mrs. Clark his original right of pre-emption had ripened into a right much more substantial and valuable. Under the authority of Myers v. Croft, and upon principles of sound reason, we think the assignment and transfer contemplated by this section is an assignment and transfer made before final proof, and before the taking of the affidavit prescribed by section 2262 of the United States statutes. The fact that the court failed to find upon the statute of limitations set up by respondents is a matter entirely immaterial to appellants.

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

VALENTINE v. SLOSS et al. (No. 15,432.)

(Supreme Court of California. June 26, 1894.)

PUBLIC LANDS — CONFIRMATION OF MEXICAN GRANT—ORDER FOR SURVEY—LIMITATIONS.

1. Where the decree of the circuit court confirming a claim to lands in California under a Mexican grant describes the land as bounded by the "shore of the bay," and the description by courses and distances includes the land to ordinary high tide, the ordinary high-tide line will be the boundary, though "shore," under the Mexican law, extended only to the extraordinary high-tide line, and the Mexican grant described the land as bounded by the shore, as words used in a common-law court decree must be given the common-law interpretation.

2. A patent issued by the United States land office to land claimed under a Mexican grant cannot be collaterally attacked on the ground that it includes land not included in the decree of the district court confirming the grant.

3. When the survey of land claimed under a Mexican grant was approved by the surveyor general before the passage of Act June 14, 1860, which gives the United States district courts jurisdiction to order such surveys into court on application of any interested party, and no proceedings were pending for the purpose of contesting or reforming the same, the court had no jurisdiction to order such survey into court on exceptions being made thereto after the passage of the act. United States v. Sepulveda, 1 Wall. 104, followed.

4. Limitation does not begin to run against an action for the recovery of land claimed under a Mexican grant until the issuance of a patent to the claimant.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Thomas B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Mullany & Grant and R. Percy Wright, for appellants. Lindley & Eickhoff, for respondent.

PER CURIAM. This is an action brought to recover possession of land, under section 738, Code Civ. Proc. Plaintiff claims title derived from the heirs of Juan Read, who received a grant from the Mexican government. His claim was presented to the board of land commissioners, and by them confirmed. Patent issued to the confirmees February 25, 1885, and this action was commenced February 21, 1890. This appeal is from an order denying defendants' motion for a new trial, made upon a statement of the case. The statement contains the following: "It appeared from other documentary evidence introduced that all of the right, title, and interest of John Read, Hilaria Read, and Ynez Read in the land described in the complaint herein had vested in the plaintiff before the commencement of this action. It was admitted by all of the parties to the action that all of the land described in the complaint in this action lies and is included within the boundaries by courses and distances as given in said patent, and as surveyed and delineated on the plat attached thereto. It was admitted on behalf of the plaintiff that all of the land described in the complaint lies between the line of extraordinary high tide and the line of the ordinary high tide of the waters of the Bay of San Francisco, as the same existed on the 2d day of October, 1834, and on the 7th day of July, 1846." It appears from the recitals contained in the patent that the claim was confirmed by the board of land commissioners June 13, 1854. In the decree of the commission the land of which confirmation was made was described as follows: "Commencing from the solar which faces west, at a point at the slope and foot of the hills which lie in that direction and on the edge of the forests of redwoods called 'Corte de Madera del Presidio,' and running from thence, in a northwardly direction, four thousand five hundred varas, to an arroyo called 'Holon,' where is another forest of redwoods, called 'Corte de Madera de San Pablo;' thence, by the waters of said arroyo and the Bay of San Francisco, ten thousand varas, to the Point Tiburon, said point serving as a mark and limit; thence running along the borders of said bay, and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Tiburon, four thousand seven hundred varas, to the mouth of the Canada and the point of the Sausal, which is near the Estero, lying east of the house on said premises, which was occupied by said Juan Read in November, 1835; and thence continuing the measurement from east to west, along the east line, eight hundred varas, to the place of beginning,—containing one square league of land, be the same more or less." This decree was approved by the circuit court on appeal, January 14, 1856. The survey upon which the patent was based was approved by W. H. Brown, United States surveyor general for the district of California, March 24, 1883. The field notes of the survey are set out at length in the patent, and the grant therein contained recites that the United States has granted, and does give and grant, to Juan Read and others, "the tract of land embraced and described in the foregoing survey."

1. Appellants' first point is that the patent, rightly construed, does not include any portion of the salt marsh described in the complaint. It is admitted that the land described in the complaint is included within the boundaries by courses and distances, as given in the patent, and as surveyed and delineated on the map attached thereto. As the patent conveyed by express reference the land described in the survey, the admission leaves no room for this argument.

2. The second point seems to be the same differently stated. It is said that natural boundaries control courses and distances. The decree describes the land as bounded by the shore of the Bay of San Francisco; that by the civil law, which controlled in Mexico, that line was the line of extraordinary high tide. It is stipulated that the land described is between the line of extraordinary high tide and ordinary high tide. The patent contains a copy of the decree, and the survey purports to describe the same land. The survey, it is admitted, includes all the tide lands, but it is said that it shows where the lines cross the line which divides the uplands from the tidelands, "so that the patent itself affords an accurate description of the land confirmed to the grantee by the district court by simply rejecting the courses and distances after the salt marsh commences, and until the line of extraordinary high tide is reached, and following the Mexican shore of the Bay of San Francisco between the two points." It is contended that the rule laid down in More v. Massini, 37 Cal. 432, determines, in favor of defendants, that the line of the survey does not extend beyond what counsel are pleased to call the "Mexican shore." The cases, however, are not alike: (1) There were indications in the case of More v. Massini that the survey was intended to be bounded by the beach. Here there is no mistaking the fact that the survey was intended to pass the line of the Mexican shore. (2) The decree was rendered in a common-law court, and the language used must be given the meaning attached to it by the common law. And (3) the Mexican shore is not shown to be a visible and obvious natural boundary or monument.

3. The third point is that the officers of the United States land office had no authority to issue a patent for the tidelands, because these lands are plainly not included in the decree of confirmation. This question has been so often determined, and the decisions are so uniform, that it can no longer be deemed open for discussion. The following are some of the cases: Moore v. Wilkinson, 13 Cal. 478; Chipley v. Farris, 45 Cal. 527; People v. San Francisco, 75 Cal. 388, 17 Pac. 522; De Guyer v. Banning, 91 Cal. 400, 27 Pac. 761; San Francisco City and County v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364; Knight v. Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258.

4. It is contended that the court erred

in sustaining plaintiff's objection to the introduction in evidence of the delivery of juridical possession. The correctness of this ruling is shown by U. S. v. Halleck, 1 Wall. 439, and Younger v. Pagles, 60 Cal. 525.

5. The last point made is that the court erred in not permitting the defendants to introduce in evidence the decree of the United States district court approving the Mathewson survey. This survey was made by R. C. Mathewson, deputy United States surveyor general for California, in 1858, and was approved by J. W. Mandeville, United States surveyor general for the district of California, September 19, 1859. It included only 4,460.24 acres, which was about the quantity called for in the grant, to wit, one square league, Spanish measure. It did not include any portion of the demanded premises. The patent includes 7,845.12 acres, which is nearer two leagues, Spanish measure, than one. The Mathewson survey was ordered into the United States district court, September 18, 1860, upon exceptions to it made at that date by the heirs of Juan Read. The exceptions were disposed of September 28, 1865, at which time the court approved the Mathewson survey. June 14, 1860, an act was passed by congress giving the district court jurisdiction upon the application of any party interested to order any such survey and plat into court, and, after due notice and proceedings, to approve or disapprove of the survey, and to direct a modification; and it was provided that "the plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land had been issued by the United States." If the district court had jurisdiction to affirm the Mathewson survey, it would seem to follow that the decree of confirmation was thereby satisfied, or would be by the issuance of a patent in conformity with it, and that the land office of the United States had no authority to issue letters patent for any other land. Unfortunately, however, for appellants, the Mathewson survey was approved by the surveyor general before the passage of the act of June 14, 1860; and at that time there were no proceedings pending for the purpose of contesting or reforming the same. Section 6 of the act limited its operation, so far as surveys theretofore approved were concerned, to those which had been returned to the court, or those in which proceedings were then pending for the purpose of contesting or reforming the same. This section was construed in U. S. v. Sepulveda, 1 Wall. 104, in such way as to show that the district court had no jurisdiction, and therefore the decree was void. The ruling was therefore correct.

The statute of limitations was pleaded, and, in a separate brief on the part of certain defendants, it is contended that plaintiff's claim is barred, notwithstanding the fact that the suit was commenced within five years after the issuance of the patent, because, it is said, plaintiff and his grantors could at all times have maintained ejectment upon this title. This position finds some support in the first decision in San Jose v. Trimble, 41 Cal. 536. The views first announced in that case were modified on rehearing, and were practically repudiated in Gardiner v. Miller, 47 Cal. 570, since which decision it has been uniformly held that the statute does not begin to run until the issuance of the patent. It is not necessary to say what would have been the effect upon the bar of the statute had there been a valid decree approving the survey under the act of congress of June 14, 1860. The judgment and order are affirmed.

VALENTINE v. SLOSS et al. (No. 15,233.)

(Supreme Court of California. June 26, 1894.)

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by T. B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Edgar M. Wilson (Warren Olney, of counsel), R. Percy Wright, T. J. Bowers, Mich. Mullany, and Wm. Grant, for appellants. Lindley & Eickhoff, for respondent.

TEMPLE, C. This is an action to recover the possession of land, brought under section 738 of the Code of Civil Procedure. The title of plaintiff is derived from Juan Reed, who claimed the land under a grant from the Mexican government. The claim was duly presented to the board of land commissioners, and was confirmed. Patent was issued to the confirmees February 25, 1885. This action was commenced February 21, 1890. That the land is wholly within the exterior boundaries of the grant, as described in the patent, is not disputed, nor is it denied that plaintiff has succeeded to whatever rights the confirmees had to the land. The land lies wholly above the line of ordinary high-water mark of the Bay of San Francisco, as the same existed at the date of the grant and at all times since. Some of the defendants claim title under patents issued by the state of California under the Arkansas act. Some claim under conveyances from the board of tide land commissioners of the state of California, acting under an act entitled "An act to survey and dispose of certain salt marsh and tide lands belonging to the state of California," approved April 1, 1870. Others claim under patents of the United States conveying the lands as parts of the public domain of the United States. Some of the defendants have since 1872 been in the actual possession of the tracts described in their respective answers, and their possession has been such as would set in motion the statute of limitations, and plaintiff's right of action as to them is barred if the statute commenced to run in their favor before the issuance of the patent to plaintiff's grantors. The lands held under patents from the state as swamp lands are salt marsh and tide lands, and are all between extreme high-water line and the line of ordinary high water. The grant was bounded by the Bay of San Francisco, and, it is contended, under the Mexican law such grants extended only to the line of extraordinary high tide; that the decree of confirmation followed the language of the grant, bounding the land upon the Bay of San Francisco. The decree also contained the following proviso: "Provided, that the quantity of one square league now confirmed be contained within the boundaries called for in the grant and the map to which the grant refers, and, if there be less than that quantity, then we confirm to the claimants that less quantity." One league, Spanish measure, was about 4,440 acres. The patent includes 7,845 acres, and, as already stated, extends beyond the line of the highest tides, to include the tide lands claimed by the defendants. It is claimed that, by thus including in the survey and patent land plainly not within the boundaries described in the decree of confirmation, the executive officers exceeded their authority, and that the patent is as to such land void. This question has been so often determined adversely to the contention of appellants that it can no longer be considered an open question. It is a federal question, and has been determined by those courts. The following are some of the cases: Moore v. Wilkinson, 13 Cal. 488; Chipley v. Farris, 45 Cal. 539; People v. San Francisco, 75 Cal. 397, 17 Pac. 522; De Guyer v. Banning, 91 Cal. 402, 27 Pac. 761; San Francisco City and County v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364; Knight v. Association, 142 U. S. 142, 12 Sup. Ct. 258. The position taken by the defendants as to the running of the statute of limitations finds some support in the case of San Jose v. Trimble, 41 Cal. 536. The views first announced in that case were somewhat modified on rehearing, and were practically repudiated in Gardiner v. Miller, 47 Cal. 570, since which decision it has been uniformly held that the statute does not begin to run until the patent has been issued. It does not appear that the survey of the rancho had been judicially approved under the act of congress to regulate the jurisdiction of district courts of the United States in California, dated June 14, 1860. I advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

VALENTINE v. SLOSS et al. (No. 12,228.)

(Supreme Court of California. June 26, 1894.)

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by T. B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Mullany & Grant and R. Percy Wright, for appellants. Lindley & Eickhoff, for respondent.

PER CURIAM. This case being in all material respects the same as Valentine v. Sloss (No. 15,432, this day decided) 37 Pac. 326, it is ordered that the judgment appealed from be affirmed.

103 Cal. 374

GARMS v. JENSEN et al. (No. 19,402.)

(Supreme Court of California. July 17, 1894.)

MORTGAGE — PAYMENT OF TAX—INVALID AGREEMENT BY MORTGAGOR—CONSTITUTIONAL LAW.

1. Under Const. art. 13, § 5, which provides that all contracts requiring the mortgagor to pay any tax on the mortgage shall be void as to any interest specified therein, and as to such tax, a provision in a mortgage that the mortgagee may include in the mortgage all taxes and assessments on the premises, "including

taxes on the interest of the mortgagee therein by reason of the mortgage," renders the mortgage void as to the interest on the notes secured thereby.

2. The fact that the mortgagee did not attempt to make the mortgagor pay the tax on the mortgage is immaterial.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by one Garms against Jensen and others to foreclose a mortgage. From a judgment declaring defendant Upton's mortgage a prior lien, plaintiff appeals. Modified.

J. Marion Brooks, for appellant. H. E. & F. J. Upton, J. M. Voss, and Willis & Appel, for respondents.

HARRISON, J. The plaintiff seeks herein the foreclosure of a mortgage executed to him by the defendants Jensen, bearing date June 20, 1889, and made Mrs. Upton, one of the respondents herein, a party defendant, under the allegation that she claimed some interest in the premises, subject to the lien of the plaintiff's mortgage. A cross complaint was filed on behalf of Mrs. Upton, in which she alleged that the defendant Jensen had executed to her a mortgage upon the same premises on the 10th day of January, 1889, which was a lien thereon prior to that of the plaintiff, and asked a judgment for its foreclosure, and that out of the proceeds of sale the amount of her claim should be paid prior to that of the plaintiff. To her cross complaint was annexed a copy of the mortgage, which contained a provision that in case of foreclosure the mortgage "may include in such foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for taxes and assessments on said premises, including taxes on the interest of the mortgagee therein by reason of this mortgage, and for the insurance of the buildings on said premises, and for any adverse claims to the mortgaged property, all of which payments the mortgagee is hereby authorized to make, and the same, with interest thereon at the same rate as said promissory note, shall be deemed to be secured by this mortgage, and payable to the mortgagee, in U. S. gold coin, out of the proceeds of the sale under said foreclosure." The plaintiff filed a general demurrer to this cross complaint, and, his demurrer having been overruled, he filed an answer, in which he averred that this provision contravened the provisions of the constitution and laws of this state, by reason of which his mortgage became a first lien upon the land. The court below held that the provision was not in violation of any provision of the constitution or laws of this state, and rendered a judgment in favor of Mrs. Upton for the full amount of the principal and interest upon the note for which the mortgage was given as security, and that her claim be first paid out of the proceeds from the sale of said property. From this judgment the plaintiff has appealed directly upon the judgment roll alone.

The foregoing provision in the mortgage to Mrs. Upton does not differ materially from the provision in the mortgage which was under consideration in Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342. In that case the provision with reference to the payment of the tax on the mortgage was almost identical in terms with the provision in the present mortgage, the agreement being that in case of foreclosure the mortgagee might include therein all payments made by him "for taxes on said premises, and the taxes of this mortgage, or the money hereby secured," and in the present case the agreement is that he may include in such foreclosure all payments made by him "for taxes and assessments on said premises, including taxes on the interest of the mortgagee therein by reason of this mortgage." It was held in that case that this provision in the mortgage fell within the penalty of section 5 of article 13 of the constitution, and that the plaintiff should not have been allowed any interest on the note for the payment of which the mortgage was given as security. Under the rule there established this provision in the mortgage to Mrs. Upton must be held to contravene the foregoing section of the constitution, and to be subject to the penalty therein provided. The constitution does not, however, declare that all of the provisions of the mortgage containing such agreement shall be invalid, but merely that the contract to pay the tax "shall as to any interest specified therein, and as to such tax or assessment, be null and void." The mortgage of Mrs. Upton was therefore a prior lien upon the premises, to the extent of the principal sum for which it was given, but it was void "as to the interest specified therein," and the court erred in holding that the amount of such interest was a lien upon the premises.

The proposition of the respondent that this provision of the constitution cannot be invoked against her by the plaintiff, for the reason that she does not seek to recover for any taxes paid by her upon the mortgage, cannot be maintained. Whether the mortgagee has paid the tax or not is immaterial. The constitution does not limit the penalty to an attempt by him to enforce the payment of the mortgage tax, but affixes it to the contract itself. Its object is to prevent the making of such an agreement, and not merely to prevent its enforcement. Hence, it strikes at the agreement itself, by providing that if made it shall be void, not only as to the tax agreed to be paid, but also as to any interest specified therein.

The court below is directed to modify the judgment by deducting therefrom the amount allowed for interest upon the principal sum for which the mortgage to Mrs. Upton was executed, and as so modified the judgment will stand affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(103 Cal. 174)

RYAN v. ALTSCHUL. (No. 15,392.)[1]

(Supreme Court of California. June 23, 1894.)

ASSESSMENTS FOR STREET IMPROVEMENTS—VALIDITY.

Laws 1885, p. 147, § 7, subd. 1, provides that the expense of street work "shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided." Subdivision 8 provides that, where any work mentioned in section 2 (sewers, manholes, cesspools, culverts, cross walks, crossings, curbing, grading curbing, piling, and capping excepted) is done on one side of the center line of streets, the lots fronting on that side only shall be assessed to cover the expenses of the work. *Held* that, where an assessment included charges for macadamizing as well as grading and curbing, the imposition of the whole expense of grading and curbing on a lot on one side of the street renders the whole assessment void, not only as to the grading and curbing, but also as to the macadamizing.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by James Ryan against Ludwig Altschul to recover for improving a street in front of defendant's lot. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Sullivan & Sullivan, for appellant. J. C. Bates, for respondent.

PER CURIAM. On the 11th day of June, 1888, the board of supervisors of the city and county of San Francisco made and passed a resolution of intention declaring their intention to order "redwood curbs, plank sidewalks, and rock gutters to be laid on the southerly side of Post street, commencing at the southwesterly corner of Broderick and Post streets, for a distance of 275 feet; and that the southerly one-half of the roadway opposite to the above-described portion of Post street be regraded and remacadamized." In regular course of the procedure thus inaugurated, the board ordered the work to be done February 11, 1889, and March 18, 1889, awarded to plaintiff a contract for the work. Plaintiff duly entered into a contract with the street superintendent, and proceeded to do the work, and on May 8, 1889, the assessment upon which this suit is brought was made and assigned to him. The specifications stated: "That portion of Post street is to be graded by the removal of all loose sand or earth until the old macadam shall have been reached, or to a depth of not less than twelve (12) inches at the center or crown of the street should the original macadam be entirely gone." Plaintiff's bid was for macadamizing (including regrading), per square foot, 5¾ cents; for sidewalks, per front foot, $1.20; for curbs, per lineal foot, 25 cents,—which shows that the grading was charged for in the charge for macadamizing. The assessment was:

5,328 square feet macadam, at $0.05¾ per foot	$306 36
275 lineal feet redwood curbs, at $0.25 per foot	68 75
275 front feet plank sidewalk, at $1.20 per foot	330 00
Printing	94 20
Engineering	29 99
	$828 31

The diagram shows one lot assessed, to wit, defendant's lot on the south side of the street, 275 feet frontage. It is contended that the assessment is void; that it charges defendant with the entire cost of grading and curbing, while the law required that the expense of this work should be assessed upon the lots fronting upon the work on both sides of the street. Subdivision 1, § 7, of the Vrooman act (St. 1885, p. 147) provides that the expense of street work "shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided." Subdivision 8 of that section reads as follows: "Where any work mentioned in section 2 of this act (sewers, manholes, cesspools, culverts, cross walks, crossings, curbing, grading curbing, piling and capping excepted) is done on one side of the center line of said streets, lanes, alleys, places or courts, the lots or portions of the lots fronting on that side only shall be assessed to cover the expenses of said work, according to the provisions of this section." Whether other parts of the street within this block had been graded, macadamized, curbed, or otherwise constructed the record does not disclose. It is difficult to discover any reason for putting curbing or grading in the list of exceptions in subdivision 8, and this was changed by the amendment to the act made in 1889. The proceedings here had been commenced and had proceeded up to the reception of plaintiff's bid before that act was passed. In that act it was expressly provided "that any work or proceedings commenced under the act of which this is amendatory shall in no wise be affected thereby, but shall in all respects be finished and completed thereunder, and this act shall in no wise affect such work or proceedings." The effect of a street assessment is to put a burden upon a property holder against his will. No such lien can be put upon his property save by a substantial compliance with all the provisions of the statute, and in no way can a burden be put upon him against the provisions of the statute. We may not be able to comprehend the reason for this exception as to curbing and grading, but the language is not ambiguous, and the legislative power is not in this court. So far as the act of grading and curbing is concerned, the assessment is illegal. Does it render the whole assessment void? The following cases seem to hold that it has that effect: Dyer v. Chase, 52 Cal. 440; Schirmer v. Hoyt. 54 Cal. 280; Donnelly v. Howard, 60 Cal. 291.

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[1] Rehearing denied.

Respondent contends that appellant's only remedy was to appeal to the board of supervisors, and have a new assessment made. The same point was made in Donnelly v. Howard, supra, and expressly overruled. In fact, each of the above cases is an authority for appellant upon this question, as is also the case of Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537. See, also, Dyer v. Harrison, 63 Cal. 447; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373. The last two cases are utterly inconsistent with respondent's contention. Evidently, however, if he had appealed, and the board had refused relief, their conclusion could not be final, for neither as an appellate board nor otherwise can it transcend its power in making contracts to become a charge upon private property. If the assessment includes expenses which, under any circumstances, might have been a charge upon the property assessed, and the alleged error is to be determined by matters outside of the assessment itself, it has been held that the owner must first seek its correction by an appeal. McDonald v. Coniff, 99 Cal. 386, 34 Pac. 71. If, however, the assessment is void upon its face, it does not constitute an apparent lien upon the property; and, as its invalidity is always apparent, the owner is not "aggrieved," and is not required to seek its correction by an appeal, but may defend upon this inherent invalidity, whenever an attempt is made to enforce it, or any right is asserted by virtue of its existence. An assessment is void upon its face if it purports to be for work which is not included in the contract upon which it is made, or which has not been authorized in the resolution of intention (Donnelly v. Howard, 60 Cal. 291; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082), or if it appears from the diagram attached thereto to be upon lands which the statute does not make chargeable with the expense of the work (Parker v. Reay, 76 Cal. 103, 18 Pac. 124), or which lie outside of the district to be assessed (Schumaker v. Toberman, 56 Cal. 508). The assessment is to be regarded as an entirety, and is equally void if it appears upon its face that a portion or the whole of it is for the expense of work which is not legally chargeable upon the property assessed (Partridge v. Lucas, supra), or that the statute required a portion of the expense incurred to be assesed upon other property (Diggins v. Brown). It appears upon the face of the present assessment that the lot of the defendant is charged with a portion of the expense for the work done that the statute declares must be assessed upon other lots, and which cannot, under any circumstances, be imposed upon the lot of the defendant. It must, therefore, be regarded as invalid for any purpose. The judgment and order are reversed.

103 Cal. 473

RAUB v. LOS ANGELES TERMINAL RY. CO. (No. 19,317.)

(Supreme Court of California. Aug. 1, 1894.)

CARRIERS—INJURY TO PASSENGER—QUESTION FOR JURY.

In an action for personal injuries, it appeared that defendant had a station in Los Angeles known as D., and that it was on defendant's time-table, and that trains all stopped there for passengers; that plaintiff was in the habit of traveling from a point outside of Los Angeles to this station, and that she had been told by the conductor that all trains stopped there, though the tickets sold were to Los Angeles, and did not mention the station; that on the day in question one of defendant's trains, on which plaintiff was traveling, stopped a short distance beyond the station, and while she was alighting the train started, without warning, and threw her to the ground. *Held*, that a nonsuit was improperly granted.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Sarah Raub against Los Angeles Terminal Railway Company to recover damages for personal injuries. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

J. L. Murphey, for appellant. Burnett & Gibbon, for respondent.

HARRISON, J. The plaintiff took passage upon a car of the defendant to be transported from Glendale to De Camp station. De Camp station is a station upon the road of the defendant within the limits of the city of Los Angeles, and is printed upon the published time-table and list of its stations. The defendant does not issue tickets from Glendale for that station, but for all stations or stopping places within the limits of Los Angeles tickets are sold to Los Angeles. The trains of the defendant always stop at this station, and passengers are accustomed to get off and on at that place. The plaintiff had frequently taken passage from Glendale, and got off and on at this station, and had been informed by the conductor that he always stopped there. On the morning of May 6, 1892, she purchased a ticket at Glendale for Los Angeles, and took passage on the defendant's road. When the train reached De Camp station, it stopped a short distance beyond the platform, and while the plaintiff was in the act of getting off, and had reached the lower step of the car, the train started without any warning, and she was thrown to the ground, and received injuries for which this action was brought. At the trial the court granted a nonsuit, and the plaintiff has appealed.

We think that the nonsuit should not have been granted. Whether the plaintiff was entitled to a recovery depended upon her ability to show that her injury resulted from negligence on the part of the defendant. The negligence of the defendant in the present case was not attempted to be shown by any single act or omission on its part, of which the import or character was in no respect uncertain, but it was an ultimate fact resulting from other facts and circumstances in the case, and was to be ascertained upon a consideration of these facts and circumstances viewed in connection with the respective relations of the parties. In such a case the issue of negligence is so much a question of fact, or is so dependent upon the determination of controverted facts, that its existence must be left to the jury. It is the duty of a railroad corporation to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of showing that the injury was not the result of its own act or negligence. The defendant's permission to its passengers to get on and off its trains at De Camp station would counteract its claim that the plaintiff was negligent in attempting to get off at that station, and the fact that passage tickets which it sold for Los Angeles were recognized by it as equally available for all stations within the limits of Los Angeles must be considered as a permission, if not an invitation, to get off at any of those stations. The defendant cannot avail itself of the failure of the conductor to announce the station before reaching it as evidence of negligence on the part of the plaintiff. The evidence tended to show that it was a regular station upon the road, at which passengers were wont to get on and off every day, and, as the plaintiff had always been informed by the conductor that he always stopped there, she was authorized to consider the stopping of the train at the station as an invitation by the defendant to get off. We held in Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213, that it was not negligence per se for a passenger to get off from a moving train that had carried him beyond the station called for by his ticket; and, under the principles of that case, it cannot be considered to have been negligence on the part of the plaintiff herein to attempt to get off from the train after it had stopped at a point beyond the platform. Under the principles of that case, the question of the plaintiff's negligence should have been submitted to the jury. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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103 Cal. 472

GRANNIS v. LORDON. (No. 19,378.)

(Supreme Court of California. Aug. 1, 1894.)

PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

Granting or continuing preliminary injunctions is a matter within the discretion of the trial court, and will be disturbed only for abuse of discretion.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by R. W. Grannis against M. H. Lordon to quiet title and to enjoin defendant from interfering with plaintiff's possession. From a decree dissolving the injunction, plaintiff appeals. Affirmed.

H. H. Appel, for appellant. John T. Jones, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a certain 40-acre tract of land in Los Angeles county. Upon filing the complaint, a preliminary injunction was issued, restraining the defendant from interfering with the plaintiff's possession of the said land. The defendant answered, denying all the equities set up in the complaint, and alleging that the said land was unsurveyed government land, and that he had been in the actual possession of the same, and had cultivated a portion of it, for more than two years prior to the filing of the complaint. He afterwards moved for a dissolution of the injunction, and based the motion upon his verified answer, and nine affidavits. At the hearing, the plaintiff filed a counter affidavit made by himself, and the affidavits of several other parties who deposed that the reputation for truth and veracity of one of the affiants for the defendant was bad, and that they would not believe him under oath. After due consideration, the court below granted the defendant's motion, and dissolved the injunction, and from that order the plaintiff appeals.

The dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and, unless it appears from the records in the case that the discretion has been abused, the action of the court will not be disturbed on appeal. Rogers v. Tennant, 45 Cal. 184; Patterson v. Santa Cruz, 50 Cal. 344; Parrott v. Floyd, 54 Cal. 534; White v. Nunan, 60 Cal. 406. After carefully going over the record presented in this case, we fail to see that the court below in any way abused its discretion in making the order appealed from. We advise, therefore, that the order be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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103 Cal. 461

LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES. (No. 19,337.)

(Supreme Court of California. July 31, 1894.)

CITY—GRADING STREETS—CULVERTS FOR SURFACE WATERS.

1. Where surface water, owing to the natural conformation of the country, has formed for itself a definite channel, in which it is accustomed to flow, a city is bound to build culverts, sufficient to discharge the ordinary flow of water, in grading streets.

2. Where a city, under the superintendence of a competent engineer, builds a culvert sufficient to discharge the ordinary quantity of surface water flowing through a definite channel, it is not liable when, because of a flood caused by an unusually heavy rain, the culvert is unable to discharge the water, and lands are overflowed.

3. In an action against a city for damages by the construction of an embankment across an alleged water way, plaintiff asked the court to submit to the jury the question of whether the embankment caused the water which "naturally" flowed down the water way to overflow, etc. The question was submitted with the substitution of the word "ordinarily" for "naturally." *Held* not error, as in a deluge all water naturally flows to a lower level, and defendant was bound to provide for only such water as ordinarily flowed.

4. In such an action, evidence of freshets occurring after the action was brought is not admissible, as the necessity for providing for the discharge of water in the construction of the embankment could only be predicated on past experience.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Los Angeles Cemetery Association against the city of Los Angeles for damages for constructing an embankment over an alleged water way, whereby their lands were overflowed. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

A. J. Hudson and M. C. Hester, for appellant. C. McFarland, for respondent.

SEARLS, C. The plaintiff and appellant here is a corporation, and the owner of some 35 acres of land situate within the city of Los Angeles and devoted to the purposes of a cemetery. The action is brought against the city of Los Angeles, a municipal corporation, to recover damages alleged to have been suffered by the construction of an embankment across an alleged water course, near to and below the cemetery, in which a culvert was constructed of such small size, and at such an elevation above the natural surface, that it was insufficient and unable to carry off the water which in time of storms flows down said water course, whereby the water was backed up upon and over a portion of said cemetery grounds, depositing mud, débris, and filth thereon, and rendering such portion of said grounds unfit for cemetery purposes, and causing a deposit of mud, etc., washed from adjoining land, in an artificial lake owned by plaintiff in said cemetery grounds. The answer denied the material allegations of the complaint. Defendant had a general verdict in its favor. There were also submitted to the jury certain special issues, at the request of the respective parties, upon which they found. The appeal is from a final judgment in favor of defendant.

The following are the special issues submitted to the jury, with their answers thereto:

"Special issues by plaintiff: The jury are instructed to answer the following questions of fact: '(1) Is there and has there been, during the time plaintiff owned said land, a natural water course for the passage of storm water, extending across a portion of said land, through which a large amount of water naturally runs whenever a heavy fall of rain occurs? Ans. There is. (2) Did the defendant cause an embankment to be constructed across said water course immediately below the line of said land of plaintiff, tending to obstruct the natural flow of water therein, without providing a sufficient culvert or passage through the same for the storm water that ordinarily flows down said water course? Ans. It did not. (3) Did the said embankment across said water course, at any time within the two years immediately prior to the 21st day of November, 1891, cause the storm water that ordinarily flowed down said water course to overflow an artificial lake on plaintiff's said premises? Ans. It did not.' '(5) Did said embankment, within the time mentioned in the last question, cause the said waters to overflow any of the lots of land laid out in said grounds for cemetery purposes? Ans. It did.' '(7) If you answer that said waters were so caused to overflow any of said cemetery lots, then what damage, if any, did plaintiff sustain by reason of the overflow of said cemetery lots? Ans. No damage.'

"Special issues presented to the jury at the request of the defendant: '(1) Was the filling up of First street caused by the grading of the street by the city authorities? Answer. It was. (2) Was the water which was backed up on plaintiff's property water of a running stream, running in a channel between well-defined banks? Answer. No. (3) Was the water which was backed up upon plaintiff's property surface water caused by a rain? Answer. Yes. (4) Was the culvert across First street of sufficient size to carry off the ordinary flow of surface water? Answer. Yes. (5) Was the city official who designed the culvert a person competent to judge of the size and dimensions which the same should be constructed? Answer. Yes. (6) Was the culvert constructed in a good workmanlike manner? Answer. Yes.' '(8) Was the overflow caused by an extraordinary or unusual rain? Answer. Yes. (9) Could plaintiffs have prevented their ground from being overflowed or damaged by filling up their property to a level with the grade of the street? Answer. No. (10) Did water flow across plaintiff's premises at any other time except in times of rains or floods? Answer. No.'

"[Indorsed:] Filed March 21, 1893."

A water course is defined to be "a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets." Black, Law Dict. tit. "Water Course." There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, water courses. Ang. Water Courses, pp. 3-7; Shields v. Arndt, 7 N. J. Eq. 234; Hoyt v. City of Hudson, 27 Wis. 656; Luther v. Winnisimet Co., 9 Cush. 171; Washb. Easem. §§ 209, 210. The complaint does not in terms aver that the stream in question is a natural water course. The allegation is that it is "a natural water course for the passage of storm water, extending across a portion of the said lot two, over which a large amount of water naturally runs whenever a heavy fall of rain occurs."

The first finding submitted to the jury by plaintiff, upon which they found in the affirmative, is in almost the exact language of this allegation. As will be seen, the subsequent findings establish the following propositions: (1) The water which backed upon plaintiff's land was not that of a running stream running in a channel between well-defined banks. (2) It was surface water caused by rain. (3) Water did not flow across plaintiff's premises except in times of rain or floods. These findings are supported by the evidence, and show that the alleged stream is not a water course. In order to constitute a water course, "it must have a source independent of that fitful and occasional character that results from the falling of rain or the melting of snow." Wood, Nuis. (3d Ed.) p. 415, citing Eulrich v. Richter, 37 Wis. 226; Barnes v. Sabron, 10 Nev. 217; Shields v. Arndt, supra, and many other cases, are to like effect. "And this would be the case," says Wood, at page 416, "so far as water arising from the melting of snow and the falling of rain is concerned, even though at such seasons it took a definite channel." Indeed, it may be said that in all regions of country having a broken surface, and subject to heavy rainfall, surface water does make for itself or assume definite channels in seeking, pursuant to the law of gravitation, a lower level. The law may be thus stated:

1. At common law, no natural easement or servitude existed, as between conterminous owners of land, in favor of the owner of the superior or higher land and against the owner of the lower tenement, for the flow of mere surface water, or such as falls or accumulates by rains or the melting of snow; and the proprietor of the inferior or lower tenement or estate might, at his option, lawfully obstruct or hinder the flow of such surface water thereon, and in so doing might turn it back or off of his own lands, and onto and over the lands of other proprietors, without liability by reason of such obstruction or diversion.

2. Under the civil law, the owner of the upper or dominant estate had a natural easement or servitude in the lower or servient estate to discharge all surface waters falling or accumulating on his higher land upon or over the lower lands of the servient owner as they were accustomed to flow in a state of nature; and such natural flow could not be interrupted or prevented by the lower proprietor or servient owner to the detriment or injury of the estate of the dominant proprietor. Washb. Easem. (4th Ed.) p. 573, and authorities cited; Hoyt v. City of Hudson, 27 Wis. 659; Wood, Nuis. (3d Ed.) § 385; Gillham v. Railroad Co., 95 Am. Dec. 627.

3. In a considerable number of the states of our Union, California included, the doctrine of the civil law has been substituted for the common-law rule, and it is held, as in Ogburn v. Connor, 46 Cal. 347, that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude. Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976.

4. The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, had no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots; and this rule has been very generally adopted in this country. Ogburn v. Connor, supra, at page 351, and cases there cited; Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798; Dill. Mun. Corp. §§ 1039–1044.

5. An apparent exception to the general rule that municipal corporations, in the grading and improvement of streets, are not bound to provide for the escape of mere surface water, has been hinted at in some of the cases, and established in others, in that class of cases where the surface water, owing to the conformation of the adjacent country, has formed for itself a definite channel in which it is accustomed to flow, in which cases it is held, as in Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41, that the municipal corporation had no right, pursuant to a general plan for the grading and improvement of Montgomery avenue, to erect a solid embankment, without a culvert or water way, so as to obstruct the flow of a water course which flowed in a well-defined channel, although it served only to discharge the drainage or surface water from the adjacent hills, and, according to the statement of the case, did not come within the common-law definition of a water course. Hoyt v. City of Hudson, at pages 663 and 664; Dill. Mun. Corp. subd. 3, §§ 1051 and 1051a; Lehn v. City and County of San Francisco, 66 Cal. 76, 4 Pac. 965; Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798; Gibbs v. Williams, 25 Kan. 214; Palmer v. Waddell, 22 Kan. 352.

In the case last quoted, it was said: "The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water having no definite source is supplied by the falling rains and melting snow from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains; and such has always been the case, so long as the memory of man runs;" and it was held that such channel so far possessed the attributes of a water course that the owner of lands through which such water course ran could not lawfully turn the flow upon adjacent lands to their injury and damage.

The facts of this case bring it within the exception stated. It therefore remains to inquire whether, conceding the case within the exception noted, the municipal corporation is liable. It appears that as early as 1885 the board of public works recommended to the city council that the superintendent of streets be instructed to lay a cement pipe 30 inches in diameter across Alviso (now First) street at the point in question. The matter was for some cause referred back to the board and city engineer, and on the 10th day of November, 1885, they reported to the council, recommending a brick culvert, which report was adopted, and a culvert of brick, say 70 feet in length, and 30 inches in diameter, was in 1886 or 1887 constructed across the street, and a fill of, say, 5 feet was made over the culvert to bring the street up to grade. The evidence tends to show that the work was well done, according to a regular plan, and in accordance with lawful municipal authority in the necessary improvement of the street, and that the city engineer was a competent person. The culvert served to carry all the water coming down the ravine until about Christmas, 1889, when, in consequence of an unusually heavy rain, a flood came, and the culvert, although in good order, proved insufficient to carry the water, and it was backed up over a portion of the cemetery grounds, with the result as complained of, or found by the jury. But three witnesses testified as to the character of the flood. One said: "The flood of 1889 was an extraordinary flood. * * * The brick culvert through First street was not large enough to let the water of heavy rains through." Another testified: "I remember the rains about Christmas of 1889. They were unusually heavy. So much water came down the ravine where I live that we thought there had been a cloudburst. I have lived in Los Angeles over thirty years, and never saw as heavy a rain as the storm about Christmas, 1889." The third testified he had lived in Los Angeles many years, had noticed the rainfall, and never saw such a rainfall in as short a space of time as that of Christmas, 1889.

Assuming, as was said by Chief Justice Gray, in Hill v. Boston, 122 Mass. 344: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river or a natural water course so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts,"—and still we fail to see, in the face of the findings here, how the defendant can be held liable. A municipal corporation is not liable at common law for the consequential damages of authorized acts. Dill. Mun. Corp. § 989. The findings of the jury negative the charge of negligence in the construction or maintenance of the sewer built by the defendant. Where, as in the present case, the overflow was occasioned by an extraordinary flood, which could not have been reasonably foreseen, it does not at common law give a right of action, and does not constitute a damage to private property for a public use, within the purview of section 14 of article 1 of our state constitution. If the immediate, direct, and necessary effect of the embankment had been to damage plaintiff's property, it might with propriety be said the liability of the defendant would arise, under the constitution; but for an unforeseen calamity, beyond the ken of human foresight, without the pale of previous experience, there is no such liability.

The court did not err in striking out from the issue presented to the jury (No. 3), at the request of plaintiff, the word "naturally," and inserting the word "ordinarily." No doubt the water, in case of a deluge, "naturally" flows to a lower level through fixed channels or otherwise, but it was the water which "ordinarily" flowed in times of storm for which defendant was bound to provide. Had the evidence showed that the water way in question had previously been subject to great freshets, it would have been the duty of defendant to provide adequate means to meet them; but there was no such showing. Mayor, etc., of City of New York v. Bailey, 2 Denio, 433.

The evidence offered to show that an equally great freshet had occurred in the same place in 1891, and after this action was brought, was inadmissible. The experience which dictated to defendant the necessary size of the culvert to accomplish the object in view was that of the past, at the date of its construction, and the possibilities or probabilities of the future could reasonably be predicated only upon the past, subject, of course, to such future changes as experience might dictate to be reasonably necessary.

The fourth instruction given by the court at the request of defendant, to the effect that if the injury to plaintiff was caused by the grading of a public street to its established grade, and that plaintiff could grade its property so as to conform to the established grade, whereby the surface water would flow off, and not stand upon, its property, the plaintiff could not recover, was erroneous, as applied to the facts of the case. Such is no doubt the rule as to ordinary surface water, but it has no application to a case where surface water assumes the form of a regular stream or water course, and comes within the exception hereinbefore stated. The error, however, caused no injury to the plaintiff, as the jury found specially that plaintiff could not have prevented its ground from overflow by filling it to grade.

The objections to other instructions need not be specially noticed, for the reason that if erroneous, and if a general verdict had been found in favor of plaintiff, it would have been controlled by the facts specially found by the jury, upon which facts it would have been the duty of the court to have entered a judgment in favor of the defendant, notwithstanding such general verdict in favor of plaintiff. Code Civ. Proc. § 625. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 425

PEOPLE v. ROSS. (No. 21,054.)

(Supreme Court of California. July 26, 1894.)

SUBORNATION OF PERJURY—INDICTMENT—WAIVER OF DEFECTS.

1. An indictment for subornation of perjury, which alleges that defendant, in the contest of a will in which I. was contestant, procured one N. to falsely swear that she, said N., was the wife of the testator, and does not allege that I. and N. were the same person, is insufficient, as it does not show that the testimony was material.

2. Such an indictment, which alleges that the witness defendant procured did "falsely" and "contrary to her oath" swear, etc., is insufficient, as it should allege that the witness did so "willfully" and "knowingly."

3. Such an indictment must not only allege that defendant knew that the testimony of the witness would be false, but also that the witness knew her testimony was false also.

4. Defects of substance in an indictment are not cured by a failure to demur.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

A. J. Ross was convicted of subornation of perjury, and appeals. Reversed.

A. V. Scanlan, Nicol & Orr, and Swinnerton & Rutherford, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. The information in this case does not state a public offense. The crime with which it seeks to charge defendant is subornation of perjury, and it is well established that to constitute this offense all the essential elements constituting the crime of perjury must be stated. 2 Bish. Cr. Proc. §§ 1020, 1021; U. S. v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; Coyne v. People, 124 Ill. 17, 14 N. E. 668; U. S. v. Evans, 2 West Coast Rep. 611; U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947. In several essentials the information falls short of this requirement. It is lengthy, and somewhat confused, and contains much redundant matter and many immaterial recitals and repetitions, but the substance of the charge is that in a contest in the superior court of San Joaquin county of the will of one Joseph McKenney, deceased, in which Isabella McKenney was contestant, the defendant, Ross, in the interest of said contestant, and for the purpose and end of having her declared and adjudged the widow of said deceased, and entitled to share in his estate, procured one Ida Maud Nicholaus to appear as a witness at the trial, and falsely swear on behalf of said contestant, Isabella McKenney, that she, said Ida Maud Nicholaus, was married to the said Joseph McKenney in his lifetime, and was then at the time of said trial the widow of said deceased. From this it sufficiently appears, perhaps, that the issue upon which the false testimony was given was material; but it is nowhere alleged that the evidence of the suborned witness was material to that issue, nor is that fact made manifest from the evidence alleged to have been given. In one form or the other this fact must be made to appear,—either by direct averment, or by stating evidence given by the witness, which the court can judicially say was material. People v. Brilliant, 58 Cal. 218; 2 Bish. Cr. Proc. § 921; Com. v. Pollard, 12 Metc. (Mass.) 225; Hoch v. People, 3 Mich. 554. How can we say that the false testimony here alleged was necessarily material? It is alleged that defendant procured the witness to falsely testify that she, the witness, was the widow of the deceased, McKenney, for the purpose of establishing the fact that Isabella McKenney was the widow of the deceased. This testimony would not have any necessary tendency to prove that fact, and, if not, it would not be necessarily material. If the fact had been alleged, which appears elsewhere in the record, that Ida Maud Nicholaus and Isabella McKenney, the contestant, were one and the same person, the materiality of the evidence might be apparent on the face of the pleading; but, there being no such averment, that fact cannot be regarded in testing the sufficiency of the information.

After alleging the administration of the oath to the witness, the information then proceeds, "and said Ida Maud Nicholaus did then and there," etc., "falsely and contrary to her oath, depose, swear, testify, state," etc. (reciting the alleged false testimony). This language does not charge perjury. It is not the equivalent of saying that the witness willfully or knowingly did the act. To say that a witness testified falsely does not necessarily imply that he did it willfully or knowingly, and saying that he so testified contrary to his oath is merely to say in another form that he testified falsely. The language of the statute is, "willfully, and contrary to such oath, states as true any material matter which he knows to be false." Pen. Code, § 118. This, or language of like import, must be employed to satisfy the statute. U. S. v. Evans, supra; People v. Parsons, 6 Cal. 487.

It is further alleged that at the time of said procurement "he, the said A. J. Ross, well knew that the said Ida Maud Nicholaus would not give her evidence according to the truth, and that the said evidence so to be given by her was false, feigned, and altogether fictitious;" but it is not alleged that at the time of said procurement or the giving of said false testimony the defendant knew that the witness was aware of the falsity of her evidence. This averment was essential. The rule and its reason are well stated in U. S. v. Evans, above cited, where it is said: "To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knew them to be false; for, unless the witness has that knowledge, the intent to swear falsely is wanting, and he commits no perjury. It is, therefore, essential that the indictment should aver not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him." The several defects in the information above pointed out, being matters of substance, and not of form, were not waived by failure to demur (Pen. Code, §§ 1004, 1012, 1185), and, being fatal to its sufficiency, the defendant's motion in arrest of judgment should have been granted. Judgment and order reversed, and cause remanded, with directions to the lower court to arrest its judgment.

We concur: HARRISON, J.; GAROUTTE, J.

4 Cal. Unrep. 724

GRAY v. LONG et al. (No. 18,237.)

(Supreme Court of California. July 26, 1894.)

SALE—VALIDITY—ACTION FOR PRICE.

1. Plaintiff sold to defendant certain trees. It was provided that, on account of a disease with which the trees were affected, a certain percentage should be excepted. Defendant selected the trees, and they were shipped to him in another county. On account of an ordinance of the county to which the trees were shipped, adopted after the sale, defendant was prohibited from planting therein any of the trees which were diseased, and returned the same to plaintiff, who refused to receive them. *Held*, that plaintiff could recover for all of the trees selected by and shipped to defendant.

2. The fact that an ordinance of a county to which trees are shipped prohibits the planting of any diseased trees therein does not invalidate a sale of trees as to any diseased ones included therein, where the sale was made in another county before the ordinance was adopted.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by H. P. Gray against one Long and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Frank H. Short, for appellants. George E. Church, for respondent.

HARRISON, J. The plaintiff and the appellants made the following agreement at Armona, in the county of Tulare, December 2, 1891: "This is to certify that I have this day sold Long Bros. & Co., of Fresno county, California, all my budded one year old nursery stock, amounting in all to about 25,000 trees, except what I wish for my own use, to the amount of 5,000 trees, more or less, assorted, and 10 per cent. deduction for black knot; trees to be f. o. b. cars at Armona, Cal., at the rate per tree of 14 cents, amounting to about $2,494.80, on which I acknowledge the receipt of $500; stock to be delivered by the 1st day of January, 1892. Long Bros. & Co. agree to be on the ground to examine and accept the stock. H. P. Gray. Long Bros. & Co." On or about the 1st of January, 1892, the defendants went to the nursery of the plaintiff at Armona, and examined the stock of trees covered by the agreement, and, after such examination, accepted 15,058 of them, and the same were thereupon shipped by railroad to the defendants at Fresno. After the trees had been received at Fresno, one of the members of the county board of horticultural commissioners of Fresno county examined them, and, finding that many of them were affected with black knot, notified the defendants that the trees could not be planted in that county, and, under his directions, the defendants shipped back to the plaintiff, 6,153 of the trees. The plaintiff refused to recognize the right of the defendants to return the trees, and the defendants refused to pay for them; whereupon this action was brought to recover the amount due for all the trees that had been accepted by the defendants at the price named in the contract. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

By the terms of the contract between the parties, the plaintiff sold to the defendants his entire stock of one year old trees, reserving the right to retain about 5,000 for his own use. It was understood by them that some of the trees would be affected with black knot, and they thereupon agreed that a deduction on that account to the extent of 10 per cent. of the entire amount should be made from the stock which was sold. The contract does not provide that the trees which might be affected with black knot shall not be embraced in the sale, but that all of the trees are sold save such as were reserved for the plaintiff's use, and that a deduction of 10 per cent. shall be made on that account, whether the number of trees so affected should amount to that quantity or not. The price per tree was fixed upon this estimate, and whether the affected trees exceeded or fell below the estimate cannot change the amount which the defendants agreed to pay. This is not only the natural construction to be given to the words of the agreement, but it is the construction which the defendants themselves placed upon it when they accepted the trees. Instead of objecting to all the trees that were affected with the black knot, after those so affected had been sorted out from the others, they culled these over, and took their choice of them, in order that only 10 per cent. of the stock might remain, and accepted them in fulfillment of the contract. After the contract had been made, the county of Fresno passed an ordinance, to take effect December 30, 1891, requiring an inspection of all fruit trees that should thereafter be brought into the county, and directing the destruction or removal from the county of such as should be found to be affected with any live scale or insect pests injurious thereto. It was under the provisions of this ordinance that the defendants were directed to return to the plaintiff a portion of the trees, as above stated; and it is now urged by them that they are not liable, therefore, for such trees, upon the ground that the contract for their purchase was in violation of this ordinance. The contract, however, was not made within the county of Fresno. By its terms the sale was made, and the trees were to be delivered in pursuance thereof, within the county of Tulare; and it is not contended that there was any ordinance of the county of Tulare by which such contract would be affected. Moreover, at the time the contract was entered into, the ordinance had not been adopted in the county of Fresno. For these reasons, this contention of the appellants cannot be maintained. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(103 Cal. 381)

QUINT v. McMULLIN. (No. 18,334.)

(Supreme Court of California. July 20, 1894.)

QUIETING TITLE—DECREE.

In an action to quiet title, defendant denied any interest in the land, except that he held a tax certificate thereon. The court rendered judgment that plaintiff was the owner in fee, and that defendant had no interest in the land; that there was no adverse claim of defendant's to be determined in the action; and that any right which defendant might have acquired could not be determined in the action; and that defendant was entitled to costs; and that the rights of defendant under the certificate were not to be affected by the judgment. *Held*, that plaintiff was entitled to a judgment either refusing or granting his prayer to quiet title.

Department 1. Appeal from superior court, Glen county; Seth Millington, Judge.

Action by Fred Quint against John McMullin to quiet title. Judgment was rendered that plaintiff was owner in fee, and that defendant had no adverse claim which could be determined in the action, and awarded costs to defendant, and plaintiff appeals. Reversed.

Maxwell, Dorsey & Soto and R. A. Long, for appellant. R. Percy Wright, for respondent.

GAROUTTE, J. This is an action to quiet title, and the complaint is in the usual form. The answer denies that the defendant claims, or has at any time claimed, to have or to own any estate or interest in the land, and avers that he claims nothing as to said land, except as disclosed by the following facts: He thereupon alleges that said lands are situated within the boundaries of Central irrigation district, and that said district is a public corporation. He further alleges in detail all the steps and proceedings leading up to and including the sale of the aforesaid land to the defendant, and the issuance of a certificate of sale thereon to him on account of an assessment, levy of a tax, and delinquent sale thereunder, for the benefit and at the instance of the aforesaid irrigation district. The case went to trial upon these pleadings, and the court made findings of fact to the effect that defendant had never claimed any interest in the said real estate, and that he now claims nothing respecting said land except that on the 16th day of October, 1893, he purchased said land at a sale of the same for delinquent assessments, etc. As conclusions of law, the court found the plaintiff to be the owner in fee; that the defendant had no estate or interest therein; that there is no adverse claim of defendant to be determined in this action; that any rights which the defendant may have acquired through his purchase at the said delinquent sale cannot be determined in this action; and that defendant is entitled to his costs. The judgment followed the conclusions of law, and plaintiff now appeals from that portion of the judgment awarding costs against him, and also from that portion reading as follows: "That any right which said defendant, John McMullin, may have acquired by or through the purchase of said pieces or parcels of land at a sale thereof on October 16, 1893, by the collector of Central irrigation district, for delinquent assessments on said pieces or parcels of land, levied on the same for the purposes of said district, is not in any manner affected or determined hereby."

The course followed by the learned judge of the trial court in the rendition of this form of judgment is certainly somewhat out of the ordinary, and the defendant's answer is likewise a pleading of peculiar construction. Respondent now insists that plaintiff is appealing from a judgment rendered in his own favor, and that the portion of the judgment from which the appeal is taken is pure surplusage, and entirely harmless. If such be the fact, we are at a loss to understand why defendant set up these things in his answer, for, believing as he does, he should have appeared, disclaimed any interest, and allowed judgment to be taken against him quieting plaintiff's title. But we think his contention is unsound. The only object of plaintiff's cause of action was to quiet his title against this delinquent assessment sale; and to quiet his title, expressly reserving as an open question the status of the property as affected by such sale, was a fruitless victory. Theoretically the judgment was in his favor; practically it decided nothing, for, after the judgment of the trial court, he knew no more as to the status of his realty than he did before he brought this action. Under the foregoing circumstances, we think, the plaintiff has a proper appeal before the court. The right of appeal is remedial in its character, and in doubtful cases the right should always be granted. Plaintiff was entitled to a judgment, without any reservations or exceptions, either refusing or granting his prayer to quiet title. The reservation in this judgment is the portion of which he makes complaint, and he is necessarily injured and aggrieved thereby, for in effect it renders the judgment in his favor a nullity. We think the principle declared in People v. Mining Co., 66 Cal. 155, 5 Pac. 1150, justifies this appeal. Inasmuch as the trial court expressly refrained from considering the merits of the special defense set up by the defendant, the merits of that defense are not before us for review; but it was the duty of the trial court to pass upon that question and all other questions raised by the pleadings, and to thereupon grant or deny plaintiff's demand that his title be quieted. For the foregoing reasons, it is ordered that the judgment be reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

4 Cal. Unrep. 723

MACOMBER v. CONRADT et al. (No. 15,259.)

(Supreme Court of California. July 20, 1894.)

Bond on Appeal.

Where a surety on an appeal bond disposes of his property pending the appeal, the court cannot require appellant to file a new bond, in the absence of a statute authorizing it to do so.

In bank. Appeal from superior court, city and county of San Francisco; Wm. T. Wallace, Judge.

Appeal by Julius Conradt and another from a judgment in favor of C. A. Macomber. Motion by respondent to require appellants to file a new appeal bond. Motion denied.

John H. Durst, for appellants. Henley & Swift, Henley & McSherry, and S. V. Costello, for respondent.

PER CURIAM. Respondent recovered a money judgment against appellants in the superior court, and the case is pending before this court upon appeal. He now makes a motion to this court wherein he prays that an order be made requiring the appellants to forthwith file a new bond upon appeal herein, with sufficient sureties for the payment of the judgment in the above-entitled action, and that such sureties qualify before a justice of this honorable court, and in default of the filing of such bond, or in default of the sureties upon such bond to justify as may be ordered by this court, that this appeal be dismissed. In support of this motion, he filed an affidavit, the material portion of which is to the effect that Maria Conradt, one of the sureties upon the aforesaid bond and undertaking, had disposed of all her property since she qualified thereon, and that, in consequence thereof, said security had become wholly insufficient and inadequate as a guaranty for the payment of the judgment, together with costs, appealed from. No statute has been called to our attention which authorizes us in making the order here prayed for, and we know of none. For this reason, the motion and application is denied.

103 Cal. 387

CHILDS v. LANTERMAN et al. (No. 19,333.)

(Supreme Court of California. July 20, 1894.)

Judgment against Infant—Waiver of Objections.

1. A judgment rendered against an infant without the appointment of a guardian ad litem is voidable only; and if, after the judgment is entered and the infant becomes of age, he makes no objection thereto, he waives his right to make such objection.

2. An infant was one of the defendants in an action to quiet title, and no guardian ad litem for him was appointed. Judgment was entered in favor of plaintiff, and, after the infant came of age, he joined with the other defendants in a motion for a new trial, and filed his own affidavit in support thereof. The motion was denied, and, on appeal, the order denying it was affirmed. He then moved to set aside the judgment, on the ground of his infancy. *Held* that, by joining in the motion and appeal, he submitted himself to the jurisdiction of the court, and was bound by the judgment.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Barbara Childs against F. D. Lanterman, Roy S. Lanterman, and others to quiet title. Defendant Roy S. Lanterman made a motion to set aside judgment entered in favor of plaintiff, on the ground that he was an infant pending suit. Motion denied, and defendant Roy S. Lanterman appeals. Affirmed.

Edwin A. Meserve and M. W. Conklin, for appellant. Will D. Gould, for respondents.

HARRISON, J. The plaintiff brought this action to quiet her title to certain lands in the county of Los Angeles, making Roy S. Lanterman, the appellant herein, one of the defendants. An answer to the complaint was filed by Stephen M. White, as attorney for all the defendants, including the appellant, and upon a trial of the cause judgment was rendered in favor of the plaintiff. When the action was commenced, and at the time of the trial, the appellant was an infant, and did not attain his majority until July 20, 1890. No order of court was made appointing a guardian ad litem for him, and the record does not contain any evidence that the summons in the action was served upon him, although it is not alleged or shown that service was not in fact made upon him. The findings of the court were filed July 12, 1890, but the judgment, although signed as of that date, was not filed or entered until July 21st. Thereafter a motion for a new trial was made in behalf of the defendants, Roy S. Lanterman, the appellant herein, making and filing an affidavit in support thereof, and, this motion being denied, the defendants appealed from the order and also from the judgment. Upon this appeal the order and judgment were affirmed. 95 Cal. 369, 30 Pac. 553. After the remittitur had been filed in the court below, viz. March 9, 1893, a motion was made on behalf of Roy S. Lanterman to set aside the findings and judgment against him, and to strike out the answer filed on his behalf, upon the ground of his infancy at the time the answer was filed and trial had, and the want of any authority in the attorney to appear in his behalf. This motion was denied, and the present appeal is from that order.

Although it is provided in section 372, Code Civ. Proc., that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court, yet a judgment rendered against an infant in which no guardian ad litem has been appointed is not for that reason void (1 Black, Judgm. § 195; Emeric v. Alvarado, 64 Cal. 600, 2 Pac. 418; Kemp v. Cook, 18 Md. 130); and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person (Barber v. Graves, 18 Vt. 290; Marshall v. Fisher, 1 Jones [N. C.] 111; Townsend v. Cox, 45 Mo. 401). The appearance by an attorney in his behalf will be assumed as authorized by him, so far as the direction and consent of the infant can give authority (18 Mo. 138); and if, after reaching majority, he would repudiate such appearance, it is incumbent upon him, when he takes any action with reference to the judgment, to indicate his repudiation, rather than do some act which assumes that the authority was given. If he then treats the judgment as having been regularly entered, and makes no objection upon the ground of irregularity or want of jurisdiction, he waives his right thereafter to make such objection. As the judgment is not void, but is merely voidable at his instance, it may be affirmed by him; and, as in the case of any other obligation that he has assumed during infancy which is susceptible of ratification, it will be considered as affirmed by him if he takes any action in reference thereto after he comes of age, which is consistent only with assuming its validity.

At the time the judgment herein was entered, the appellant had reached his majority. He could then have sought relief therefrom upon the ground of irregularity in the service of process upon him, or want of authority in the attorney to appear for him, by reason of his infancy, instead of which, however, he moved the court for a new trial, and failing therein appealed to this court, not only from this order, but also from the judgment; and it was not until after the affirmance of that judgment (nearly three years subsequent to its entry) that his infancy at the time it was rendered was brought to the attention of the court. Nor did he upon the hearing of the present motion make any personal showing or affidavit in his own behalf, the motion having been presented through an attorney without any affidavit by himself in support thereof indicative of his desire to avoid the judgment. It is also to be observed that the appellant does not deny that the appearance of the attorney in his behalf was with his full knowledge and concurrence. We are of the opinion that by these acts the appellant submitted himself to the jurisdiction of the court, and is bound by its judgment. It is well settled that if a defendant, though not served with process, takes such a step in an action, or seeks such relief at the hands of the court as is consistent only with the hypothesis that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court, and is bound by its action as fully as if he had been regularly served with process. Coad v. Coad, 41 Wis. 26; Wood v. Young, 38 Iowa, 102; Crowell v. Galloway, 3 Neb. 215; Foote v. Richmond, 42 Cal. 443. "A party cannot come into court, challenge its proceedings on account of irregularities, and, after being overruled, be heard to say that he never was a party in court or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground. This is familiar doctrine." Burdette v. Corgan, 26 Kan. 104. The motion of the appellant herein for a new trial, and his appeal from the judgment, upon the ground that the court erred in rendering such judgment, assumed that the court had jurisdiction of him, and was a waiver of his right to question that fact. Fee v. Iron Co., 13 Ohio St. 563; Mason v. Alexander, 44 Ohio St. 329, 7 N. E. 435. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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103 Cal. 393

KUMLER v. BOARD OF SUP'RS OF SAN BERNARDINO COUNTY. (No. 19,463.)

(Supreme Court of California. July 21, 1894.)

CONSTITUTIONAL LAW—CLASSIFICATION OF COUNTIES—LOCAL ACTS—CENSUS OF COUNTY.

1. Laws 1893, § 235, which provides that when the population of any county shall have been reduced, by the creation of any new county from the territory thereof, below the class first assumed under the act, the supervisors of such county shall designate by order the class to which such county has been reduced, is not in conflict with Const. art. 11, § 5, which provides that the legislature, by general laws, shall classify the counties by population, as it does not delegate to supervisors the power to classify counties, but simply authorizes them to determine how many people are left within the old county after the new county is created.

2. The section is not in conflict with Const.

art. 4, § 25, which provides that the legislature shall not pass local or special laws affecting the fees or salary of any officer, as it applies to every county of the state whose class is changed.

3. In arriving at the population, the board need not be controlled by the federal census of 1890, but may determine the same from such source as it sees fit, as the matter to be determined is the population at the time of creation of the new county, and not that at the time of census.

Department 1. Certiorari to superior court, San Bernardino county; George E. Otis, Judge.

Abe N. Kumler applied for a writ of certiorari to annul an order of the board of supervisors of San Bernardino county reclassifying that county. A demurrer to the petition was interposed and sustained, and the petitioner appeals. Affirmed.

Henry W. Nisbet, for appellant. Frank F. Oster and Curtis, Oster & Curtis, for respondent.

PER CURIAM. The appellant made application to the court below for a writ of certiorari to annul an order of the board of supervisors of San Bernardino county reclassifying that county, and reading as follows: "Whereas, by reason of the creation and organization of the county of Riverside, the population of the county of San Bernardino has been reduced below the class and rank of a county of the tenth class; and, whereas, the population of said county of San Bernardino is now over twenty-three thousand and under twenty-four thousand,—now, therefore, it is hereby ordered, by the board of supervisors of said county of San Bernardino, that said county of San Bernardino has been reduced to and is a county of the twelfth class, and that the population of said county is now over twenty-three thousand, and under twenty-four thousand." The order was made on January 12, 1894, and it is alleged, upon information and belief, that the population of the territory then within the boundaries of the said county was, in the year 1890, according to the federal census of that year, not greater than 19,000; that the board, in making the order, disregarded and ignored the federal census, and the population shown thereby, and attempted to classify the county on the basis of the population it contained when the order was made; and that in doing so the board exceeded its jurisdiction, and acted without any authority of law. A demurrer to the petition was interposed and sustained, and, the petitioner declining to amend, judgment was entered dismissing the proceeding, from which he appeals.

The constitution (section 5, art. 11) provides: "The legislature by general and uniform laws * * * shall regulate the compensation of all such officers in proportion to their duties, and for this purpose may classify the counties by population. * * *" And the county government act (St. 1893, p. 346) has the following provisions:

"Sec. 10. The several counties of this state are hereby classified, and shall hereafter remain classified, according to their population, as ascertained by the federal census taken in the year eighteen hundred and ninety."

"Sec. 162. For the purpose of regulating the compensation of all officers hereinbefore provided for, the several counties of this state are hereby classified, and shall hereafter remain classified, according to their population, as ascertained by the federal census taken in the year eighteen hundred and ninety as follows. * * *"

"Sec. 235. When the population of any existing county shall have been reduced, by reason of the creation of any new county from the territory thereof, below the class and rank first assumed hereunder, it shall be the duty of the board of supervisors of such county to designate by order the class to which such county has been reduced by reason thereof, and such county shall thereafter enter the list of such class."

1. It is claimed for appellant that the section last quoted, under which the order in question was made, is in conflict with the section of the constitution quoted, because it delegates to the board of supervisors power which, under the constitution, can be exercised only by the legislature. There is nothing in this point. The section does not delegate, or attempt to delegate, to boards of supervisors, the power to classify counties, but simply, in effect, authorizes and directs them to find out and determine how many people are left within the boundaries of the old county after the new county is created. This is merely finding a fact, and is not a legislative act; and, when found, the classification follows as declared by the statute. Nor is the said section of the statute in conflict with section 25 of article 4 of the constitution, which provides that "the legislature shall not pass local or special laws * * * affecting the fees or salary of any officer." It is not a local or special law, for the reason that it applies to every existing county of the state whose class is changed by having a portion of its territory detached and put into a new county.

2. It is further claimed that the board of supervisors, in determining what was the population of the county, was limited to an inquiry as to what was the population within its present boundaries in 1890, as shown by the federal census of that year. It will be observed that sections 10 and 162 make the census of 1890 controlling as to the classification of the several counties of the state as they then existed, but in section 235 no reference is made to that census, and the action of the board is not expressly, nor, as we think, impliedly, limited thereby. The failure to so limit the action of the board must be treated as intentional, and it doubtless arose from the fact that, in the cases provided for by the section, it would often

be difficult, if not impossible, to determine what was the census population in 1890, since the new boundary lines may not follow any township or precinct lines then established. See De Camp v. Eveland, 19 Barb. 81. The same section provides for the classification of all newly-created counties, and in Sanders v. Sehorn, 98 Cal. 227, 33 Pac. 58, a question as to the classification of the newly-created county of Glenn was involved. In deciding the case, it was said: "According to the county government act, the population of the various counties, for the purposes of the act, is to be determined from the last preceding federal census; but in the case of newly-organized counties, especially when the boundary lines of the new county do not follow township lines, such census would not furnish the data contemplated, and for that reason the legislature, for the purpose of classification, would well declare the population of Glenn county to be over 6,500, and under 6,600, receiving its information for such declaration from whatever source it saw fit." And, again: "Glenn county came into existence as a county, fully organized and equipped, May 11, 1891. At that time, under the terms of the act creating it, as we have construed that act, it had a population of more than 6,500, and less than 6,600, and, consequently, came within the limits prescribed for counties of the forty-first class." This language plainly implies that the population of the county at the time of its creation, and not its population as ascertained by the federal census, was a proper basis upon which to determine its classification. The same rule must be held equally applicable to an old county under like conditions. It follows that the judgment appealed from must be affirmed; and it is so ordered.

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103 Cal. 397

In re JONES. (No. 21,149.)

(Supreme Court of California. July 23, 1894.)

CONTEMPT—WHAT CONSTITUTES.

Where the statute does not authorize a change of venue for bias, prejudice, or partiality of a judge, it is a contempt of court to present an affidavit for a change of venue on that ground.

In bank.

Petition for habeas corpus by David Jones. Writ denied.

John L. Boone, for petitioner. J. A. Cooper, for respondent.

McFARLAND, J. The petitioner, David Jones, asks to be discharged from the custody of the sheriff of the county of Mendocino, and alleges that he is illegally imprisoned under an order of the superior court of said county adjudging him guilty of contempt of court. It appears that upon the hearing in said court of a motion made by petitioner, Jones, for the change of the place of trial of a certain civil action, to which said petitioner was a party, the petitioner filed, presented, and read a certain affidavit, and that he was adjudged guilty of contempt for and on account of certain language and statements used and made in said affidavit. It is not necessary to set forth the affidavit here, but it is quite clear that it is of such a character that the act of petitioner in presenting it was disorderly, contemptuous, and insolent behavior towards the judge of said court while holding the same, and, as such, was a contempt of said court. If the matter of the affidavit had been material and relevant and pertinent to any issue before the court, a different question might be presented. If bias, prejudice, or partiality on the part of a judge was a ground for a change of venue, a party seeking such change upon such ground would have the right to state in an affidavit the facts upon which he based his charges of such bias; but the only ground for a change of venue which has any relation to the judge of a court of record is found in subdivision 4, § 397, Code Civ. Proc., which is as follows: "When from any cause the judge is disqualified from acting,"—and the only disqualifications of a judge are those stated in section 170, by which he is disqualified when he is a party to or interested in the action pending, when he is related to either party or his attorney within the third degree, and when he has been an attorney for either party in the action. "These are the only causes which work a disqualification of a judicial officer." McCauley v. Weller, 12 Cal. 524. Bias or prejudice on the part of a judge is not a ground for a change of the place of trial. McCauley v. Weller, supra; People v. Williams, 24 Cal. 31; People v. Mahoney, 18 Cal. 186; People v. Shuler, 28 Cal. 495; Hibberd v. Smith, 39 Cal. 148. The affidavit, therefore, was entirely irrelevant and immaterial, and there is no excuse for or justification of its presentation. The petitioner is remanded to the custody of the said sheriff, and the proceeding is dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J; VAN FLEET, J.

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103 Cal. 404

BATES v. TOWER et al. (No. 19,323.)

(Supreme Court of California. July 24, 1894.)

PROOF OF AGENCY—RECEPTION OF EVIDENCE.

It is not error to admit evidence of what an agent did and said while acting for his principal, before proof of his authority, where it is admitted on condition that his authority will be subsequently proved.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by F. E. Bates against Virginia A. Tower and another for damages for breach of contract. Judgment for plaintiff, and Virginia A. Tower appeals. Affirmed.

Shaw & Holland, for appellant. Clarence L. Barber, for respondent.

VANCLIEF, C. The defendants are husband and wife, and this action was brought against them to recover damages for a breach of an alleged written agreement, of which the following is a copy: "This agreement, made and entered into this 27th day of September, 1888, by and between Virginia A. Tower and Frank E. Bates, both of the city and county of San Diego, state of California. Whereas, the said Virginia A. Tower agrees to deliver all the said personal stock and property sold by the said F. E. Bates to F. C. Tower on the 25th day of July, 1888, in consideration of a certain promissory note of $2,500 now in the possession of said F. E. Bates,—the said stock and personal property to be delivered to the said F. E. Bates upon the surrender of the said promissory note,—the said F. E. Bates agrees to deliver to the said Virginia A. Tower a certain promissory note for $2,500, made and executed by F. C. Tower, payable to the order of F. S. Jones, and indorsed by F. S. Jones, the same being in possession of and owned by the said F. E. Bates. Witness our hand this 27th day of September. Virginia A. Tower. F. E. Bates." The court found the execution of the agreement, and a breach thereof by the defendant Virginia A. Tower, substantially as alleged, and gave judgment against her for damages in the sum of $3,100, from which judgment, and from an order denying her motion for a new trial, she alone appeals.

The appellant contends that in several specified particulars the findings of fact by the court are not justified by the evidence. But the sufficiency of the evidence in each of the other specified particulars depends upon its sufficiency to justify the finding that, in dealings leading up to the execution of the agreement above set out, Frank C. Tower was authorized to act as the agent of his wife, Virginia; and that this finding is amply justified is so obvious that it would be a waste of space and time to make a detailed statement of the direct and circumstantial evidence tending to prove it.

It is further insisted that the court erred in admitting evidence of what the husband did and said, while ostensibly transacting certain business for appellant, before proof of his authority to transact such business. When objected to on this ground, the court admitted the evidence pro tempore, and upon the express condition that it should not be considered unless the authority of the husband should thereafter be proved; and, as above stated, the husband's authority was afterwards satisfactorily proved. The general rule is that the mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court except in cases of abuse of such discretion. Crosett v. Whelan, 44 Cal. 200; People v. Shainwold, 51 Cal. 468. But appellant contends that subdivision 5 of section 1870 of the Code of Civil Procedure is an exception to this general rule, and permits the acts and declarations of agents to be proved only "after proof of agency." Conceding this to be as contended, though I have found no case in which the Code has been so construed, yet it is clear that appellant was not injured by the alleged error. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from should be affirmed.

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103 Cal. 399

CONRAD et al. v. ARROWHEAD HOT SPRINGS HOTEL CO. et al. (No. 19,376.)

(Supreme Court of California. July 24, 1894.)

POLLUTION OF WATER COURSE.

A nonriparian appropriator of the water of a stream has no right of action for the pollution of the water of said stream by a prior riparian owner, who, in the interest of sanitary conditions, discharges sewage into said stream.

Commissioners' decision. Department 2. Appeal from superior court San Bernardino county; George E. Otis, Judge.

Action by F. W. Conrad and others against the Arrowhead Hot Springs Hotel Company and others to abate a private nuisance, and for a perpetual injunction against its continuance. Judgment for plaintiffs, and defendants appeal. Reversed.

H. C. Rolfe and Chapman & Hendrick, for appellants. Rowell & Rowell, for respondents.

SEARLS, C. This action was brought to abate a private nuisance, and for a perpetual injunction against its continuance. Plaintiffs had judgment granting them a perpetual injunction, and for nominal damages. Defendants moved for a new trial, which was refused. Two separate appeals are taken,—one from the final judgment, and the other from the order denying a new trial. Both appeals are elucidated by the same transcript. There is also a separate appeal in the same case—No. 19,193 (37 Pac. 388)—from an order refusing to dissolve a preliminary injunction issued in the cause, the result of which depends upon the decision of the other appeals, which will be considered together.

Plaintiffs are the owners of certain tracts of nonriparian lands in the county of San Bernardino, forming a part of a larger tract known as the "Orange Grove Tract." Defendant the Arrowhead Hot Springs Hotel Company (a corporation) is, and it and its grantors have been since 1882, the owners in fee of a tract of land situate upon both sides of and including the bed and banks of East Twin creek, an unnavigable stream, which lands the court finds "are, and from time immemorial have been, riparian to said creek and its flow." There are upon the lands of said defendant a large number of springs,—hot, cold, and medicinal,—and also what are designated "mud baths." Defendant has upon said land, and for ten years prior to the commencement of this action had, an hotel thereon, as a resort for invalids, with bath houses, mud baths, etc., all of which are used for the entertainment of guests and treatment of invalids generally, whether suffering from rheumatic troubles, diseases of the blood, or other diseases. During all of said 10 years, defendant has discharged from its kitchen, bath houses, hotel, privies, etc., the drainage and accumulation of filth and refuse matter therein accumulating, by means of sewers, pipes, etc., into certain ravines contiguous thereto, from and through which ravines it flows by natural channels into and down East Twin creek and pollutes the waters thereof so that they are unfit for drinking, or for any domestic purpose. Plaintiffs have a ditch which diverts the water from East Twin creek about one-half mile below where defendant discharges its sewerage into the stream, by which, and a pipe line connected therewith, they conduct the water of said creek to their land for domestic purposes, and for irrigating their land. Plaintiffs aver, and the court finds, that they have been using, and had a right for one year before the commencement of this action to use, the water of the creek for irrigation and domestic purposes upon their land. There is no allegation or finding as to the date of construction of the ditch through which plaintiffs take the water from the creek, or the source or origin or character of their right thereto. The evidence shows that in 1887 John Hancock conveyed the land now owned by plaintiffs to certain grantees, and in his deed of conveyance included "all the right, title, and interest of John Hancock, the party of the first part therein, in and to the waters of East Twin creek and its tributaries, acquired either by appropriation or otherwise, and then owned or held by him as riparian proprietor of the lands aforesaid, or otherwise; also, ditches held by him, or to which he was entitled, and a right of way for said ditches and such pipe line as the grantees desired to construct over a tract of land held by the grantor on East Twin creek as a timber culture claim," reserving to the grantor five inches of water to be taken from the ditch, which it recites was constructed in 1885, and is, say, one mile in length. Plaintiffs have constructed a pipe line from the end of the ditch to their several lots of land for a distance of, say, one-half mile. The ditch through which the water furnished to plaintiffs' land is diverted and conducted thereto taps East Twin creek, so far as can be determined from the record, about one mile above the Orange Grove tract of land. Defendants, in their answer, plead a prescriptive right to the use of East Twin creek as a place of deposit for the refuse from their hotel, baths, etc. There was evidence to show that until a period within four years next before July 19, 1892, the land of plaintiffs was wholly unoccupied and vacant, not settled upon or improved, and that the pipe system had not, at the last-mentioned date, been in use more than two years. The court found against the prescriptive right of the defendants.

Judging from the record, and the conclusion is drawn that the rights of the plaintiffs are those of the ordinary locators who divert water for a useful purpose from a stream in this state. In other words, they are appropriators. The defendants, as riparian proprietors upon the same stream, have a right thereto prior in time, and, as to the acts complained of, are prior in user, to any rights of plaintiffs. As against other riparian owners below them on the same stream, defendants have no right to pollute the water to the material injury of the former. Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such stream, or caused a deterioration of its quality, the subsequent locator cannot complain. Familiar examples of the application of this rule, as between appropriators, are of frequent occurrence in the mining regions of this state, where water is diverted from flowing streams, upon which mining has destroyed the purity of the water. In such cases the appropriator takes the water with his eyes open,—takes it as he finds it,—and as to him the like continued deterioration is damnum absque injuria. Drainage and the discharge of the sewerage from the hotel of the defendants is shown by the evidence to have been necessary, in the interest of sanitary conditions, and to have been for 10 years accomplished by the only feasible plan, of discharging into the ravines contiguous to and upon their own premises. This was not, nor was its continuance as against subsequent locators and appropriators of the water of the stream, a wrongful act. "Every person who constructs a drain or cesspool upon his own premises, and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors." Wood, Nuis. (3d Ed.) § 114. This doctrine is well settled, and applies as between parties who have equal rights to the enjoyment of their own property, and to be protected from injury arising from the undue use by their neighbors of their property. In the case of appropriators of running water, there is no mutuality of right. Their titles or rights are not coextensive as to time, or equal in rank. The second appropriator simply takes the residuum in quantity, subject to the changed conditions existing by reason of the prior user. If the water of East Twin creek was so contaminated by the acts of defendants as to be detrimental to the public, or to individuals living upon the stream below, a very different question would be presented. But as an individual who should collect the refuse from a slaughter yard, and haul it to his home, would not be heard to complain that the odor constituted a nuisance, so the locators of this ditch, who have diverted the water of the stream to their homes, a mile or more away, cannot be heard to complain that the water continues after their diversion, as it was before, noxious to the senses, and unfit for domestic use.

Two results follow from the position assumed:

1. The finding of the court that "the defendant corporation has not any right, and at the time this action was commenced had not acquired any right, to drain or sewer its said premises by conducting its sewerage matter accumulating on said premises, from any source or cause, into East Twin creek," is contrary to the evidence.

2. The conclusions of law and judgment are unsupported by the findings.

The judgment and the order denying a new trial, and each of them, should be reversed, and a new trial had.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial, and each of them, are reversed, and a new trial ordered.

CONRAD et al. v. ARROWHEAD HOT SPRINGS HOTEL CO. et al. (No. 19,193.)

(Supreme Court of California. July 24, 1894.)

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by F. W. Conrad and others against the Arrowhead Hot Springs Hotel Company and others to abate a private nuisance, and for a perpetual injunction against its continuance. Judgment for plaintiffs, and defendants appeal. Reversed.

H. C. Rolfe and Chapman & Hendrick, for appellants. Rowell & Rowell, for respondents.

PER CURIAM. The order appealed from in the above-entitled cause is reversed for the reasons given in No. 19,376 (37 Pac. 386), in the same cause, and between the same parties.

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103 Cal. 409

PEOPLE v. SHERMAN. (No. 21,097.)

(Supreme Court of California. July 25, 1894.)

HOMICIDE—SELF-DEFENSE.

Deceased was a large man, and quarrelsome when drinking. Under the influence of liquor, he assaulted defendant with a knife, threatening to "cut him in two." Defendant declined to fight, and begged him to desist. A friend took deceased away about 30 feet, but he broke away, drew a pistol, and pointed it at defendant. Defendant fired several shots. Deceased fired none, but kept advancing towards defendant while he was shooting. *Held*, that the killing was done in self-defense.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

J. D. Sherman was convicted of manslaughter, and appeals. Reversed.

J. A. Cooper and J. G. White, for appellant. Atty. Gen. Hart and J. H. Seawell, for the People.

PER CURIAM. Upon information accusing the defendant of the crime of murder, he was convicted of manslaughter, and sentenced to the state's prison for the term of six years. He appeals from the judgment and from an order denying his motion for a new trial. It was proved, and not disputed, that about 1 o'clock a. m., on June 20, 1893, in Mendocino county, he shot and killed G. W. Parker, but it is claimed for appellant that the killing was done in self-defense, and therefore was justifiable; and so it appears from the evidence without conflict. It appears that six witnesses were present at the time of the killing. Of these two were called by the people, and four by the defendant; and all concur in testifying substantially that, without provocation, the deceased assaulted defendant with a small clasp knife, threatening "to cut him in two;" that defendant tried to pacify him, declined to fight him, and begged him to desist; that Scott Howard (a mutual friend) interfered, took the knife from deceased, and led him to another part of the room, about 30 feet from defendant, and endeavored to pacify him; but soon after he broke away from Howard, drew his pistol, and started towards defendant, pointing his pistol in the same direction. Mr. Howard, the first witness for the prosecution, described this scene as follows: "I took Parker away and went down to the billiard table at the south end of the room. I was watching deceased. Defendant could see myself and deceased. * * * I was standing talking to deceased, trying to get him to go home, and he just jumped up all at once, and jerked out a gun, and ran around the billiard table. The bar of the saloon is near the north end of the saloon. The billiard table is near the south end, some thirty feet from the bar. I was at the end of the billiard table, where I had taken deceased, and was trying to pacify him. He just jumped out as quick as he could. I ran to catch him, and did catch hold of his sleeve, but I slipped, and he got past. I says, 'Look out up there, boys!' Just about that time I jumped back by the billiard table, and the first shot was fired. At that time the deceased was going around the billiard table towards the north end of the room, and towards where the defendant was. I could not tell the distance he was from defendant, but fifteen to twenty feet, or may be thirty feet. Parker had a silver-mounted pistol in his hand. I do not know how many shots were fired. I was facing the bar when the first shot was fired. I jumped through the partition, and ran out of the building. * * * Defendant fired the first shot. * * * He put his arm over Dick Simmons' shoulder, and fired. Sherman was standing by the bar, and near the door, within five feet of the entrance. A screen was in front of the door. The crowd was there by the bar. Simmons was in front of defendant, and between him and Parker. Defendant advanced towards deceased, and fired over Simmons' shoulder." Gus Henry, on the part of the people, after describing the knife scene, said: "Finally Scott Howard took Parker away. * * * Defendant, myself, and Simmons were standing near the bar, and not far from the door. I thought the matter was all over. The defendant was standing by the bar talking. All at once Scott was running; Scott Howard hollered: 'Look out, boys!' Deceased was coming towards the defendant. He said, 'God damn you—' Just got that far when defendant shot. He had his pistol up, and was advancing towards defendant. As he advanced he said, 'God damn you, I'll—' I heard no more, and the shots were fired. After I saw Parker start towards the defendant with his pistol, his hand was moving up and down. I could not tell whether he was trying to work the trigger or not. There were four or five shots fired as fast as the pistol could be fired; looked like a stream of fire. After the first shot, the deceased kept advancing towards the defendant till he got to the beer chest. He kept coming, and the shots kept going. As the deceased advanced towards defendant, defendant could not have shot without putting his hand out towards Simmons. Just as the shooting commenced, Simmons dropped on the floor. Deceased was drinking at the time. He was always wanting to scuffle and monkey around when he was drinking. He slapped a man's face before that evening. He wants to fight when he is drinking. He could walk as straight as anybody although drinking. Deceased was a very strong man; more than an average man for strength. He always prided himself on being the best man in the saloon when drinking." The pistol of deceased was found fully charged, and it was admitted that he did not fire a shot, though some of the witnesses thought he did at the time of the shooting. The testimony for the prosecution of the witness Schoonover, as to an asserted declaration made by defendant previous to the homicide, contradicted, as it was, by two other witnesses, was of too little importance to affect the result above reached. It is not necessary therefore to determine whether the objection to Schoonover's testimony should have been sustained, or whether the offered evidence of defendant's witness Hughes upon the same subject was properly excluded. Judgment and order reversed.

(103 Cal. 407)

PEOPLE v. CHAVEZ. (No. 21,065.)

(Supreme Court of California. July 25, 1894.)

RAPE—INSTRUCTIONS.

Where the evidence is convincing that a rape has been committed, it is proper to refuse to charge that defendant might be convicted of an assault with intent to rape.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Jose Antonio Chavez was convicted of rape, and appeals. Affirmed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was convicted of the crime of rape upon Rebecca A. Foss, a widow, aged 57 years. He appeals from the judgment and from an order denying his motion for a new trial.

The court refused to give the jury an instruction, at the request of the defendant, to the effect that under the information charging the crime of rape the defendant might be convicted of an assault with intent to commit rape. The ruling of the court in this regard rested upon its opinion that there was no evidence to support an instruction of that character. This is the only assignment of error demanding any special consideration, and the proper disposition of it depends upon the nature of the evidence placed before the jury at the trial, for while it may be conceded that an assault with intent to commit rape, as well as a simple assault, are included in the offense here charged, still, if there was no evidence tending to reduce the offense from that charged in the information, the court was entirely justified in refusing to give the instruction requested. This principle has been repeatedly recognized and approved by this court in the trial of defendants charged with murder, where instructions have been asked and refused pertaining to the offense of manslaughter. People v. Turley, 50 Cal. 469; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183.

Upon an examination of the record we think the court committed no error in refusing the instruction asked. The evidence upon the part of the prosecution is direct, clear, and convincing that the crime of rape was committed. The outrageous and brutal manner in which the defendant's victim was maltreated and assaulted need not be detailed. Upon the part of the defense there is no evidence contradictory to that introduced by the prosecution, save the testimony of certain medical gentlemen who were placed upon the witness stand as experts upon the probability of an actual penetration having occurred. We think the evidence wholly insufficient to create any conflict in this particular. The slightest penetration is sufficient to constitute the offense, and the expert evidence cannot be said to cast a doubt upon the fact of such penetration having occurred. The judgment and order are affirmed.

(103 Cal. 412)

Ex parte AHERN. (No. 21,153.)

(Supreme Court of California. July 25, 1894.)

CRIMINAL LAW—FORM OF JUDGMENT.

A judgment in a criminal case need not run in the name of the people of the state, under Const. art. 6, § 20, which provides that the style of all process shall be "The People of the State of California," and that all prosecutions shall be conducted in their name and by their authority, as "process," as used in that section, does not include such a judgment.

In bank.

Michael Ahern made application for a writ of habeas corpus. Motion denied.

Alfred Clarke, for petitioner.

BEATTY, C. J. This is a petition for a writ of habeas corpus, in which the petitioner, Michael Ahern, alleges that he is imprisoned by W. E. Hale, in the state prison at San Quentin, "in violation of the constitution and laws of the United States and of this state, in this: that the paper of commitment on which he is held is not due process of law, because it does not run in the name of the people." It does not appear from the allegations of the petition whether W. E. Hale is or is not warden of the state prison, whether the petitioner has or has not been convicted of a felony punishable by imprisonment in the state prison, or whether or not Mr. Hale has a duly-certified copy of a judgment showing such conviction. But, putting the best construction we can on a petition which, for looseness and vagueness, is rather worse than usual in the productions of its class, we assume that the petitioner is in the custody of the warden of the state prison, who detains him under the authority of a duly-certified copy of a judgment convicting him of an offense punishable by imprisonment in the state prison, and that the supposed illegality of his imprisonment arises out of the fact that the warden has no commitment running in the name of the people of the state. The idea of counsel for petitioner seems to be that no one can be lawfully held a prisoner in the state prison without "process," in the sense in which that word is used in section 20 of article 6 of the constitution, which provides that "the style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." This provision was contained in the old constitution, and has been in force for more than 30 years, but has never been supposed to apply to the warrant by which prisoners are held after conviction. By the old criminal practice act (section 463), it was provided, as it is now provided by the Code (Pen. Code, § 1213), that a certified copy of the judgment, as entered in the minutes, should be the only warrant or authority necessary to justify or require its execution. Under these provisions of the old constitution and the statute,—exactly the same as the existing provisions of the new constitution and the Code,—the question arose in several cases as to the sufficiency of process, in the form which counsel deems so essential; and it was uniformly held to be insufficient, and a certified copy of the judgment declared to be the proper, essential form of warrant. In re Ring, 28 Cal. 248; Ex parte Dobson, 31 Cal. 498; Ex parte Gibson, Id. 620; In re Brown, 32 Cal. 49. It is true the constitutional provision invoked by counsel was not discussed in those decisions, for the reason, probably, that it was not deemed applicable. But, whatever may have been the reason it was not referred to, we cannot suppose that the framers of the new constitution were ignorant of the point decided, or that they intended the provision readopted from the old constitution to have an operation theretofore uniformly denied to it. In short, we consider that the question which counsel raises, besides being trivial and technical to the last degree, has been settled by the decisions of this court, and the universal practice under those decisions for the last 30 years.

We concur: VAN FLEET, J.; McFARLAND, J.; FITZGERALD, J.; HARRISON, J.; GAROUTTE, J.

(4 Cal. Unrep. 726)

LUCE et al. v. SAN DIEGO LAND & TOWN CO. (No. 19,375.)

(Supreme Court of California. July 26, 1894.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT.

Plaintiffs, by letter, offered their services to defendant for $5,000 a year. Defendant replied that plaintiffs' "names shall appear on the pay roll at the rate of $416.66 per month." Later, defendant's president inquired if the salary was satisfactory, and plaintiffs replied that they did not know whether they were employed by the month or year; that they would accept no employment except by the year, to which defendant's president consented. *Held*, that the employment was by the year, at $5,000, payable monthly.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by M. A. Luce and another against the San Diego Land & Town Company for a balance due on salary. Judgment for plaintiffs, and defendant appeals. Affirmed.

Works & Works, for appellant. E. W. Britt, for respondents.

GAROUTTE, J. This is an action to recover the sum of $4,166.68, alleged to be the balance due on the annual salary of respondents as the attorneys of appellant, from the 1st day of March, 1892, up to and including the last day of February, 1893, with interest thereon. On the 1st day of March, 1889, the law firm of Luce, McDonald & Torrance, which up to that time had been acting as the attorneys of appellant, at a salary of $83.33 per month, wrote a letter to the land and town company, appellant, explaining the condition of the corporation's legal affairs at that time, and asserting that for some time thereafter an extra amount of labor would devolve upon them as attorneys of the company, by reason of important cases then pending. Among other matters this letter contained the following statement: "We have, as before stated, given the matter very careful consideration, and have concluded that, until these important matters in litigation are disposed of, an annual salary of $5,000 is the least sum for which we ought to take upon ourselves the labor and responsibilities incident to continuing our position as general attorneys for the company in this county and state." In due course, the plaintiffs, in reply, received from the president of the defendant a letter containing, among other matters, the following: "In view of the coming litigation, and the trial of the causes which are enumerated by Judge McDonald, I think that their statement that their present compensation is not adequate is correct. * * * I note, however, the suggestion of our attorneys that they shall receive on and after March 1st compensation at the rate of $5,000 per annum; the same, I suppose, to be payable monthly, in conformity to the precedent hitherto. I think this is carrying our legal expenses rather beyond the limit which we ought to incur, especially as many of the cases enumerated may never come to trial. This is not a matter, however, in which we can afford to resort to dickering. You may therefore inform Messrs. Luce, McDonald & Torrance that on and after March 1st, until a change shall be made, their names shall appear on the pay roll at the rate of $416.66 per month." Within a few days subsequent to the receipt by plaintiffs of this letter, William G. Dickinson, general manager of the defendant (appellant), held a conversation with plaintiffs, wherein the following occurred, as appears by the uncontradicted testimony of the plaintiff McDonald: "Col. Dickinson inquired if we had received his letter in regard to our proposition for salary. I informed him that we had. He then inquired if the proposition was satisfactory. Judge Torrance replied that we didn't know exactly whether it was satisfactory or not. Col. Dickinson replied by inquiring wherein it was unsatisfactory. Judge Torrance replied that 'we had made a proposition for a yearly employment, and that the letter which we had received in reply stated that we would be placed on the pay roll at the rate of $416.66 per month,' and that he (Torrance) 'didn't know whether the company meant by that to employ us by the month, or whether it had accepted our proposition for a yearly employment.' Col. Dickinson replied: 'Why, Judge McDonald knows how that is. He has been on the pay roll before, and knows that we always pay by the month. In his case he has been receiving a thousand dollars a year, divided into twelve monthly payments of $83.33 a month.' Judge Torrence replied: 'Well, there might possibly be some contention with regard to the terms of the employment, and we would under no circumstances accept an employment other than by the year.' Col. Dickinson replied: 'We would no more employ you by the month than you would be employed by it; for we are no more anxious to have you leave us in the lurch at some time in the future, or jump your salary on us,—raise it again,—than you are willing that we should have the right of discharging you at any day that we saw fit.' Judge Torrance said: 'Well, we are perfectly willing, as stated in our letter, to be employed by the year at five thousand dollars per annum. But,' he said, 'I think the proper construction of the two letters means a yearly employment, and nothing else, but I didn't want to leave it in any doubt. I want it distinctly understood that the employment is by the year.' Col. Dickinson replied: 'If it is a monthly payment that you object to, we will pay you by the year, if you want to be paid that way instead of by the month. But,' he said, 'we have always been paying by the month, and I supposed that would be more agreeable to you.' Both Judge Torrance and myself stated that it would be more agreeable to us to be paid in monthly installments than any other way. Col. Dickinson then made some reference to the business of the National City and Otay Railway Company. We told him that that was perfectly satisfactory; that we would attend to the business of the National City and Otay Railway Company, and all other matters or interests in which the land and town company was interested, for the salary of five thousand dollars a year. He said it was all right." The case was tried by the court, without a jury, and the only contention at the trial was as to whether plaintiffs' employment by the defendant was by the year, at an annual salary of $5,000, payable in monthly installments of $416.66; and the findings were in favor of such contention. This appeal is prosecuted from the judgment and order denying a motion for a new trial, and it is now insisted that the evidence is insufficient to support these findings of fact made by the court.

There is no substantial conflict in the evidence, and we have quoted the important and controlling portions of it. Viewing this evidence from any standpoint, we think the case before us a very simple one. Plaintiffs, by letter, offered their services to defendant at an annual salary of $5,000. If defendant's letter be construed as constituting an acceptance of their offer, then plaintiffs' cause of action is complete, and the judgment is right. If defendant's letter does not constitute an acceptance of plaintiffs' offer, then the two letters, taken together, do not constitute a binding contract, and no recovery to any extent could be based thereon. It cannot be successfully urged that defendant's letter was an offer to hire plaintiffs by the month, and that plaintiffs accepted such offer and rendered services thereunder; for they at all times asserted to Dickinson, the general manager of defendant, that they would not enter into a contract of that character. Again, if the letters did not constitute a contract of hiring by the year, they constituted no contract at all, for certainly the minds of the contracting parties never met upon any other terms and conditions. If these letters constituted no contract, then a contract for employment by the year was entered into with plaintiffs by the general manager of the defendant corporation. That the general manager of a corporation doing business in California (its president and directors living in a distant state) had the right to make the contract here sued upon is too clear to demand the citation of authority. It is thus apparent from any aspect of the case that plaintiffs are entitled to recover. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

103 Cal. 350

In re BLYTHE'S ESTATE.

WELSH et al. v. PENNIE. (No. 15,284.)

(Supreme Court of California. June 29, 1894.)

APPEAL—PARTIES IN INTEREST.

Where, on the death of an administrator, his successor sues his executor for an accounting, and such successor is directed to pay the executor money, to be paid an attorney for services, this does not make the attorney a party to the suit so as to authorize him to prosecute, in his own name, an appeal from an order refusing to allow interest on such sum.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by Elizabeth G. Welsh, executrix of the will of Philip A. Roach, and John A. Wright, for an order requiring James C. Pennie, administrator of the estate of Thomas H. Blythe, to pay a sum of money allowed on accounting in equity. Order made that amount be paid without interest, and Elizabeth G. Welsh and John A. Wright appeal. Affirmed.

Wm. F. Herrin, Smith, Wright & Pomeroy, and John A. Wright (Isaac Frohman, of counsel), for appellants. Naphtaly, Freidenrich & Ackerman, for respondent.

PER CURIAM. Philip A. Roach, deceased, died while administrator of the estate of Thomas H. Blythe; and James C. Pennie succeeded him as such administrator. Afterwards, Pennie brought a suit in equity in the superior court, against the executor of said Philip A. Roach, for an accounting of the acts and doings of said Roach as such administrator; and on January 15, 1891, a judgment was rendered in said suit, in which it was adjudged, among other things, that the estate of Roach be allowed the sum of $95,000 as a counsel fee for the services of John A. Wright rendered to said Roach as such administrator, and that Pennie pay the same, out of the moneys of the estate of said Blythe, to the executor of said Philip A. Roach. This judgment was affirmed on appeal to this court. Pennie v. Roach, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106. Afterwards, Elizabeth G. Welsh (present executrix of the will of said Phillip A. Roach) and said John A. Wright made a motion in the probate court for an order that Pennie, administrator of the estate of said Blythe, deceased, pay to the said executrix, for the use and benefit of said Wright, the said sum of $95,000, with interest thereon from the 15th day of January, 1891, at 7 per cent. per annum. On the hearing of the motion, it appeared that Pennie had already paid $5,000 of said amount; and the probate court on August 5, 1892, made an order that Pennie pay to Wright $90,000, without interest, in full satisfaction of the services of said Wright. The executrix, Welsh, and said Wright, appeal from so much of said order as refuses to allow interest.

It is not necessary to determine whether or not the order appealed from, or any part thereof, is appealable. The appeal of the executrix certainly need not be considered; for she is not, in any sense, an aggrieved party. So far as Wright is concerned, assuming that the order sought to be appealed from is appealable, we see no error committed by the probate court. As Roach, the former administrator of Blythe, had died, his successor as such administrator, Pennie, was compelled, under well-settled practice, to go into a court of equity for an accounting; and, in the suit which he brought there against the executor of Roach, he and the said executor were the only parties. That part of the judgment in that case which allowed said executor, in his settlement, the amount of said attorney's fee for the services of Wright, was in favor of said executor. There was no judgment in that case in favor of Wright, who was not a party to the action; therefore, when the said order of the probate court was made, from which this appeal is taken, the said Wright had no judgment or claim which bore interest. The order appealed from is affirmed.

103 Cal. 287

MERRILL v. MERRILL. (No. 19,223.)

(Supreme Court of California. June 27, 1894.)

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Mattie H. Merrill against F. H. Merrill to recover money paid under contract for the purchase of land, in which there was a judgment for plaintiff. From a refusal of the court to allow her a lien on the land, plaintiff appeals. Affirmed.

John D. Pope, for appellant. R. Duningan, J. M. Voss, and W. H. Henning, for respondent.

PER CURIAM. Upon further consideration of this cause, after submission in bank, we are satisfied with the conclusion which was reached by department 2, in its opinion filed January 26, 1894 (35 Pac. 768); and, for the reasons stated in said opinion, the judgment appealed from is affirmed.

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103 Cal. 325

SHEEHY v. SHINN. (No. 15,237.)

(Supreme Court of California. June 29, 1894.)

SALES ON MARGINS—GAMBLING CONTRACTS.

1. Const. art. 4, § 26, provides that all contracts for the sale of corporate shares on margin, or for future delivery, shall be void, and any money paid on such contracts may be recovered by the party paying it. *Held*, that whenever the purchaser of stock paid the vendor, or his broker, a percentage of the price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin."

2. An agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price—the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance—is a sale of stock on margin, and for future delivery.

3. An agreement that defendant should act as agent for plaintiff in buying stock for her from third parties, and pay the whole price thereof, two-thirds of which is advanced by plaintiff,—the stock to be held by defendant until the balance is paid, and as collateral security for the balance due on other stock, the title to remain in defendant while so held by him,—is a sale on margin of such stock by the defendant to plaintiff.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Anne M. Sheehy against Howard H. Shinn to recover money paid defendant upon contracts for the sale of stocks on margin. Judgment for plaintiff for part of her claim. Both parties appeal. Affirmed.

Wm. F. Herrin and Pillsbury, Blanding & Hayne, for plaintiff. John P. O'Brien, for defendant.

BEATTY, C. J. This is an action founded upon the following clause of section 26 of article 4 of the constitution of 1879: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." The plaintiff sues to recover money alleged to have been paid to defendant upon contracts for the sale of stocks "on margin." The cause was tried in the superior court without a jury, and, on the facts found, judgment was given for the plaintiff for $648 and costs. From this judgment both parties appeal, the plaintiff contending that on the findings the judgment in her favor should have been for about $1,200, and the defendant insisting that the decision of the superior court is contrary to the evidence set out in his bill of exceptions, and also that the specific findings of fact are inconsistent with the general finding to the effect that the transactions between him and the plaintiff "were sales of stock of incorporated companies on margin, or to be delivered at a future day," upon which finding the judgment against him is based.

We are of the opinion that our decision in both appeals must depend wholly upon the proper construction of the findings of the superior court and of the constitutional provision above quoted. The evidence contained in the defendant's bill of exception relates exclusively to the meaning of the terms "on margin," "future delivery," etc., according to the usage of brokers and other dealers in stocks at San Francisco during the years immediately preceding the adoption of the new constitution; and, although it has been carefully read and considered, it can only be regarded as one among various sources of information to which the court may resort for the purpose of ascertaining a fact of purely judicial cognizance. Whatever may have been the evidence in the superior court, and whatever effect it may have been allowed, this court must now decide, as matter of law, what the framers of the constitution intended by the terms they have employed; and this construction does not depend upon the evidence of the witnesses in a particular case, for if it did we should be compelled to affirm one construction in one case, and a different construction in another case,—an absurdity which can only be avoided by giving effect to the rule that courts take judicial notice of the true meaning of all legal expressions (Code Civ. Proc. § 1875), and this, of course, includes all the terms used in the constitution or in acts of the legislature.

Looking, therefore, to the evidence in this case only so far as we may find that it affords us some aid in arriving at the actual intention of the framers of the constitution, we proceed to inquire what that intention was. For this purpose the language of the constitution is necessarily the first thing to be considered, and if its meaning is plain there is no occasion to resort to extraneous aids. With respect to the clause under consideration, it does not seem to be very obscure in its terms or intent. It declares that certain contracts shall be void, and that any money paid in pursuance of them may be recovered back by the party paying it, in any court of competent jurisdiction. The provision is evidently self-executing, needing no act of the legislature to give it its intended effect. Contracts of the class designated are rendered void by the constitution itself, and money paid in pursuance of them is recoverable by actions commenced in the superior or justice's courts, according as the amount claimed is greater or less than $300. The only question of construction which can possibly arise is upon the meaning of the phrase, "on margin or to be delivered at a future day," but even as to this there is little difficulty, so far as the present case is concerned. There are some transactions which are clearly and plainly within the designated class, although there are others with respect to which it may be doubtful whether they are included or not. The meaning of the word "margin," as ordinarily used in connection with stock sales, has long been well understood. As most frequently employed in this state at the time of, and for many years prior to, the adoption of the constitution, it meant the sum deposited by a purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price upon condition that he should hold the stock as security for his advances, with the right to sell it in case of depreciation in value, and failure of the purchaser to keep the margin good. This, we say, was the sense in which the word was most frequently employed, but it was also employed to describe deposits made by sellers and purchasers of stock for future delivery upon a variety of conditions, and in various ways, which need not be considered here. It is enough for all the purposes of this case to say that whenever the purchaser of stock paid to the vendor of the stock, or to his broker, a percentage of the purchase price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin," in the sense in which the term was used by the framers of the new constitution. If the mere language of the instrument did not make this sufficiently manifest, it is made so by reference to the arguments of both the advocates and opponents of the provision in the constitutional convention (2 Debates, pp. 806–810), and by the evidence in this record. This being so, it follows that an agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price—the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance—is a sale of stock on margin, and for future delivery. That such was the agreement between the plaintiff and defendant in this case, and that he (the defendant), though nominally a mere broker for the plaintiff, was in reality her vendor, is, in effect, the finding of the superior court, as a conclusion, not of law, but of fact, and upon this fact the judgment is based. Unless, therefore, the more specific findings of fact are inconsistent with this general finding, the right of the plaintiff to recover the amount paid by her upon such margin sales cannot be denied. To determine whether there is any such inconsistency, it will be convenient to quote the more material portions of the findings in full. They are as follows:

"Between the 1st day of April, 1890, and the 1st day of July, 1891, the defendant was a stockbroker, engaged in business as such, in the purchase and sale for customers at the city and county of San Francisco of the stocks of incorporated companies. That on the 10th day of April, 1890, the plaintiff opened an account with the defendant, as such broker, and from that time onward until about July 1, 1891, continued said account with him, and to transact business with him, as such broker; having him purchase and sell, for her account with him, stocks of incorporated companies, as such broker. That on each occasion that the plaintiff ordered defendant to buy or sell any of such stock, as aforesaid, she made, signed, and delivered to him a written order therefor in the following form:

" 'Howard H. Shinn, member S. F. Stock Exchange Board, stockbroker, No. 318 Pine street, will buy and sell stocks for cash, with the express understanding that all stocks purchased, or which are held by him as collateral, may be sold by him, in his discretion, at any time, without any demand upon the customer for the payment of the balance of account then due, or without any demand whatever, or without any notice of the time or place of said sale, and without any notice whatever at the San Francisco Stock and Exchange Board, at any regular or informal session thereof, or at private sale, whenever the lowest market value of such stock or stocks is less than thrice the amount of such balance of account due him by the customer, or whenever, in his judgment, the stock is liable to depreciate so as to make the security insufficient; and if such sale or sales do not cover such balance of account then the undersigned will pay the remainder, with interest, and any taxes levied on such indebtedness, or on the securities held as collateral, shall be charged to the account, and become a part thereof. Rates of interest to be 1½ per cent. per month, compounding monthly. When stocks are borrowed or sold on account of the undersigned, H. H. Shinn has the right to buy such stocks without any demand upon, and without any notice to, the customer, on street, or in said San Francisco Stock and Exchange Board, at any regular or informal session thereof, whenever he thinks he has not sufficient money or security on hand to protect himself against loss. H. H. Shinn shall not be required to keep on hand the identical certificates of stock purchased or pledged, but it shall be sufficient if they have the same number of shares of stock to deliver when properly deliverable and properly called for. All customers' stock on hand shall be held as collateral for customers' entire account. If at any time the funds in the hands of H. H. Shinn, belonging to the customer, are insufficient to pay the purchase price of any stock purchased for him, then H. H. Shinn, if he sees fit to do so, may advance the deficiency, and the money so advanced shall immediately become due and payable from the customer to him; and if not immediately paid, without demand, he shall have the right, at any time after such advance, to sell any or all stocks in his hands, without notice or demand upon said customer, to repay such balance, such sale to be made in the manner hereinabove provided. All stocks purchased or held under this agreement may be placed absolutely in the name of any person selected by H. H. Shinn. This agreement shall not be varied by any oral agreement, but can only be varied by a written agreement indorsed hereon, and subscribed by the parties hereto. Stocks bought and delivered, as received, to customers, at their risk, unless transferred at office. H. H. Shinn is hereby constituted and appointed my attorney in fact, to purchase or sell stocks for my account in accordance with the foregoing conditions, and his signature to this order, as a contract between us, is hereby expressly waived. For value received, I hereby agree that the foregoing terms and conditions do and shall apply to and govern all future transactions and accounts with the undersigned, unless varied by a subsequent written agreement.

" 'San Francisco, ———, 1890. Please ———, for my account and risk, subject to the above terms, and also subject to the rules of the San Francisco Stock and Exchange Board: ———. This order good for street, or any session, until ———. (Unless time is expressed, orders good until countermanded.)'

"The foregoing is one of the orders given, all of which were in the same form, with the insertion in the particular order of the word 'buy' or the word 'sell,' as the case required, and the particular stock and number of shares intended to be bought or sold. Each order was signed by the plaintiff, and delivered to and accepted by the defendant.

"The course of dealing and the proceedings upon such orders and said account were as follows: Upon receipt of the order the defendant, in all cases, went into the next meeting of the stock board, and bought or sold the stock requested for the account of the plaintiff. The stock so purchased was always actually delivered by the seller to the defendant, for the plaintiff's account, on the day following the purchase, and upon such delivery the whole purchase price was paid by the defendant to the seller. In some instances the plaintiff furnished to the defendant the whole purchase price of the stock ordered to be purchased. In such cases the stock was actually, at once, delivered to her, or she was notified by defendant that it was at her disposal when she chose to call for it, whereupon she sometimes called for such stock at once, and sometimes left it for a few days in the hands of the broker, and then took it away. But in some of the instances, though the particular stock was paid for, the defendant claimed and asserted a right to hold it, under his contract, as security for the general balance due upon plaintiff's general account with defendant, as such broker, which account existed at all of the times aforesaid, and as hereinafter shown. In the general account which defendant, as such broker, opened with plaintiff, and conducted through the aforesaid period, there were in general daily transactions of purchases and sales, and often many of such transactions on the same day, either purchases or sales, or both, for said account, throughout said period during which said account was continued as aforesaid; and the defendant, in order to keep plaintiff advised of the state of said account, furnished her a pass book, in which he entered the particulars, showing the different transactions in said account as they occurred; namely, on the debit pages of said pass book was entered by defendant the date of each purchase, with the kind and number of shares purchased, and the price paid for the stock; also, the commissions charged by defendant for executing the order; also, any moneys which defendant paid to plaintiff directly out of said account, and the date of its payment; also, monthly, at the end of each month, the amount of interest charged by defendant on any balance of said account in his favor during that particular month. And on the credit pages of said pass book were entered the date of each sale of stock, with the number of shares and kind of stock sold, the price obtained therefor, and the commissions charged by defendant for executing the order; also, the different amounts of money which plaintiff paid to defendant to be applied, and which defendant received from plaintiff directly, and applied on said account, with the date of its payment. When, during said account, plaintiff executed to defendant an order as aforesaid to buy a particular lot of said stock for her said account, he bought the stock so ordered on the day of the date of the order, and on the following day the stock was delivered to him by the seller; and thereupon defendant furnished and paid to the seller the price of the stock so bought, and thereupon the defendant received from the seller the said stock, and held the same under the provisions of the agreement above set forth, and defendant charged to plaintiff's said account in said pass book the amount advanced on her account to make said purchase, and also the commissions charged by him for executing the order. In the cases where the order was to sell, the defendant, on the day of the date of the order, sold the stock so ordered sold, and the following day he furnished and delivered it to the purchaser, and received from the purchaser the price obtained; and defendant thereupon entered to plaintiff's credit, in said account in said pass book, the amount so received by him, less his commissions for executing the order. From time to time, during said account, defendant paid to plaintiff, out of said account, sums of money, and upon making any such payment he made entry in said pass book, on the debit side, of the amount so paid, with the date of its payment. From time to time, during the continuance of said account, defendant made calls upon plaintiff, requiring her to pay him money or further security on said account to keep the balance of said account due him within the limits as agreed in said orders,—namely, so that the market value of the stocks and security in his hands on said account should be equal to thrice the amount of such balance due him on the said account,—and plaintiff, at various times, and for that purpose, paid to defendant, on said account, sums of money, and upon any such payment being made the defendant entered the amount and date thereof to plaintiff's credit in said account, on the credit side of said pass book. The aggregate monthly purchases of stocks on said account with the expenditures made by defendant therefor, also, the aggregate monthly sales and receipts therefor in said account, are given below; and also, below, are set out the items, with amounts and dates, of money either paid by defendant to plaintiff out of said account, or paid by plaintiff to defendant on said account, as above stated. It was always understood that the plaintiff could at any time have possession of the stock purchased as aforesaid, upon payment to the defendant of the full sum due on her account, as above stated; but, on the other hand, it was always understood that the stock should be held by defendant as security, as above stated, until all of plaintiff's obligations on the account should be paid to defendant, or the stock should be disposed of to satisfy the same, and in all these cases the plaintiff never saw the stock. In all cases, at the time when the orders were given, and the advances and purchases made, the plaintiff intended to buy and sell, as the case might be, the stock she ordered to be bought or sold, and intended that the defendant should actually purchase or sell it, and should hold it, when bought, subject to her orders, but subject also to his rights of security upon it for his advances, interest, and commissions, and all plaintiff's obligations to him, and the defendant had the same intention; and it was understood that plaintiff could buy or sell what stocks she pleased on said account, so long as she kept the security sufficient in defendant's hands. In many of the cases the plaintiff ordered the defendant to sell stock held by him for her as aforesaid in the course of said account, and in such cases the defendant went into the market, and sold the stock in pursuance of the order, receiving and crediting the plaintiff's account with the proceeds. In some cases, for purposes of convenience, the defendant substituted one certificate of stock for another of an equal number of shares of the same kind of stock, but always kept on hand, for the account of the plaintiff, the requisite number of shares of the particular stock. Such substitutions were in accordance with the agreement of the parties and the usages of the business."

The succeeding findings set forth in detail payments by and to plaintiff, the purchases and sales of stock, the prices paid and realized, the commissions and interest charged, etc., from which it appears that the plaintiff paid in during a period of 14 months the sum of $3,034.35, and drew out $1,441.00, leaving a balance in her favor of $1,593.35; that the defendant bought 787 shares and sold 7,530 shares, which, presumably, were the shares fully paid for and delivered to plaintiff. Then comes the general finding to which reference has been made, as follows: "But the court find that the transactions between plaintiff and defendant, as shown on said account, in that a part only of the purchase price was advanced by defendant, and the stock retained by him as aforesaid, were sales of stock of incorporated companies on margin, to be delivered at a future day." Here, as above stated, the court finds as a fact that the transactions between the plaintiff and defendant were, in substance and effect, a sale of stocks on margin, and for future delivery; and the question is whether this conclusion is invalidated by the more specific findings which precede it. We do not find any inconsistency. It is not to be denied that the defendant did all that was possible to give to the transactions between him and the plaintiff the form and color of dealings between her and third parties, in which he was a mere agent; but it is equally true that the court might properly find, from the terms of their contracts and their course of dealing, that the form under which they sought to conduct the business was one thing, and its substance a different thing.

Counsel for defendant, in their argument, lay great stress upon the provision of the contract that "all customers' stock on hand shall be held as collateral for customers' entire account," and upon the findings that, on every order of plaintiff, defendant actually went into the next meeting of the stock board, and bought the stock for plaintiff's account, paid for it in full, and had it actually delivered by the seller for plaintiff's account, and held it under the provisions of the agreement above set forth; that "in all cases, at the time when the orders were given and the advances and purchases made, the plaintiff intended to buy or sell, as the case might be, the stock she ordered to be bought or sold, and intended that the defendant should actually purchase or sell it, and should hold it, when bought, subject to her orders, but subject also to his rights of security upon it for his advances, interest, and commissions, and all plaintiff's obligations to him, and the defendant had the same intention. In some cases, for purposes of convenience, the defendant substituted one certificate of stock for another, of an equal number of shares of the same kind of stock, but always kept on hand, for the account of plaintiff, the requisite number of shares of the particular stock. Such substitutions were in accordance with the agreement of the parties." But none of these things are inconsistent with the conclusion that the real transactions between the plaintiff and defendant were sales on margin by him to her, except in those instances where she paid in full, and received the stock. The fact that by the contract it was stipulated that all customers' stock should be held as collateral, etc., amounts to nothing, when you can see from other portions of the contract that the customer would never in fact become the owner of any stock not fully paid for. Nor is it anything to the purpose that defendant actually bought the stock ordered, paid for it, and received it for the account of the plaintiff. It is quite consistent with a sale by him to her that he should do all these things. By buying the stock he would protect himself from loss in case of a rise, and the margin of 66⅔ per cent., which, by the terms of the contract, she was obliged to keep good (though the word "margin" is not used), would protect him from loss in case of a fall. The purchase and delivery of the stock for her account would be a mere formality, meaningless and delusive, in view of the provisions of the contract which left him the practical owner of it, and deprived her, not only of all the rights ordinarily pertaining to ownership, but of all the ordinary rights of a pledgor. By the express terms of the contract, she was never to acquire the title to any specific shares until they were fully paid for and delivered. As to all other shares, she was merely to have a credit on account for a certain number; the title and possession of the certificates remaining in the defendant, with absolute right of disposition whenever the margin was not kept good.

Nor is it inconsistent with a sale from defendant to plaintiff that she intended to buy the stock which she ordered, and that he should buy it and hold it subject to her orders and his own rights under the contract, and that he had the same intention, and that he always kept on hand the requisite number of shares. She, of course, intended to buy the stock on margin, subject to all the contingencies provided for in their agreement, and he intended that she should have it subject to the stipulated conditions; but, until those conditions were performed, he was substantially the owner of the stock and the certificates. She was not the owner, and was never to become the owner unless she paid for them. Counsel, of course, would not contend that a contract for the sale of stocks on margin and for future delivery would be placed beyond the reach of the constitutional provision by the mere fact that the seller under such a contract purchases the stock from a third party, and holds it pending the time given to complete the purchase; but they are contending that the court should shut its eyes to all the indicia of the real nature of these transactions, and treat them as if they were in fact what the parties have chosen to call them. But this we cannot do. The provision of the constitution was aimed at the substance of these abuses, and not at the form. Its framers meant to put an end to the stock gambling then prevalent, and for this purpose declared void all margin sales, or sales for future delivery. To hold that a broker may make and enforce such sales, and retain the payments made under such contracts, by the simple device of going through the form of buying from a third party for the account of the purchaser, when by his contract he has made elaborate provision that the title to the shares shall remain in himself, and never pass to the purchaser until full payment is made, would render the provision in question utterly nugatory. To give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated. This is the principle of the decision in Cashman v. Root, 89 Cal. 373, 26 Pac. 883,—a case which cannot be distinguished from this in any essential particular. Counsel attempt to establish a distinction by pointing to the fact that in that case the defendant expressly admitted that the object of the transaction there in question was a course of dealing in stocks on margin. But what was there admitted in terms is here amply established in substance, the name only being suppressed. It would, indeed, have been sufficient to have affirmed this judgment on the authority of that decision; but the importance of the subject, and the numerous cases which have arisen, or may arise, out of similar dealings, has induced us to reconsider the whole question, and the arguments advanced by counsel, not only in this case, but in a number of other cases pending here, which involve a similar state of facts. After such reconsideration, we are entirely satisfied that the decision in Cashman v. Root was right, and that it must stand. We are, at the same time, convinced that it involves none of the mischiefs which counsel insist will flow from it. It will not prevent any legitimate transfer of stock, whether through the agency of a broker or otherwise, nor will it prevent any legitimate and bona fide pledge of stock certificates as security for borrowed money, whether borrowed for the purpose of paying for the stock, or any other purpose. Where such is not only the form, but the substance, of the transaction, the inhibition of the constitution does not apply.

With respect to the defendant's appeal, to which we have thus far confined our attention, our conclusion is that the judgment must be affirmed. The plaintiff's appeal demands but little attention. She contends that on the findings she is entitled, as a simple matter of bookkeeping, to a judgment for the difference between what she paid defendant and what she received from him, and her counsel states the balance at $1,243.75. As a simple matter of bookkeeping, the balance seems to us to be $1,593.35, but the right of plaintiff to demand that amount is not so clear. The findings show that defendant purchased 340 shares more than he sold, and also that, for some shares, plaintiff made full payment, and received the certificates. It is entirely consistent with the findings to assume that the price of these full-paid shares makes up the difference between the balance claimed and the amount allowed by the superior court, viz. $602. If it be contended that we have no right to assume this, as against the defendant, it may be replied that we have no right to assume anything else against the plaintiff. The judgment is in her favor, and the findings must support it. Really, they do not show conclusively that she was entitled to recover as much as $602, and it is only by the presumptions in its favor that it can be sustained at all. The judgment is affirmed.

We concur: FITZGERALD, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment, and in the opinion of Chief Justice BEATTY. I see no other possible construction of the constitutional provision in question. It is proper to remark, however, that the judiciary cannot avoid the consequences of a provision of constitutional law which allows a party to a contract to profit by it as long as it pays, and to repudiate it by boldly ignoring his solemn obligations as soon as it begins to show loss.

VAN FLEET, J., not having heard the argument herein, and Justices HARRISON and DE HAVEN, being absent, did not participate herein.

103 Cal. 278

GREENZWEIG v. STRELINGER. (No. 15,168.)

(Supreme Court of California. June 27, 1894.)

Action on Foreign Judgment — Impeachment—Failure to Serve Writ.

1. In an action on a judgment rendered in another state, such judgment may be impeached by showing by extrinsic evidence that no summons had been served therein.

2. In such case it cannot be shown that the summons was not read to defendant when it is not shown that the reading was necessary to effect a service.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by George Greenzweig against Marie A. Strelinger on a judgment rendered in another state. Judgment for plaintiff, and defendant appeals. Reversed.

H. H. Lowenthal, for appellant. Wm. Rigby, for respondent.

DE HAVEN, J. This is an action to recover $706.35 and interest alleged to be due upon a judgment recovered against defendant in one of the courts of general jurisdiction of the state of Illinois. The complaint is unverified, and the answer contains a general denial. The plaintiff obtained judgment in the superior court, from which and an order denying her motion for a new trial defendant appeals. The record shows that the defendant was sworn as a witness in her own behalf upon the trial, and was asked whether any summons was served upon her in the action in which the judgment sued upon was rendered. The court sustained an objection to this question, upon the ground "that the judgment on which this suit was brought could not be attacked collaterally; that it could only be attacked in a supplemental proceeding in the suit itself in the court in which it was rendered, or by suit in equity directly aimed to set aside the judgment; that all evidence of defendant tending to show the want of service of such process or summons, or to contradict the return of the sheriff of Cook county, Ill., as to such service, was inadmissible, and should be excluded on that ground." This ruling was erroneous. In Re James' Estate, 33 Pac. 1122, we said that it was competent to collaterally impeach a judgment rendered in another state by extrinsic evidence showing want of jurisdiction in the court pronouncing the judgment, and this, too, notwithstanding the record of the judgment sought to be impeached might contain a recital of the existence of such jurisdictional facts. See, also, as sustaining this rule the following cases, which were cited in that opinion. Thompson v. Whitman, 18 Wall. 457; Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92; Starbuck v. Murray, 5 Wend. 148; Eager v. Stover, 59 Mo. 87.

There was no error in sustaining the objection to the other question in relation to the omission of the sheriff to read to the witness the writ of attachment and summons issued in the action resulting in the judgment sued upon. There is nothing in this record to show that it was necessary to read those papers to the witness in order to effect their service. Judgment and order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

103 Cal. 314

MOWRY v. MOWRY et al. (No. 15,119.)

(Supreme Court of California. June 27, 1894.)

Power of Attorney—Validity of Execution.

In an action to quiet title and for a writ of possession, it appeared that S., in 1873, gave O. a power of attorney to convey lands; that O., in 1877, as attorney, made a deed of the land to his own son, who paid no consideration therefor; that, when this deed was made, O. held notes of S. for $4,500, which were marked "Paid" the day the deed was dated; that, shortly afterwards, S. asked the son if he had received the deed; that, about the date of the deed, S. admitted his indebtedness to O., and said he would convey the property in payment. *Held* that, as there was evidence from which a jury might find a sale for a valuable consideration, the transaction was within the power, the only objection being that the agent who made the purchase and paid the consideration executed the deed, but that this was ratified by the principal by personal delivery of the deed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Joseph C. Mowry against George B. Mowry and others to quiet title, and for a writ of possession. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Percy R. Wright, for appellants. Frank Otis, for respondent.

PER CURIAM. The defendants are in possession of a certain lot in San Francisco, and the plaintiff brought this action to quiet his title thereto, and for a writ of possession. Both parties claim under Sylvester Mowry, deceased,—the plaintiff under a deed executed by Sylvester by his attorney in fact, Origin Mowry, and the defendants George B. and Ellen M. Mowry as the only children and heirs at law of Sylvester, of whose estate George B. is administrator. The other defendants are tenants under the administrator. Origin and Sylvester Mowry were brothers, and Origin is also dead. The power of attorney under which Origin executed the deed was made in 1873, and the conveyance thereunder to the plaintiff was dated July 21, 1877, and is claimed to have been delivered in August of that year. Several questions of fact were litigated, the principal of which were the mental capacity of Sylvester, the delivery of the deed, and whether there was any consideration therefor. The case was tried before a jury, and resulted in a general verdict for the plaintiff, and this appeal is from the judgment entered thereon, and from an order denying a new trial. The only exceptions to the sufficiency of the evidence relate to the conveyance to plaintiff, and not to the mental capacity of Sylvester Mowry.

It is contended by appellants that plaintiff gave no consideration for the conveyance, and that there was no sale to him. The facts shown by the evidence touching this transaction were that Sylvester owned the lot here in question, and also a 40-acre tract near Niles, in Alameda county. The plaintiff, at the time of the conveyance, was about 19 years of age, recently out of school, and was then working on his father's place. As between plaintiff, the grantee in the deed, and Sylvester Mowry, the grantor, it is clear there was no consideration, nor was there any agreement of sale between them; and, as between the plaintiff and his father, who was the attorney in fact of Sylvester, it was a gift. It is not contended by respondent that an attorney in fact can, unless expressly empowered so to do, make a gift of his principal's property. The power here was to sell and convey. It is contended, however, that a consideration was paid by Origin to Sylvester, and that such consideration is sufficient to support the conveyance to the son. If there was a sale by Sylvester to Origin, it is insisted by appellant that Origin's relation of the transaction was such that he could not make a conveyance to himself; and as the son paid no consideration, and was in no way connected with the alleged sale, which, if made at all, was made to Origin, that Origin could not make a valid conveyance. The plaintiff introduced in evidence the power of attorney and the deed to the plaintiff, the latter being a grant, bargain, and sale deed, reciting a consideration. This made a prima facie case, and is sufficient to support the verdict, in the absence of evidence sufficient to overcome it. For the purpose of sustaining the deed against the attack of defendants, evidence was introduced tending to show that Origin held two promissory notes made by Sylvester,—one for $500, and the other for $4,000,—and that Sylvester was indebted to Origin for other moneys; and these notes were produced upon the trial, bearing an indorsement, "Paid, July 21, 1877," that being the date of the deed; that Sylvester, at or about the time of the transaction, admitted his said indebtedness, and said he had or would convey the property to Origin in payment of his debt; and, as to the delivery of the deeds, the evidence tends to show that, after the deeds were signed and acknowledged, they came to the hands of Sylvester, who examined them, and himself delivered the deed of the 40 acres to plaintiff's brother, and left the deed for plaintiff, who was absent, with Origin, to be delivered, and a few days thereafter asked plaintiff if he had received his deed. While the course here pursued is not to be commended, we think the evidence sufficient to justify the jury in finding that there was a sale by Sylvester for a good consideration, and that the deed was in fact delivered by Sylvester to the plaintiff. The case of Videau v. Griffin, 21 Cal. 390, cited by appellant, is not in point. There, there was no authority in writing given to the person who executed the deed as attorney in fact. The acknowledgment by the grantor did not cure the defect. If, in this case, there was no sale by Sylvester, the transaction was outside and beyond the power, and in such case Videau v. Griffin would apply; but, as there was evidence from which the jury might find a sale for a valuable consideration, the transaction was within the power, the only objection being that the agent who made the purchase and paid the consideration himself executed the deed; but this, we think, was ratified by the principal by his personal delivery of it. The court did not err in receiving said promissory notes in evidence. It is true the indorsements thereon that they were paid did not of themselves show that they were in any way connected with the conveyance of the land, but the plaintiff testified that Sylvester told him that he owed Origin "some money on notes, and that these deeds were in payment." This evidence, and the indorsement of payment, coinciding with the date of the deed, sufficiently tended to show their connection with the transaction to justify their admission in evidence. The views we have expressed are in harmony with the instructions given to the jury, to which appellants excepted, so far as they relate to the conveyance of the premises to the plaintiff; and the instructions requested by appellants which were refused, being inconsistent therewith, were properly refused. Whether the court erred in striking out the testimony of Laura A. Mowry is immaterial, as that was directed to the mental incapacity of Sylvester Mowry, and no question is made here as to the fact of his capacity to make the conveyance. We have examined all the questions presented by appellant, but find no error which would justify a reversal. The judgment and order appealed from are affirmed.

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103 Cal. 294

SMITH v. ELLIS et al. (No. 19,294.)

(Supreme Court of California. June 27, 1894.)

Motion for New Trial — Specification of Errors.

Where, upon a motion for a new trial, some of the specifications are inartificially expressed, but are sufficient to point out the particulars in which it is claimed the evidence failed to support the findings, and neither the court nor the opposing party is left in doubt as to this, it is error to disregard such specifications, and hear the motion on the remaining ones.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by W. A. Smith against M. E. Ellis and others to set aside a deed as fraudulent. Judgment was rendered for defendants, and upon a motion by plaintiff for a new trial the court struck out some of plaintiff's specifications, and heard the motion on the remaining ones, and also denied plaintiff's motion for leave to amend his specifications. The motion for a new trial was denied, and plaintiff appealed from the order denying same, the order striking out specifications, the order denying motion to amend specifications, and the judgment. Judgment and order denying motion to amend specifications affirmed, and orders striking out specifications and denying motion for new trial reversed.

J. T. Houx, for appellant. J. W. Ballard, for respondents.

VAN FLEET, J. This is an action on the part of a judgment creditor of J. N. Ellis, Sr., to set aside as fraudulent a deed of conveyance of certain land in the county of Orange, executed by said J. N. Ellis to his daughter, M. E. Ellis, and to satisfy plaintiff's judgment out of said land. Findings and judgment were in favor of defendants, and plaintiff moved for a new trial on a statement of the case, specifying, among other things, insufficiency of the evidence to justify the findings. At the hearing of the motion for new trial the defendants moved the court to disregard the statement of the case and the specifications of insufficiency of the evidence therein, upon the ground that the specifications were insufficient to authorize the court to review the evidence; which motion the court granted to the extent of disregarding, and, in effect, striking out, six of the several specifications relied upon by plaintiff. The plaintiff then moved the court for leave to amend his statement by correcting and restating said specifications, which motion the court denied. Thereupon the court, upon the statement thus emasculated, heard the motion for new trial, and denied the same. The plaintiff appeals from said several orders and from the judgment.

1. A careful examination of the specifications objected to satisfies us that the action of the court in disregarding them was erroneous; that, while perhaps inartificially expressed in some respects, they were in no substantial respect insufficient to point the particulars in which it was claimed the evidence failed to support the findings. "The specification is not required to be made in any particular form of words, but, in some form, should distinguish each particular proposition of fact excepted to from all others found by the court or involved in a general verdict of a jury." Dawson v. Schloss, 93 Cal. 200, 29 Pac. 31. These requirements are sufficiently met by the specifications here in question. Neither the court nor the defendants are left in doubt as to the particulars in which the plaintiff deems the evidence insufficient to sustain the findings excepted to. They are not opened to the objection raised in the cases cited by respondent, either as being too general or in being a mere recital of what the evidence does show. Without stating them in detail, we regard them as fully up to the specifications held sufficient in Harnett v. Railroad Co., 78 Cal. 32, 20 Pac. 154. This being so, the plaintiff was entitled on his motion for a new trial to a ruling by the lower court upon the sufficiency of the evidence to sustain its findings in the light of these specifications, and the action of the court in the premises was the denial to plaintiff of a substantial right. Brenot v. Brenot (Cal.) 36 Pac. 672.

2. We think the findings sufficient to sustain the judgment, and the order of the court denying plaintiff's motion to amend his statement, in view of the conclusion above reached, was without prejudice. The judgment and the order denying plaintiff's right to

amend statement are affirmed. The order striking out and disregarding plaintiff's specifications, and the order denying motion for new trial, are reversed, with directions to the trial court to hear the parties upon the alleged insufficiency of the evidence suggested by the said specifications, and thereupon to pass upon the motion for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.

103 Cal. 319

KENDALL v. PARKER et al. (No. 18,196.)

(Supreme Court of California. June 28, 1894.)

NONNEGOTIABLE NOTE—INDORSEMENT BY PAYEE—LIABILITY TO SECOND INDORSEE.

The payee of a nonnegotiable note, who transfers it by indorsement in blank, does not become liable, as the indorser of a negotiable note would, to the indorsee of his indorsee, where the second indorsement is also in blank, or "without recourse."

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by William S. Kendall against J. A. Parker, E. F. Aiken, and J. F. Hill on a promissory note. From a judgment against him after his demurrer to the complaint was overruled, defendant Hill appeals. Reversed.

L. T. Hatfield, for appellant. Johnson, Johnson & Johnson, for respondents.

PER CURIAM. This is an appeal from a judgment entered after appellant's demurrer had been overruled, appellant standing upon his demurrer. The complaint is upon a promissory note, which is nonnegotiable, because it contains a stipulation for an attorney's fee. Suit is brought by the assignee of the first assignee against the makers and the payee as indorser. The complaint avers that Hill assigned the note by writing his name upon the back thereof, and by delivering the same to the Huntington-Hopkins Company before the maturity of the note. The Huntington-Hopkins Company, upon the maturity of the note, presented the same to the makers, and demanded payment thereof. The said makers refused and failed to pay the same, or any part thereof, of which demand and failure due notice was given to the defendant Hill. The note was transferred to plaintiff by the Huntington-Hopkins Company, without recourse, and after maturity. The complaint was demurred to on several grounds, all, however, founded upon the proposition that the complaint fails to show any liability on the part of Hill. Plaintiff had judgment, not only for the debt which the note was given to secure, but for $100 attorney's fee. The stipulation in regard to an attorney's fee in the note is: "And in case suit is instituted to collect this note, or any portion thereof, we, or either of us, promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit."

The question here presented is whether, when the payee of a nonnegotiable note transfers the same by a simple indorsement in blank, he becomes liable as the indorser of a negotiable note would, not only to his immediate indorsee, but to the indorsee of his indorsee; the second indorsement being also in blank, or, as in this case, "without recourse." It was held in England, prior to the statute of 3 & 4 Anne, that by the custom of merchants, when the payee indorsed his name upon a negotiable note, intending thereby to transfer it, the indorsee was at liberty to write over the signature not only an assignment, but a conditional guaranty of payment. The law thus made for the indorser of such a paper a contract not expressed, and which, independently of the law, there was nothing in the nature of the transaction to indicate. Independently of statute law, there is no custom or rule of law which can add such a condition to the assignment of a nonnegotiable note. In many states, however, there are statutory provisions on the subject. In 1850 the legislature of this state passed an act in regard to bills of exchange and promissory notes (St. 1850, p. 247), the first and fourth sections of which are as follows:

"All notes in writing made and signed by any person, whereby he shall promise to pay to any other person or to his order or to the order of any other person or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

"The payees and indorsees of every such note, payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise."

In Hamilton v. McDonald, 18 Cal. 128, this court had occasion to consider the liability of an indorser of a nonnegotiable promissory note, as affected by that act. There, as here, the action was against the first indorser by the indorsee of the first indorsee. It was contended that the action could not be maintained for want of privity. The court said: "The answer to this objection is to be found in the provisions of the statute regulating the rights and liabilities of the parties. The fourth section of the act of April, 1850, relative to bonds, duebills, etc., makes every assignor of a nonnegotiable note liable upon his assignment to the assignee of such note; and it is evident from the language used that it was not the intention to limit this liability to his immediate assignee. The rule at common law was that, as between the assignor and his immediate assignee, the assignment created the same liabilities and obligations on the part of the assignor as the indorsement of a negotiable note created on the part of the indorser. But in respect to subsequent holders, no privity or connection existed between them and the assignor, unless expressly created by the assignment; and, where this was not done, the immediate assignee was the only person who could maintain an action in his own name against the assignor. The statute places the subsequent holder upon the same footing with the original assignee, and gives him a right of action against every person from whom the instrument has passed by assignment." It is claimed that this statute was repealed by the Code, and a very different rule established. At common law, however, although the subsequent holder could only sue his immediate indorser in his own name, he could sue the more remote indorser at law in the name of his assignor, or could obtain relief against them in equity in his own name. Story, Prom. Notes, § 128. Whether the statute of 1850 is repealed or not under our practice, it cannot be doubted that such holder may still sue in his own name, if the liability of such indorser is admitted. It may be remarked here that neither under the statute of 1850 nor at common law would the instrument sued upon be considered a promissory note at all. Under the act of 1850 the note was required to be for the payment of a sum of money therein mentioned. According to Blackstone, a promissory note was an engagement in writing to pay a sum specified. 2 Bl. Comm. 467. Story says it is a written engagement to pay absolutely and unconditionally a certain sum of money (section 1, Prom. Notes); and the author expressly shows that the definition applies both to negotiable and nonnegotiable notes (section 3). See, also, Byles, Bills, 5-41; Chit. Bills, 548; 3 Kent, Comm. 74. The instrument is not a promissory note when there may be contingent additions. Smith v. Nightingale, 2 Starkie, 375; Civ. Code, § 3244. The note involved in Hamilton v. McDonald, supra, had all the elements of a negotiable note, except that it was not payable to bearer or to order. But has the Code made no change in this matter? Section 3087, Civ. Code, defines a negotiable instrument as "a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this Code," and all the provisions of the Code in relation to the liability of drawers and indorsers and in reference to demand, notice, and protest are expressly limited to such instruments. Moreover, section 1774, Id., defines what liabilities one incurs who sells or agrees to sell other choses in action. Originally this section contained a further provision, which was stricken out in 1874, that such seller thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto. Some of the liabilities created by this section are identical with those created by section 3116, Id., as to the parties to the assignment of negotiable paper, and others are evidently in lieu of them.

In view of these sections, can it be said that the rule established by the act of 1850 is still in force? Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866, is cited as authority for the judgment entered in this case. That action was brought by the first indorsee against his immediate indorser, and the note was indorsed with an express waiver of protest. This was held to be an indication that the indorser expected to be held as a guarantor. The writer quotes a rule laid down in Gerard v. La Coste, 1 Hare & W. Am. Lead. Cas. 302, note, to the effect that a mere indorsement is but a transfer of the note, and whether any and what liability is incurred by the transfer by indorsement and delivery of such a note will depend upon the intention of the parties and the circumstances of the transaction. It is expressly stated that this rule is sufficient for the case in hand. What follows in regard to an alleged further rule upon the subject must be regarded as obiter. The case does not support the position of respondent. The judgment against Hill is reversed, and the court directed to sustain the demurrer to the complaint.

103 Cal. 476

Ex parte MAIER. (No. 21,116.)

(Supreme Court of California. Aug. 1, 1894.)

VIOLATION OF GAME LAWS—CONSTITUTIONAL LAW.

1. Section 626, Pen. Code (as amended St. 1893, p. 280), providing that every person who shall at any time sell or offer for sale the hide or meat of any deer shall be guilty of a misdemeanor, prohibits the sale of deer meat brought from without, as well as that taken within the state.

2. Such act is not in excess of the police power of the state.

3. Such act is not unconstitutional, as an attempt to regulate interstate commerce, the meat not having been sold in original packages.

In bank.

Petition for habeas corpus by Simon Maier, who was arrested for unlawfully selling deer meat. Writ denied.

Hunsaker, Goodrich & McCutcheon, for petitioner. H. C. Dillon, Dist. Atty., for respondent.

VAN FLEET, J. Petitioner was arrested and is held in restraint under a warrant issued out of the police court of the city of Los Angeles, based on a complaint charging him, under section 626 of the Penal Code, with unlawfully selling, on the 18th day of December, 1893, at said city, one pound of deer meat, which meat, the complaint alleges, "was then and there by said Simon Maier cut from the carcass of an entire deer, which said deer had been theretofore brought by said Simon Maier from the state of Texas, in which state said deer had been lawfully killed." Petitioner asks for his discharge on habeas corpus, upon the ground that the complaint does not state a public offense, and, if that be true, there is no question but that he is entitled to his discharge in this proceeding. Ex parte Corryell, 22 Cal. 179; Ex parte Harrold, 47 Cal. 129; Ex parte Kearney, 55 Cal. 212. Section 626 is one of the provisions of the Penal Code for the preservation and protection of the wild game of this state, and the particular paragraph or subdivision of the section under which petitioner is charged (as amended, St. 1893, p. 280) reads: "Every person in the state of California who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope or mountain sheep, shall be guilty of a misdemeanor." Petitioner contends that this provision of the statute, properly construed, does not prohibit the sale of deer meat lawfully taken without the state, but has reference solely to deer killed within this state; that the law is intended to protect game within the state, not to prohibit the importation and sale of game from other states. With this contention we are unable to agree. It is true the law is intended for the protection of the game within the state, but it by no means follows from that fact that it is not the intention, as a means to accomplish that very end, to prohibit the sale of the meat of the animals procured elsewhere. The statute is perfectly plain and unambiguous in its terms, and is sufficiently broad and comprehensive to include the inhibited article wheresoever taken or procured. It does not confine itself in terms or by implication to the meat of deer killed in this state, but denounces as unlawful the sale of the meat of any deer; and there is nothing elsewhere in the statute tending to give it a more restricted sense. The language is too plain to leave room for construction, and we are not at liberty, even if so disposed, to place a limitation upon the meaning of the legislature which its language will not support. But we have no doubt that the legislature intended exactly what its words import. Aside from the explicit language in which this particular provision is couched, an examination of the various changes which these sections of the Code relating to protection of game have undergone at the hands of the legislature is persuasively convincing of the intention to do just what this act does by its terms,—entirely prohibit traffic in the meat of these game animals within the state, no matter where killed. And it need hardly be suggested that such a provision, if enforced, will lend great aid to the attainment of the object sought. The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season, and foisted upon the market as game procured without the state; and, owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form; and we know of no good reason why it should not be held to mean what it says.

Similar statutes in other states have received a like construction. In Magner v. People, 97 Ill. 331, involving a statute of Illinois making it unlawful to sell or have in possession quail and certain other game birds during the close season, and which was not in terms limited to birds taken in the state, it was contended, as here, that the statute did not condemn the possession or sale of the birds taken and killed beyond the limits of the state, and shipped into the state for sale. But the court held that the statute must be taken as comprehending within its terms the prohibited game, no matter where taken. It is there said: "But it is argued that this cannot be the fair construction, because such a prohibition does not tend to protect the game of this state. To this there seems to be two answers: First. The language is clear and free of ambiguity, and in such case there is no room for construction; the language must be held to mean just what it says. Second. It cannot be said to be within judicial cognizance that such a prohibition does not tend to protect the game of this state. It being conceded, as it tacitly is by the argument, that preventing the entrapping, netting, ensnaring, etc., of wild fowls, birds, etc., during certain seasons of the year tends to the protection of wild fowls, birds, etc., we think it obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the state, and afterwards bringing them into the state for sale, or by other subterfuges and evasions." The court of appeals of New York held to the same effect under a statute very like ours, saying: "The penalty is denounced against the selling or possession after that time [close of the open season] irrespective of the place of killing." Phelps v. Racey, 60 N. Y. 10. In Whitehead v. Smithers, 2 C. P. Div. 553, Lord Coleridge held that under an English statute for the protection of British game, which made it unlawful to sell or have in possession plover during the close season, a party who imported the dead birds from Holland and sold them in the British market came within the prohibition of the statute, and said: "It is said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed, and sold under pretense of their being imported from abroad." See, also, State v. Judy, 7 Mo. App. 524, and State v. Farrell, 23 Mo. App. 176.

The cases relied upon by petitioner are clearly distinguishable from the cases referred to above. In most of them, as in Com. v. Hall, 128 Mass. 410, and People v. O'Neil, 71 Mich. 325, 39 N. W. 1, the statutes under consideration contained a provision making possession of the game during the close season prima facie evidence of a violation of the law, and the construction of the prohibitive features of the statute largely turned upon the effect of that provision. In Com. v. Hall, which is followed by the Michigan case, it is said: "Saying that possession should be prima facie evidence necessarily implies that it shall not be conclusive. If the mere possession of birds, during the time within which the taking or killing them is prohibited, of itself constituted an offense under the previous sections of the statute, to say that such possession would be prima facie evidence would be superfluous, if not absurd." And it is held that the statute must, therefore, be construed as referring only to game unlawfully taken within the state during the close season. As suggested by counsel for the people, our statute contained a similar provision up to 1883, when the legislature by an amendment (St. 1883, p. 80) eliminated it, thereby evincing an intention to remove from the law anything calculated to qualify or limit its otherwise plain and explicit terms. We have no doubt that the intention of section 626 is to prohibit the sale of deer meat brought from without, as well as that taken within, the state. Nor do we think that in giving the act this effect it contravenes the constitution of this state as being in excess of the police power of the state. The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good. To this extent it is conceded that the state may go. But it is contended that to go further, and prohibit the sale of game lawfully killed elsewhere and brought here as private property, is in effect to destroy private property, and that this is going beyond a proper exercise of the police power. While it is true that the power to regulate is not the power to destroy, in its absolute sense, it is nevertheless true that the right to regulate frequently and as a necessary sequence carries with it the right to so control and limit the use or enjoyment of private property as to amount to its destruction. In the case of Phelps v. Racey, supra, the same objection was raised, and it is there said: "The objection of a want of power in the legislature to pass the act is not tenable. It is not in conflict with the state constitution, within the case of Wynehamer v. People, 13 N. Y. 378. That case involved the validity of the prohibitory liquor law, and determined that such law, so far as it applied to and substantially destroyed property in liquors owned or possessed at the time the act took effect, was in violation of the provision of the state constitution which declares that no person shall be deprived of life, liberty, or property without due process of law; but impliedly, if not necessarily, it affirmed the power if the law had only applied to liquors subsequently manufactured and acquired. Here the property was acquired subsequent to the passage of the act, and with the presumed knowledge of its provisions and conditions. The legislature may pass many laws the effect of which may be to impair, or even destroy, the right of property. Private interest must yield to the public advantage. All legislative powers not restrained by express or implied provisions of the constitution may be exercised. The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion." And these principles have been repeatedly upheld. In some instances their enforcement may work hardship, but we see no such result here. The statute does not prevent a party from importing all the venison he wants for his own use or consumption, if he desires to do so. It simply says that for the better protection of the rights of the people in these wild animals, and as a means of preventing their destruction, the meat shall not be a lawful article of sale. There can be no serious injury to any one under such a regulation. If any person imports the meat of the deer into the state he does it with his eyes open, and a knowledge of the purposes for which the law permits it, just as the petitioner did here. Under such circumstances he cannot complain if he is prevented from making a use of the article which the legislature has declared to be detrimental to the well-being of the state. As suggested in Phelps v. Racey, supra, he acquired the property after the passage of the act, and his rights in it are necessarily subject to the regulations imposed upon its use.

It is further strenuously urged, however, that the act so construed violates the constitution of the United States, in that it is an attempt to regulate interstate commerce,—a subject wholly committed to congress. But, after a very careful consideration of the numerous authorities cited in support of this view, we do not think the statute open to this objection. It is true, its enforcement may indirectly or incidentally affect to some extent traffic in the inhibited article between the people of this and other states, but that of itself is not sufficient to bring it within the objection urged. The right of the states, under the very comprehensive police power reserved to them under our dual system of government to regulate and control their own internal affairs, including trade, to the reasonable advantage and good of their people is conceded and upheld in all the cases in which the questions growing out of the right of the federal congress to regulate interstate commerce has arisen. The only difficulty has been in defining the limitations of that power. In Railroad Co. v. Husen, 95 U. S. 470, it is said: "We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in Thorp v. Railroad Co., 27 Vt. 149: 'It extends to the protection of the lives, limbs, comfort, and quiet of all persons and the protection of all property within the state according to the maxim "sic utere tuo ut alienum non laedas," which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or, upon acknowledged principles, ever can be, made, so far as natural persons are concerned.'" "Many acts of a state," say the court further in that case, "may indeed affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct." And in the celebrated cases commonly designated as "The License Cases," 5 How. 504, it is held that the fact that a regulation may incidentally and to a certain extent affect commerce between the states does not affect its validity. In Pierce v. New Hampshire (one of the license cases, supra,) Mr. Justice Woodbury, in one of the opinions of the majority of the court, in discussing this power of the states, says: "The subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government, under the broadest construction of that power." "The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact; for, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, a merchant extensively engaged in commerce often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad." In the subsequent case of Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, the same court held a statute of Iowa, which forbid any common carrier to bring into the state for any person or corporation any intoxicating liquors from any state or territory void, as being an unwarrantable interference with interstate commerce, and not a legitimate exercise of police power, in that it was more than a regulation of its own internal affairs or an exercise of the jurisdiction of the state over persons and property within its limits. "It is an attempt," say the court, "to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation of commerce before the merchandise is brought to its border. * * * It is not a regulation confined to the purely internal and domestic commerce of the state. It is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the state. * * * But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction." And it is held that the state cannot, under the guise of a police regulation, prevent the importation of legitimate articles of commerce and trade. And in the later case of Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, it was held that, it not being within the power of the state to prohibit the importation of lawful commodities, neither can she prohibit the sale by the importer of such commodities upon their receipt by him, since the right to sell any article imported was an inseparable incident to the right to import it. But this right of sale was distinctly limited to the right of the importer to sell or dispose of the article imported in its original, unbroken package or condition as brought by him into the state, and the principle is in that case, as in Bowman v. Railway Co. and the other cases cited, distinctly upheld, that the authority of congress over any article of commerce imported into a state ceases "when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands," and that thereupon the property becomes subject to the jurisdiction of the state, and affected and controlled by its regulations. Tested by these principles, we cannot see wherein the statute, applying its provisions to the case made in the complaint, is open to the objection that it attempts to or does regulate interstate commerce. Petitioner imported the meat into the state, broke the original package, and put the commodity upon the market. It thereupon became property strictly subject to state regulation and control, and falls within the denunciation of the statute. Whether petitioner could have sold the meat as an entire carcass is a question which does not confront us, and which it is not, therefore, necessary to determine. We think the complaint states a cause of action, and it follows that the petitioner should be remanded. It is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

DE HAVEN, J., being absent, did not participate in the foregoing decision.

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103 Cal. 342

In re FAIR'S ESTATE. (No. 15,311.)

(Supreme Court of California. June 29, 1894.)

WILLS—CONSTRUCTION—RIGHTS OF DEVISEES.

Testatrix devised her entire estate to executors in trust until complete disposition thereof as directed by the will. She then bequeathed to each of her two daughters a certain sum, to be paid to her when 25 years old; to her son J. $500,000, to be paid to him when 35 years old; and to her son C. $500,000, to be paid to him when 30 years old. She then directed that, in case J. should die without leaving a wife or lawful issue, his portion should be paid to C., if living; that, in case C. should die without leaving a wife or lawful issue, his portion should be paid to J., if living; and that, in case both J. and C. should die without wife or lawful issue surviving them, their portions should be paid to the daughters. J. died before he was 35 years old, leaving neither wife nor child. *Held*, that C. was not entitled to J.'s portion until the time when J. would attain the age of 35 if living.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Charles L. Fair for an order directing the executors of the estate of Theresa Fair, deceased, to pay to him the sum of $500,000, bequeathed to his brother, James G. Fair, Jr., and which, by the terms of the will, was to be paid to petitioner in case of the death of the latter. From an order denying the petition, petitioner appeals. Affirmed.

W. S. Goodfellow, for appellant. R. S. Messick and Byron Waters, for respondents.

PER CURIAM. When this case was in department the following opinion was prepared by Commissioner HAYNES:

"Appellant petitioned the court below for an order directing the executors of the will of Theresa Fair, deceased, to pay to him the sum of $500,000, bequeathed to his brother, James G. Fair, Jr., and which, in case of the death of James, was, by the terms of the will, to be paid to petitioner. This appeal is from an order denying said petition.

"The proper determination of the questions involves the consideration and construction of the whole of the will, which, omitting formal parts, is as follows: 'I hereby give, bequeath, and devise all my real and personal estate, of what nature or kind soever and wheresoever situated, to John W. Mackay and Richard V. Dey, the executors of my last will and testament, hereinafter nominated and appointed, in trust for the payment of my just debts and the legacies and charges upon the said estate hereinafter specified; to be held and possessed by them, with power to sell and dispose of the same, or any part thereof, at public or private sale, at such time or times and upon such terms and in such manner as to them shall seem meet, and to reinvest any surplus proceeds of such sales for the best interest of said estate until the full and complete disposition of said estate by them, which I hereby direct shall by them be made in compliance with the following: I give and bequeath to my daughter Theresa Alice Fair the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twenty-five hundred dollars. I give and bequeath to my daughter Virginia Fair the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twenty-five hundred dollars. I give and bequeath to my son James Graham Fair, Jr., the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty-five years, but not before then, and that meantime there shall be paid to him monthly the sum of five hundred dollars. I give and bequeath to my son Charles Lewis Fair the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty years, but not before then, but that meantime there shall be paid to him monthly the sum of five hundred dollars. The rest and residue of my estate I give and bequeath to my two daughters above named, to be divided between them equally, share and share alike, and to be paid to them when my said daughter Virginia shall have attained the age of twenty-five years. In case my said son James Graham Fair, Jr., shall die without wife or lawful issue surviving him, the portion allotted to him shall be paid to my said son Charles Lewis Fair, if living, and, if not living, then to his surviving wife or lawful issue, if any there be. In case my said son Charles Lewis Fair shall die without wife or lawful issue surviving him, the portion allotted to him shall be paid to the said James Graham Fair, Jr., if living, and, if not living, then to his surviving wife or lawful issue, if any there be. In case both the said James Graham Fair, Jr., and Charles Lewis Fair shall die without wife or lawful issue surviving them, then the portions allotted them shall be paid to my said daughters, Theresa Alice Fair and Virginia Fair, share and share alike. In case of the death of my said daughter Theresa Alice Fair without husband or child surviving her, the portion allotted to her shall be paid one-half to my daughter Virginia Fair and the other half in equal portions to the said James Graham Fair, Jr., and Charles Lewis Fair. And in case of the death of my said daughter Virginia Fair without husband or child surviving her, the portion allotted to her shall be paid one-half to my daughter Theresa Alice Fair and the other half in equal portions to my sons, James Graham Fair, Jr., and Charles Lewis Fair, aforesaid.' The executors therein named were duly appointed, and qualified in October, 1891.

"The court found that appellant was of the age of 25 years, and no more; that James G. Fair, Jr., died on the 12th day of February, 1892, under the age of 30 years, and had never married; that the estate was but little indebted; and that the sum of $500,000 prayed for by the petitioner might be allowed to him, if he were entitled thereto, without loss to the creditors of the estate. As conclusions of law the court found: 'That by the terms of said will the petitioner is not entitled to have or receive the sum of $500,000 prayed for by him until he shall have attained the age of thirty years; that his petition is, therefore, premature, and should be denied.' The order denying said petition was entered February 16, 1893.

"Appellant's contention is that, as survivor of his brother, he became entitled to said legacy immediately upon the death of James G. Fair, Jr.; and respondents contend, in their brief, that it is not payable to Charles until, by the terms of the will, it would have been payable to James, had he lived, nor until Charles had arrived at the age of 30 years. The will does not state the dates at which the several legatees will respectively arrive at the age at which their several legacies would become payable. Nevertheless the times for the payment of the several legacies are as definitely fixed, in case none of them should die before reaching the designated age, as though the year, month, and day of the payment of each had been stated in the will, instead of the age of the legatee, as these dates must be definitely ascertained before payment could be made of the several original bequests. These clauses of the will relating to the time of payment of the original bequests may therefore be read as though the dates of the payments were specified, instead of the ages of the several legatees; and the question is whether there is any provision in the will manifesting the intention of the testatrix that, in case of the death of the legatee, the legacy should be payable to the survivor at a different or earlier date. The will does not expressly state at what time the death of the original legatee should occur to entitle the survivor to the legacy which would otherwise have gone to the deceased brother or sister, nor whether the date of payment should thereby be changed, and therefore these questions must be left to construction. It is obvious, however, that the payment of any of these original legacies to the legatee upon arriving at the prescribed age takes the money so paid out of and beyond the operation of the will, which imposes no conditions or restrictions of any character upon it after its payment to the legatee; and therefore all facts and circumstances affecting its disposition must exist or occur at or before the death of the primary legatee.

"James having died unmarried, the provision relating to a surviving wife or lawful issue need not be considered.

"Recurring, then, to the question whether there is anything in the will authorizing the payment of the legacy in question to Charles at an earlier date than that fixed for the payment to James, I think the answer must be in the negative. The language of the clause principally in question does not require such earlier payment. If the language were 'upon' the death of James, or in case of the death of James, his portion shall 'then' be paid to Charles, there would be a reasonably clear expression of an intention to change the time of payment; but the language, 'in case of the death of James, his portion shall be paid to Charles,' does not enable us to say that the testatrix intended such earlier payment; and, if we look to the other provisions of the will, I think it clearly appears therefrom that such was not her intention. The will devised and bequeathed the entire estate to Mackay and Dey in trust, to be held and possessed by them, with power to sell and dispose of it and reinvest any surplus proceeds for the best interests of the estate. It was inevitable that all of the estate should remain in their hands for a time, and it was important that the times at which the trust should terminate as to the different portions or legacies should be definitely fixed, so as to enable them to best preserve and increase the estate, and be prepared to pay the different legacies when they became payable. This was done, and, in view of the interests of the estate as a whole, and the proper discharge of their duties by the trustees, it ought to require at least a reasonably clear expression of intention to make the time of payment depend upon the happening of contingencies in their nature uncertain to justify the court in holding that such change in the time of payment was intended. That the time of payment of the several legacies is not changed by the accident of the death of any of them, but only the person to whom they are to be paid, is apparent from the several provisions of the will; provisions that cannot be complied with if appellant's contention is to prevail.

"It will be observed that there is a similar provision in favor of James in case Charles shall first die, and a further provision that, in case James and Charles both die without wife or lawful issue surviving them, the portions allotted to James and Charles shall 'be paid' to their sisters, Theresa and Virginia. In all these cases the money to 'be paid' is to be paid by the executors, and necessarily implies that the money must remain in their hands until the time arrives when no contingency could happen under the terms of the will making it payable to another than the first survivor. As each of the brothers had a contingent right to the legacy of the other, so the sisters have a contingent right to the legacies of both James and Charles; a right that could not avail them as to the legacy given to James if appellant's contention is correct. If, for example, the executors had paid to James the legacy in question in his lifetime, Charles could well insist, when the time arrived at which James would have attained the age of 35 years, that that sum should have been in their hands, as, upon the contingency of the death of James under that age, he was entitled to it; and so the sisters might well insist, if the executors had paid the legacy in question to Charles, and afterwards, and before James would have attained the age of 35, Charles had died, that they were entitled not only to the legacy of Charles which remained in the hands of the executors, but also to the legacy of James, since the contingency had happened upon which the executors were directed by the will to pay it to them; and to this claim, if the executors had voluntarily paid the legacy of James to Charles, they could oppose no possible defense. I do not think that the time of the payment of the legacy in question depends upon Charles' arriving at the age of 30 years, but that in no event is it payable until the date at which James would have arrived at the age of 35; for, if Charles should arrive at the age of 30 before that date, and the bequest to James should then be paid to him, and he should afterwards die before the date at which it was payable to James, the sisters would be deprived of the contingent bequest to them of the same legacy. Other possible contingencies, not arising upon the facts contained in the record, may yet arise, but none, I think, which can affect the conclusion stated. The conclusion of the court below that Charles would be entitled to the legacy in question if he were 30 years of age, I think, is erroneous, but, as the judgment of dismissal is right, it should be affirmed.

"We concur: VANCLIEF, C.; BELCHER, C."

After full consideration of the case in bank, we are satisfied with the foregoing opinion, and with the conclusions therein reached; and for the reasons therein given the judgment appealed from is affirmed.

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103 Cal. 421

TAYLOR v. ABBOTT et al. (No. 19,392.)

(Supreme Court of California. July 26, 1894.)

Appropriation of Water — Sufficiency of Notice.

1. A notice on surveyed public lands that a person had on a certain day "located" a spring and water right, and "claims" all the water in the spring and flowing from it, is not in conformity with Civil Code, § 1415, which provides for a notice at the point of intended diversion stating the number of inches, measured on a four-foot pressure, claimed, the purpose for which it is claimed, and the place of intended use, etc.

2. On December 17th, plaintiff posted a defective notice of his intention to divert water, and made an excavation in the spring three feet deep and three feet wide at the place of intended diversion. He also bought some pipe and lumber with which to complete the diversion, but never connected them with the spring. On December 28th, defendant, under the act of April 20, 1852, took possession of the land on which the spring was located, built himself a house thereon, and moved his family there, and filed the necessary affidavit. *Held*, that the work done by plaintiff did not constitute possession, and that neither his intentions, declarations, nor preparations were equivalent to actual possession.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Taylor against Abbott and others to enjoin interference with plaintiff in constructing a diversion of water. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Daly & Toland, for appellant. H. L. Poplin and Blackstock & Ewing, for respondents.

HARRISON, J. The plaintiff posted a notice December 17, 1892, near a spring of water upon certain surveyed public lands in the county of Ventura, stating that he had that day "located" the spring and water right, and "claims" all water in the spring and flowing from it. On the same day he made an excavation in the spring, about three feet square and three feet in depth, for the purpose of marking the place of his intended diversion. A few days afterwards he bought some pipe and lumber with which to complete the means of diverting the water, but did not in fact make any connection with the spring, or complete his intended diversion of the water. On the 28th of December the defendant went upon the land where the spring was located, took possession thereof, built himself a house and moved his family into it, and thereafter held possession of the land, and on the 20th of February, 1893, filed an affidavit in conformity with the requirements of the possessory act of April 20, 1852.

After the defendant had taken possession of this land the plaintiff attempted to complete his diversion of the water from the spring, but was prevented from so doing by the defendant. The plaintiff brought this action February 21, 1893, to enjoin the defendant from interfering with him in completing such diversion. The cause was tried by the court, and judgment rendered in favor of the defendant. Plaintiff has appealed.

The plaintiff, by this action, seeks preventive relief for the future, rather than redress for a past wrong; and his right to this remedy is to be determined by the respective rights of the parties as they were at the commencement of the action. At that time the defendant was in possession and occupancy of the land which included the spring, and had filed his affidavit under the possessory act. Under the provisions of section 1 of this act (St. 1852, p. 158), he was entitled to "maintain any action for interference with or injuries done to his possession of said land against any person or persons so interfering with or injuring such land or possession," and would necessarily have the same right to defend his possession and rights in the land in any action brought against him. After he had thus taken possession of the land, any threats or conduct on his part by which the plaintiff was prevented from completing his diversion of the water would be in support of his own rights, rather than a wrong against the plaintiff, unless the plaintiff had acquired a right to such diversion superior to the defendant's rights in the land. The court finds that on the 28th day of December, 1892, when the defendant settled upon the land, there was no other in the possession or occupation thereof, and that prior to the commencement of this action, viz. on the 20th of February, the defendant had filed his affidavit under the possessory act, and that his acts in preventing the plaintiff from completing his attempted diversion of the water were for the purpose of protecting his possessory claim. The evidence before the court was ample to sustain this finding, so that it is unnecessary to determine whether the specifications of its insufficiency are such as to preclude it from being considered. It may be conceded that, if the plaintiff had completed the diversion of the water before the defendant had acquired any rights in the land, the plaintiff's rights would have been superior to that of the defendant. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. There is, however, no allegation in the complaint that the plaintiff was in possession of the land upon which the spring was located, nor does he claim to have been in the actual occupancy thereof, or to have had any possession other than such as followed from his notice and the digging out of the spring on the 17th of December. His subsequent purchase of pipe, and causing it to be hauled to a point "towards said springs", and several hundred feet distant therefrom, did not tend to establish a possession of the spring, or of the land on which it was located. The notice posted by him at the spring did not conform to the requirements of section 1415 of the Civil Code, and he cannot therefore claim any rights thereunder as an appropriator of the water. The posting of this notice was admitted by the answer, so that its exclusion by the court when offered in evidence did not constitute any error.

The plaintiff is not entitled to the relief sought herein by virtue of the provisions of section 2339 of the Revised Statutes of the United States. That section does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right thereon. It merely provides for protecting such rights to the use of water as may have "vested and accrued" by priority of possession, and as are recognized and acknowledged by the local customs, laws, and decisions of courts. Whether the defendant would have had the right to interfere with the plaintiff if, at the time of his entry upon the land, the plaintiff had been actually engaged in laying pipes for the diversion of the water thereon, depends upon other principles of law, and is not presented in the present case. De Necochea v. Curtis, 80 Cal. 400, 20 Pac. 563, and 22 Pac. 198, merely holds that when the diversion of the water has been completed before a subsequent pre-emptor acquires any right in the land, it is superior to the pre-emptor's right. The plaintiff was not in possession of the land when the defendant entered thereon, and neither can his intentions or declarations, any more than his preparations to complete the diversion, be regarded as equivalent to an actual possession. Digging at the spring did not constitute possession, but was merely an act indicative of an intention to claim the water, and was to be considered by the court, in connection with other evidence, for the purpose of determining whether the land was vacant. The finding of the court upon this subject must be regarded as determinative of the question.

There are other errors assigned in the admission and exclusion of evidence, but they are not of such a character as require consideration. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

103 Cal. 215

VALENTINE v. SLOSS et al. (No. 15,432.)

(Supreme Court of California. July 26, 1894.)

In bank.

Action by Thomas B. Valentine against Louis Sloss and others. Judgment for plaintiff, and defendants appeal. Affirmed.

For former report, see 37 Pac. 326.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the judgment of the department. The district court had jurisdiction to hear exceptions to the Matthewson survey, and to confirm it independently of the act of congress of 1860. It had this jurisdiction by virtue of the fact that the decree confirming the grant was its own decree, and not, as in the case of U. S. v. Sepulveda, 1 Wall. 104, the decree of the land commission. This case also differs from the Sepulveda Case in the important fact that the grant was not a floating grant within extensive and indefinite boundaries, but was a grant of a tract with specific boundaries, and therefore peculiarly and appropriately subject to definite location by the court, according to the doctrine of U. S. v. Fossatt, 21 How. 445, and the cases therein cited. The Fossatt Case was cited in the Sepulveda Case; and, so far from overruling it, the court took especial pains to set forth the distinction upon which they held that in the Sepulveda Case the district court could acquire jurisdiction to correct the survey only under the act of 1860. I think the judgment of the superior court should have been reversed.

VAN FLEET, J., concurs.

103 Cal. 429

In re McLAUGHLIN'S ESTATE. (No. 15,409.)

(Supreme Court of California. July 26, 1894.)

Public Administrator — Guardian of Incompetent.

M. died in 1892, leaving, as her only heir at law, an incompetent person with a guardian. Code Civ. Proc. § 1368, which provided that a guardian of a minor was entitled to administration, was amended in 1893 so as to include the guardian of an incompetent person. *Held*, that the public administrator was not entitled to administration on the estate of M., in preference to the guardian, on the ground that at the death of M., and before the act was amended, he was so entitled, as his right to administration depended on his status at the time the letters were granted.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Kate Kenney, as guardian of James H. McLaughlin, an incompetent person, applied for letters of administration on the estate of Catherine McLaughlin, deceased. A. C. Freese, public administrator of the city and county of San Francisco, at the same time applied for such letters. An order was made granting the letters to Kate Kenney, and denying the petition of A. C. Freese, and he appeals. Affirmed.

J. D. Sullivan and Herbert Choynski, for appellant. Beverly L. Hodghead and S. Bloom, for respondent.

PER CURIAM. Catherine McLaughlin died intestate, in the city and county of San Francisco, on October 20, 1892, leaving estate therein, and leaving as her sole heir at law a son, 37 years old, named James H. McLaughlin, who had been duly adjudged to be an incompetent person. On March 17, 1893, the respondent, Kate Kenney, the duly appointed, qualified, and acting guardian of said James H. McLaughlin, filed in the superior court of said city and county her petition asking that letters of administration on the estate of Catherine McLaughlin be issued to her. On March 20, 1893, A. C. Freese, the public administrator of the city and county of San Francisco, filed his petition in the same court asking that letters of administration on the said estate be issued to him. The two petitions were heard at the same time, and on April 4, 1893, the court made and entered an order denying the petition of said A. C. Freese, and granting that of said Kate Kenney. From that order, said Freese appeals.

The only question to be determined is, was the guardian of the incompetent son or the public administrator entitled to letters of administration on the estate? Section 1368 of the Code of Civil Procedure was amended on February 27, 1893, by inserting the words "or an incompetent person," and, as amended, it reads as follows: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." It is clear that respondent was entitled to have the letters granted to her, if this section, as amended, was applicable to the case. It is claimed, however, for appellant, that the amendment was not retroactive, and was not applicable, because "the rights of the appellant had accrued, and were vested, at the date of the death of said deceased, and no subsequent act of the legislature could serve to divest the appellant of his right to letters of administration, and to invest the respondent with that right." This claim is not, in our opinion, supported by the authorities or reason. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire any interest in the estate, or in the commissions to be earned by administering upon it. His status at the time of the grant of administration determines his competency. In re Pingree's Estate, 100 Cal. 78, 34 Pac. 521. The appellant had no vested right to letters, and the court properly exercised its discretion in granting the letters to the respondent. The order is affirmed.

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103 Cal. 438

WILLIAMS v. NAFTZGER et al. (No. 19,338.)

(Supreme Court of California. July 26, 1894.)

FORECLOSURE OF MORTGAGE — ASSUMPTION BY GRANTEE—DEFICIENCY JUDGMENT — REVIEW ON APPEAL.

1. A grantee of mortgaged premises, who has assumed the mortgage, is liable, in an action of foreclosure, for a deficiency judgment.

2. Findings of fact by the trial court upon conflicting evidence will not be reviewed on appeal.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by one Williams against Naftzger and others to foreclose a mortgage. There was a judgment for plaintiff, from which, and from an order denying a new trial, defendants appeal. Affirmed.

Collier & Evans, for appellants. Curtis, Otis & Curtis, for respondent.

HARRISON, J. The defendants King and La Baron executed a mortgage to the plaintiff in 1887, upon certain lands in the county of San Bernardino, to secure the payment of their note for $2,000. In October, 1888, these defendants conveyed the mortgaged premises to their codefendants, Naftzger, Merrill, and Kanavel, subject to the lien of said mortgage; and the said grantees, as a part of the consideration for said conveyance, promised to pay said promissory note, and to secure the discharge and release of the mortgage. In July, 1891, each of these grantees signed and acknowledged a deed of conveyance, purporting to reconvey the premises to King and La Baron, subject to the said note and mortgage, and containing a clause by which King and La Baron assumed to pay and release the same. These instruments were placed in the hands of the defendant Naftzger, and he afterwards delivered them to the defendant La Baron, who caused them to be recorded in the office of the county recorder. Naftzger also paid to La Baron $500 to induce him to accept the deeds. The deeds were delivered by Naftzger to La Baron without the knowledge of King, nor did King ever accept the deeds, or in any way ratify their delivery to or acceptance by La Baron; nor did he agree to a reconveyance of the mortgaged property, or to release his grantees from the liability they had assumed by virtue of the terms of the conveyance to them. As soon as he learned that the deeds had been delivered to La Baron, he repudiated the transaction, and notified his grantees thereof. The plaintiff brings this action to foreclose his mortgage, and to recover judgment against each of the above defendants for any deficiency there may be after a sale of the mortgaged lands. King and La Baron made default, and at the trial upon the issues made by the answers of the other defendants the court found the above facts, and rendered judgment in favor of the plaintiff. The defendants Naftzger, Merrill, and Kanavel have appealed.

An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee; and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him, as well as against the mortgagor, for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises, and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. Halsey v. Reed, 9 Paige, 452; Crowell v. Currier, 27 N. J. Eq. 154; Crawford v. Edwards, 33 Mich. 354; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Jones, Mortg. §§ 741, 752.

The appellants do not controvert this proposition, but urge in support of their appeal that the evidence was insufficient to justify the court in finding that King did not accept the deed. Upon this proposition, however, there was a sharp conflict in the evidence, and the finding of the court is not here open to review. See, also, Cordts v. Hargrave, 29 N. J. Eq. 446; Stuart v. Hervey, 36 Neb. 1, 53 N. W. 1032. If the deed was never delivered to or accepted by King, the appellants were not released from their obligation to him to discharge the mortgage debt, and the plaintiff is entitled to avail himself of this obligation for the purpose of obtaining a satisfaction of the debt created by King. The judgment and order are affirmed.

We concur: GAROUTTE, J., McFARLAND, J.

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4 Cal. Unrep. 730

KELLER v. FINK. (No. 19,356.)

(Supreme Court of California. July 26, 1894.)

WATER RIGHTS.

Where plaintiff had the right to the water of a ditch and to a dam on defendant's land, which the latter used for the purpose of pasturing stock, defendant was not liable for injuries to the dam by the cattle tramping and treading the same, where plaintiff had the right to enter and protect the dam against such injuries.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Frederick Keller against Charles Fink for damages to a dam. Judgment for defendant, and plaintiff appeals. Affirmed.

Graves & Graves, for appellant. W. H. Spencer, for respondent.

HAYNES, C. Plaintiff is the lessee of the Branch Flouring Mill, operated by the waters of Arroyo Grande creek. The dam and a portion of the ditch which conveys the water from the dam to the mill are upon defendant's land. It is claimed that defendant's horses, cattle, and hogs so injure the dam and ditch that plaintiff is deprived of water to run his mill for a considerable portion of the time, and prays judgment for the sum of $5,000. The answer denies all the allegations of the complaint, and, for a second defense, alleges that he uses his land for stock purposes in the usual manner, and that he has never, in any manner, intentionally injured, or permitted to be injured, said dam or ditch. The cause was tried before a jury, and a general verdict was returned for defendant, upon which judgment was entered, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial.

Respondent makes the point that the appeal from the order cannot be considered, because not taken in time. This objection must be sustained. A bill of exceptions was taken by plaintiff, and used on the hearing of the motion for a new trial. The only errors of law noticed in appellant's brief are that the court erred in refusing to give the third and the fourth instructions requested by plaintiff. There was no controversy as to the right of the plaintiff to maintain and use the dam and ditch. The question was as to the defendant's liability for casual injury thereto upon his lands, occasioned by his stock, which was kept upon his land in the manner in which such stock is usually kept, and which rightfully had access to the water. The third instruction, if it had been given, would have required the jury to find against the defendant if they found that he permitted his stock to injure the dam and ditch "by tramping and treading and cutting the same," whereby the water was prevented from flowing to plaintiff's mill. It was not contended that defendant had not the right to the water for his stock, nor, on the other hand, was there any denial of plaintiff's right to enter to make repairs, nor does it appear that plaintiff could not, without interfering with defendant's rights, have protected his dam and ditch, or that the dam might not have been so constructed and of such material that the stock could not injure it, instead of the temporary structure composed of brush and sand which existed. The fourth instruction requested was to the effect that, under the condition of things stated in the third request, the plaintiff was entitled to damages. These instructions were properly refused, and the instructions given fairly stated the law applicable to the facts developed by the evidence.

The plaintiff was not prejudiced by not being permitted to answer the question, "You say the profits have been $8 per day?" inasmuch as he did not make a case entitling him to any damages. An objection was properly sustained to the following question: "State whether or not it was worth while to repair the ditch so long as the defendant's stock are permitted to roam and go over the same?" Unless it was shown that it was the defendant's duty to protect the dam and ditch, or in some manner prevent his stock from injuring them, the question was immaterial, and we see nothing in the evidence imposing such duty upon the defendant. Plaintiff's objection to the question put to defendant, "Have you used this land of yours, which includes the creek, any different from the way you have used your other land?" was properly overruled. No one has the right to purposely or so negligently use his property as to imply a willingness to injure the property of another, or which creates an injury which would not result from its ordinary and lawful use, but each is bound to protect his property from such injury as may arise from the ordinary and lawful use by another of his own property. We see no ground upon which the judgment should be reversed, and advise that it be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the order denying a new trial is dismissed, and the judgment affirmed.

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103 Cal. 415

SHERER v. PARK NURSERY CO. (No. 19,355.)

(Supreme Court of California. July 26, 1894.)

SALE—WARRANTY OF FRUIT TREES—MEASURE OF DAMAGES—STATUTE CONSTRUED.

1. Under Civ. Code, § 3313, the damages for breach of warranty of the quality of fruit trees is the difference in the value between the kind of trees warranted and the trees actually delivered, at the time those delivered first bore fruit.

2. The damages for breach of warranty of the quality of fruit trees may be shown by the difference between the value of the land occupied by the trees at the time the breach is discovered, and the value such land would have had if the trees had been of the kind warranted.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by J. C. Sherer against the Park Nursery Company to recover damages for breach of warranty of certain fruit trees. There was a judgment for plaintiff, from which, and from an order denying a new trial, defendant appeals. Affirmed.

W. E. Arthur and A. D. Yocum, for appellant. Spencer G. Millard, for respondent.

VANCLIEF, C. The defendant being a corporation engaged in the business of raising and selling nursery fruit trees, the plaintiff, on March 7, 1891, ordered from it 500 nursery peach trees, of specified varieties,—namely, 200 Susquehanna, 200 Muir, and 100 Salway; and thereupon defendant sold and delivered to plaintiff 500 young trees, at the price of 20 cents apiece, representing them to be of the varieties and in the proportions ordered, and so labeled them. The plaintiff did not know and had no means of ascertaining whether or not the trees were such as ordered until after he had planted them and had cultivated them about two years, when they first bore fruit, and therefore relied solely upon the representations of the defendant as to the varieties of the trees. When the trees first bore fruit, it appeared that 268 of them were of a different and inferior variety from either of those ordered, and were of a kind that plaintiff did not desire, and which, when planted, occupied about 2½ acres of plaintiff's land. The object of this action was to recover damages alleged to have been suffered by plaintiff in consequence of a breach of the warranty that the trees were of the kinds ordered. The judgment was in favor of plaintiff for $350, from which, and from an order denying his motion for a new trial, the defendant appeals.

The principal point contended for by appellant is that the court did not measure the damages by the proper rule, which they say is that expressed by section 3313 of the Civil Code, as follows: "The detriment caused by the breach of the warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." To what time, in the sense of this section, does a warranty of the quality of personal property refer? Does it refer to the time of completion of the sale by delivery of the property, or to the time of the breach of the warranty, or to the time when the breach is discovered, or with ordinary care and attention might be discovered, by the purchaser? When the quality of the property is apparent, or with ordinary care may be ascertained at the time of delivery, all three of those conditions coexist at that time, as they did in the case of Hughes v. Bray, 60 Cal. 284, in which it was held that a warranty of barley referred to the time of delivery, and that the measure of damages was the difference between the market value of the (inferior) barley delivered and an equal quantity of the quality warranted at the time of delivery; and this, the court said, was in accordance with section 3313 of the Civil Code. And doubtless this was correct on the facts of that case, since the delivery, the breach of warranty, and presumable notice of such breach concurred in point of time; and it would have been equally correct to have said in that case that the measure of damages was the difference in values, etc., at the time of the breach of the warranty, or at the time the breach was discovered. But the court did not say, and surely did not intend to be understood as meaning, that all warranties of the class specified in section 3313 of Civil Code refer to the time of delivery of the property; since such a construction would not only be contrary to the common law as administered in the United States and England, but would effect rank injustice in a large class of cases, of which the case at bar is an example. Suth. Dam. §§ 673–676; Sedg. Dam. §§ 191, 768, and cases cited. Under such construction, the measure of plaintiff's damages in this action would be merely the difference between the value of the trees delivered and the same number of trees of the kinds ordered at the time of delivery, and before they were replanted by plaintiff; and so it would be in all cases of warranty of seeds. As to whether a warranty of this class refers to the time of the breach thereof, it is enough to say that if cases ever occur in which the purchaser suffers damage after the breach and before the time when he discovers, or with ordinary care and attention might discover, the defect in the property warranted, the warranty does not in such cases refer to the time of the breach, but to the time when the defect was or might have been discovered. The time of the breach depends upon the nature and meaning of the warranty. What was warranted? In this case I am inclined to the opinion that the defendant warranted that the trees would bear the kinds of fruit known by the names Susquehanna, Muir, and Salway peaches. If so, the breach occurred when they first bore a different kind of fruit; so that here, again, the breach and the discovery thereof were concurrent events. But, if such is not the meaning of this warranty, the breach must have occurred at the time the trees were delivered. But since it seems probable that cases of the class specified in section 3313, Civ. Code, may occur in which the breach and the discovery thereof are widely separate in point of time, the only reasonable construction of that section which may have a uniformly just effect is that the time to which the warranty refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser.

The action of the trial court in admitting evidence against the objections of defendant was consistent with this construction. The sole effect of such evidence was to prove the difference between the value of trees of the kinds ordered by plaintiff and the trees actually delivered by defendant, at the time when those delivered first bore fruit; that being the earliest date at which plaintiff discovered, or could have discovered, the breach of the warranty. It was, however, to the mode of proving this difference of values that defendant more specially objected, which was (1) to prove the value of the land occupied by the trees at the time the breach of warranty was discovered; and (2) the value the land would have had, at the same time, if trees of the kinds and proportions ordered by plaintiff had been planted and cultivated, instead of the 268 trees of a kind not ordered by plaintiff.

It is strenuously contended that the allowance of any evidence of the value of the land was material error, for which the judgment should be reversed. But since growing fruit trees are a part of the land, and probably of no value when severed from it (Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401), it was proper to prove how much the different kinds of trees added to the value of the land; and the difference between the value thus added by the trees delivered and the value that would have been added if the trees ordered had been planted instead of those seems to be the measure of plaintiff's damage, according to section 3313 of the Civil Code. "It is settled in New York," says Mr. Sutherland (section 1019), "that where fruit trees are destroyed or injured, and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury;" citing Dwight v. Railroad Co., 132 N. Y. 199, 30 N. E. 398. On the assumption that the mode of proof was not materially erroneous, the findings of fact are justified by the evidence. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(103 Cal. 447)

PEOPLE ex rel. SCHWARTZ v. TEMPLE et al. (No. 19,346.)

(Supreme Court of California. July 27, 1894.)

VACATING JUDGMENT—TIME FOR MAKING MOTION.

1. A judgment void on its face may be set aside on motion. An inspection of the judgment roll only is permitted.

2. A judgment void for want of jurisdiction of the person of defendant, where the invalidity does not appear from the judgment roll, may be set aside on motion within a year, under Code Civ. Proc. § 473, providing that when the summons is not personally served the court may allow a defendant to answer to the merits within one year after judgment.

3. Where a party fails to move within such time to set aside the judgment, his remedy is by action making all persons interested parties thereto.

4. Where a judgment is rendered on publication of the summons the affidavit and order of publication are no part of the judgment roll, and the judgment is not void on its face, even where no affidavit or order is found among the papers, and there is no entry in the records that either was ever made.

5. In an action to vacate a land patent it appeared that the state in 1876 obtained by default a judgment annulling the interest of the relator in land for which he held a certificate of purchase; that the summons was served by publication; that a patent for the land was in 1888 issued to defendant; that in 1889 relator, on notice to the district attorney, defendant having no notice, obtained an order vacating the judgment on the ground that the court never acquired jurisdiction of his person as no affidavit or order of publication appeared in the case. *Held*, that the order vacating it was void.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the people on the relation of Henry Schwartz against Frank Temple and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich and H. S. Foote, for appellant. E. W. Hendrick and Chapman & Hendrick, for respondent Temple. Harris & Gregg and J. P. Hight, for other respondents. Parrish, Mossholder & Lewis, for interveners.

BELCHER, C. This action was instituted for the purpose of having two state patents, one for the east half and the other for the west half of a certain sixteenth section of land in San Diego county, vacated and set aside, so far as they affect the south half of the section, upon the ground that they were issued without authority of law and were void. The court below found the facts very fully, and gave judgment for the defendants, from which the plaintiffs appeal on the judgment roll, without any statement or bill of exceptions.

The facts found, so far as they need be noticed, are in substance as follows: Prior to July 28, 1865, the said section was surveyed by authority of the United States, and on that day the township plat, including the same, was on file in the proper United States land office. The whole section was then vacant and unoccupied, and it remained so until some time in the year 1883. On May 10, 1869, Henry Schwartz, the relator, who was then qualified to purchase school lands from the state, made application to purchase the south half of the section, and his application was approved by the surveyor general on July 14, 1869. Within 50 days thereafter he paid to the treasurer of San Bernardino county 20 per cent. of the purchase money, and the first year's interest on the balance, and also the sum of $3 for the issuance of the certificate of purchase, and on September 11th following a certificate of purchase in the usual form was issued to him, which he never assigned or transferred. In the application made by Schwartz and in the order approving the same the said section was described as being in San Bernardino county, and it was then and thereafter by the land department of the state and by the public authorities generally believed to be and treated as being in that county, until a survey of the county line was made in 1880 or 1881, when it was found to be in San Diego county. Schwartz paid the interest on the balance of the purchase money up to January 1, 1874, but never afterwards paid any interest, or any part of the principal. On July 8, 1876, an action in the name of the people of the state of California was commenced against him in the district court of the eighteenth judicial district in and for the county of San Bernardino to foreclose his interest in the said land, and to annul the said certificate of purchase. The action resulted in a judgment by default, entered on December 12, 1876, which recited "that the defendant has been regularly served with summons in said action according to law," and granted the relief prayed for. The judgment roll made up in the case consisted of the complaint, with a memorandum of the defendants' default indorsed thereon; the summons, and a copy thereof, with an affidavit annexed thereto stating that the affiant was one of the publishers and the principal clerk in the office of a certain daily newspaper published in the said county, and that the summons "was published in said newspaper for four weeks consecutively, to wit, daily from the 21st day of July, 1876, to the 11th day of September, 1876;" and a copy of the judgment. Twenty days after the entry of the said judgment a certified copy thereof was filed in the office of the register of the state land office. On May 5, 1883, the defendant Frank Temple made application to purchase the west half of the said section, and at that time he possessed the qualifications necessary to enable him to make the purchase. His application was in proper form, and was approved October 2, 1883. Within 50 days after the approval he made the first payment, as required by law, and subsequently made full payment, and on December 8, 1888, received a patent for the land applied for. On May 5, 1883, W. W. Averill made application to purchase the east half of said section, and he was then qualified to make the purchase. His application was in proper form, and was approved October 2, 1883. Within 50 days after the approval he made the first payment, and thereafter a certificate of purchase was issued to him, which he assigned to the defendant Thomas W. Carter, who made full payment, and on May 14, 1886, received a patent for the land so applied for. On February 4, 1889, on motion of Schwartz, an order was made by the superior court of San Bernardino county vacating and setting aside the said judgment entered against him in the district court of that county on December 12, 1876, upon the ground that the said court never acquired or had any jurisdiction of the person of the defendant, for the reason that no affidavit or order of the court was ever made for the publication of summons in the action, and no service of summons was made on the defendant, and the defendant never appeared in the action. Notice that a motion would be made to vacate the said judgment of foreclosure against Schwartz was given to the district attorney of the county, but not to any one else, and no one of the defendants in this action had any notice or knowledge of the motion, or was present at the hearing thereof in person or by counsel. On June 26, 1889, Schwartz tendered to the treasurer of San Diego county the balance due for principal and interest on his said certificate of purchase, if the same was still valid and in force; and thereafter, on July 9, 1889, this action was commenced. Other facts are found, and several questions based upon them are elaborately discussed by counsel, but the principal and controlling question in the case, and the only one which need be decided, relates to the validity and effect of the order of May 4, 1889, vacating the judgment of foreclosure; for, if that order was void, then the judgment here appealed from must be affirmed.

It is well settled that a judgment which is void upon its face, and which requires only an inspection of the judgment roll to show its invalidity, may be set aside on motion by the court rendering it at any time after its entry (People v. Greene, 74 Cal. 400, 16 Pac. 197); and also that a judgment which is in fact void for want of jurisdiction over the person of the defendant, but where its invalidity does not appear from the judgment roll, may be set aside upon motion within a reasonable time after its entry (Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452). Whether a judgment is void upon its face or not can only be determined by an inspection of the judgment roll, and when the service is by publication the affidavit and order for publication are no part of the roll, and cannot be considered. Estate of Newman, 75 Cal. 213, 16 Pac. 887; Sichler v. Look, 93 Cal. 600, 29 Pac. 220. And what is a reasonable time within which a motion may be made to set aside a judgment not void upon its face must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure.[1] When a judgment is not void upon its face the court has no power to set it aside on motion, unless the motion is made within a reasonable time, but resort should be had to an action, and all the parties interested should be notified, and have an opportunity to be heard. People v. Goodhue, 80 Cal. 199, 22 Pac. 66; People v. Harrison, 84 Cal. 607, 24 Pac. 311; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899. The case in which the order now under review was made was one in which service by publication was authorized by statute (Pol. Code, § 3549), and in which, under all the decisions, state and federal, a valid judgment could be rendered upon such service. The judgment roll in the case contained all the papers constituting the judgment roll when service is by publication (section 670, Code Civ. Proc.), and they were all in proper form and sufficient. It was therefore immaterial, in the proceeding referred to, that no affidavit or order for the publication of the summons was found among the papers in the case, and that there was no entry in the records that any such affidavit or order was ever made, inasmuch as, if found, they could not have been considered. The judgment was not void upon its face, and could not upon that ground be set aside on motion. The motion was made more than 12 years after the judgment was entered, and was not within a reasonable time. The court had no power, therefore, to grant the motion, and its action in doing so must be held void and of no effect. It results that the judgment appealed from should be affirmed.

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[1] Provides that where the summons in an action is not personally served the court may allow a defendant to answer to the merits of the action at any time within one year after the rendition of the judgment.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. xviii

PEOPLE ex rel. SCHWARTZ v. TEMPLE et al. (No. 19,347.)

(Supreme Court of California. July 27, 1894.)

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the people on the relation of Henry Schwartz against Frank Temple and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich and H. S. Foote, for appellant. E. W. Hendrick and Chapman & Hendrick, for respondent Temple. Harris & Gregg and J. P. Hight, for other respondents. Parrish, Mossholder & Lewis, for interveners.

PER CURIAM. This case is in all respects the same as that of People v. Temple (No. 19,346, just decided) 37 Pac. 414, except that here the land affected is the north half instead of the south half of the section, and the application to purchase the same was made by and the certificate of purchase issued to Louis Schwartz, now deceased, of whose estate Henry Schwartz, the relator, is administrator. Upon the authority of the decision in that case the judgment here appealed from is affirmed.

4 Cal. Unrep. 734

ONTARIO LAND & IMP. CO. v. HOWARD.

(No. 19,336.)

(Supreme Court of California. Aug. 15, 1894.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

A judgment for plaintiff will not be disturbed where there is a substantial conflict in the evidence, with a clear preponderance in plaintiff's favor.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Ontario Land & Improvement Company against J. S. Howard to compel defendant to pay a balance due on a contract for the sale of land, or, in default thereof, to foreclose his interest in the land. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Goodcell & Leonard and E. H. Jolliffe, for appellant. Sheldon & Borden and E. M. Hanna, for respondent.

SEARLS, C. On the 9th day of June, 1887, H. L. Macneil and others, as trustees, entered into an agreement in writing with H. C. Parker, by which they agreed to sell to him, and he agreed to buy, a certain piece or parcel of land situate in Ontario, county of San Bernardino, state of California, designated as "Lot number one (1) in Canyon Ridge Tract of Ontario Colony," together with 10 shares of the capital stock of the San Antonio Water Company, for the sum of $2,500, payable in four annual installments of $625 each,—one on the execution of the agreement, and the residue in like annual installments,—with interest, etc.; said Parker to have possession, and deed to be executed, on completion of payments. Plaintiff is assignee of Macneil and others, and defendant, Howard, is assignee of Parker, and agreed to pay purchase money to plaintiff. This action was brought to obtain a decree requiring the defendant to pay a residue of such purchase money within a specified time, or, in default thereof, that his interest in the land be foreclosed. Defendant pleaded want of title in plaintiff.

At the trial it was stipulated, in substance, that a patent from the government of the United States had issued for the rancho Cucamonga, and that plaintiff held under the grantee in said patent. The only question under the stipulation, was whether or not the land agreed to be conveyed was within the exterior boundaries of the rancho Cucamonga, as defined in said patent. It was conceded that, if the tract was within the patent, plaintiff had title thereto in fee simple, and was able to convey, and had tendered a good and sufficient deed of conveyance, properly executed, to defendant, which he had refused to accept, or to pay any portion of the money due as the purchase price of the land. The cause was tried by the court, a jury having been waived, written findings filed in favor of plaintiff, upon which a judgment was entered in its favor. The appeal is by defendant, J. S. Howard, from the judgment, and from an order denying a motion on his behalf for a new trial.

The case is plain and simple. Plaintiff, by its testimony, made what may be termed a perfect case; showing, beyond a peradventure, the land to be within the exterior boundaries of the rancho Cucamonga. Defendant introduced testimony tending to show that said land was without the boundaries of the rancho. Taken together, there is a substantial conflict in the evidence, with, as I think, a clear preponderance in favor of plaintiff. Under such circumstances, there being no other question involved, it can subserve no useful purpose to analyze and discuss the testimony. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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103 Cal. 516

PELLISSIER v. CORKER. (No. 19,384.)

(Supreme Court of California. Aug. 13, 1894.)

GRANT OF EASEMENT.

A deed to R., "his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway," conveys only an easement, and dedicates the land for use as an alleyway.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Germain Pellissier against Aurelia J. Corker for an injunction restraining defendant from obstructing an alleyway. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Westerman & Broughton and Edwin Baxter, for appellant. Moye Wicks, for respondent.

GAROUTTE, J. This action is brought for a perpetual injunction to restrain the defendant from obstructing an alleged alleyway situated between the respective lots of land of the parties. The relief prayed for was granted, and this appeal is prosecuted from such judgment and an order denying a motion for a new trial. Defendant claims title in fee to the land covered by the alleged alley or way, and bases her right to obstruct the same as grantee of one Rhinehart under a certain deed made to him by one Winbigler, the original owner of the entire tract. At the date of this deed he held the title in fee to the strip in dispute, unless it had been previously dedicated. Appellant insists that the deed from Winbigler passed the title in fee to Rhinehart, and she now relies upon the Rhinehart title; and the determination as to the character of title that passed under that deed is determinative of the case. It recites: "I, David Winbigler, for value received, do hereby grant to W. V. Rhinehart, his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway, all that tract of land," etc. We think this deed is an express grant of an easement; a right to the use, and nothing more. Section 1066 of the Civil Code declares that grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in that article; and upon the face of this writing the intention, and the whole intention, of the parties is apparent from every line, and that intention was to dedicate the strip of land for use as an alleyway by the owners of the adjacent lots, and that the legal title should be held by Rhinehart, his heirs and assigns, in trust for that purpose, and subject to the easement created by the dedication. If we consider the situation of the parties, and the surrounding circumstances accompanying the making of the deed, this conclusion is impregnably fortified. Section 1105 of the Civil Code declares that a fee-simple title is presumed to be intended to pass upon a grant of real property, unless it appears from the grant that a lesser estate was intended; and in this case it clearly appears from the grant that a lesser estate was intended. Appellant invokes a principle laid down in section 1070—that, if several parts of a grant are irreconcilable, the former part prevails; and she now declares that this grant was to Rhinehart and his heirs and assigns; that these words conveyed an estate in fee, and that the subsequent language of the deed attempted to create limitations and reservations inconsistent and irreconcilable with the title already created. We think the principle here invoked has no application to the present case. There are no irreconcilable parts to this grant. Indeed, there is but one part to it, and that is essentially the grant for a use. Many of the cases cited by appellant hold that a prohibition of the use of property granted, inconsistent with the title conveyed, is void. A notable case to this effect is Eldridge v. See Yup Co., 17 Cal. 44. It is there held that if land be conveyed in fee simple, and the habendum clause of the deed attempts to limit the use, such attempted limitation is of no effect, as being inconsistent with the fee title. But the present case is not analogous, and presents no such conditions, for no estate in fee ever passed to the grantee. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

103 Cal. 454

GAY v. DARE et al. (No. 19,322.)

(Supreme Court of California. July 30, 1894.)

CONTRACT—ACTION FOR BREACH—DAMAGES.

Plaintiff bought stock of a national bank under an agreement with defendant that, at the end of a year, he would take it back, and repay plaintiff the price and interest. Plaintiff gave notice, and, at the end of the year, tendered the stock. Between the notice and the tender the bank became insolvent. After the tender the comptroller of currency levied an assessment on the stock which plaintiff had to pay. *Held*, in an action for breach of contract, that plaintiff could recover, not only the purchase price and interest, but also the amount of the assessment.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by John H. Gay, Jr., against D. D. Dare and S. G. Havermale, to recover damages for breach of contract. A demurrer to the supplemental complaint was interposed by defendant S. G. Havermale. The same was sustained, and plaintiff appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. C. L. Barber and Wellborn, Stevens & Wellborn, for respondents.

SEARLS, C. The California National Bank of San Diego was a national banking corporation, organized under the laws of the United States, and having its place of business at San Diego, Cal. On the 20th day of January, 1891, plaintiff subscribed for 100 shares of the capital stock of said corporation, and paid therefor the sum of $12,500. In consideration of plaintiff's subscribing for and payment of said sum of money for said stock, the defendants herein jointly and severally agreed with him, in writing, that, in the event of said plaintiff "wishing to sell the said stock at the end of one year from the date of issue, we [the defendants] will take said stock at the price paid for it, and allow the said John H. Gay, Jr. [plaintiff], ten per cent. on the investment of $12,500 for the time said money was invested. Interest payable from the time the money is paid in. Said John H. Gay, Jr., agrees to give the undersigned four months' notice of his desire to dispose of said stock. [Signed] D. D. Dare. S. G. Havermale. J. W. Collins." On the 15th day of September, 1891, plaintiff, wishing to sell said stock in pursuance of the terms of said agreement, gave to the defendants notice of his desire to dispose of said stock to them, pursuant to the terms of said agreement; and four months thereafter, on, to wit, January 20, 1892, plaintiff offered to return said stock to defendants, and demanded of them performance of said agreement, and that they take and pay him for said stock said sum of $12,500, and interest from January 20, 1891, at 10 per cent. per annum, which defendants refused to do. After plaintiff gave the defendants the four months' notice of his desire to sell the stock to them, but before the tender thereof and demand, as above stated, viz. on the 12th day of November, 1891, the California National Bank of San Diego, aforesaid, became and was and ever since has been insolvent. Plaintiff thereafter brought this action to recover the $12,500 and interest, tendered and deposited in court the stock, etc. Defendant Dare was absent from the United States, and was not served with process. Defendant Collins was served with summons, made default, and thereafter died. Defendant Havermale answered. Subsequent thereto, the comptroller of the currency of the United States, on the 15th day of May, 1892, levied an assessment upon the stock of the insolvent bank to pay its debts, which amounted to $10,000 upon the 100 shares held by plaintiff, which sum he was compelled to pay, and did pay, to the receiver of the bank. Thereafter plaintiff filed a supplemental complaint, setting out the levy of said assessment and the payment thereof by him, and sought to recover the same from defendants, in addition to the sum of $12,500 and interest. Defendant Havermale demurred to the supplemental complaint, which demurrer was sustained by the court; and at the trial plaintiff had judgment for $12,500 and interest, but it was adjudged that the plaintiff take nothing in the cause of action set out in his supplemental complaint. Plaintiff appeals from so much of the judgment as adjudged that he take nothing by reason of the facts set forth in his supplemental complaint on file in said action. The case comes up on the judgment roll, without a statement or bill of exceptions.

It is quite apparent from the agreement that the true intent of the parties to it was that if the plaintiff, at the end of one year from the date of the purchase, desired it, the defendants would repurchase the stock, and repay his money, with interest at 10 per cent. The practical effect of this was to treat the sum paid by plaintiff as an investment, upon which he was to have interest, if he so desired, and gave the four months' notice prescribed in the agreement. This he did, as he had a right under the agreement to do, four months before the expiration of the year. The contention of respondents that plaintiff's notice was premature cannot be maintained. The agreement of defendants was to take the stock at the end of one year, if plaintiff desired to sell it. This he could do four months before the expiration of the year. The duty of defendants under their agreement was to take and pay for the stock when, after the four months' notice, it was, on the 20th day of January, 1892, tendered to them, and payment demanded. Not having done so, the question is, can plaintiff recover as damages the assessment which was thereafter, and on the 5th day of May, 1892, levied upon said stock, and which he was compelled under the statutes of the United States to pay and did pay? "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: "(1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such re-sale. (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." Dustan v. McAndrew, 44 N. Y. 72; Dwiggins v. Clark, 94 Ind. 49; Sedg. Dam. (8th Ed.) § 753. The plaintiff here adopted the first of the methods above set forth, and retained the property for the vendees until suit was brought, when he deposited it in court for their benefit. This he had a right to do. Indeed, in all that class of cases where a purchaser of chattels pays the price, but stipulates that, after a trial of the property purchased, or at some future time, he may, if he so desires, return the property, and receive back the price paid, it is usually held that it does not amount in law to a contract to repurchase, but is, upon the exercise of the option, a rescission of the contract, and the title at once vests in the original vendor. Laubach v. Laubach, 73 Pa. St. 387; Thorndike v. Locke, 98 Mass. 340. Be this as it may, it was the duty of the defendants on the 20th day of January, 1892, to receive the stock and repay plaintiff his money, with interest, which they refused to do. One of the results of such refusal was that plaintiff was compelled to pay an assessment of $10,000, subsequently levied upon the stock. Upon a tender by plaintiff and refusal to accept and pay by the defendants, the former held the stock as the trustee for defendants; and, as such trustee, he was entitled to all necessary expenses for which he became liable and paid by virtue of his position. The assessment was a consequential damage, it is true, which arose from the stock standing in the name of plaintiff; but it was a consequence of the refusal of the defendants to take the stock at the time they had agreed to do, and it was a proximate result of their refusal. The vendor of chattels, in cases where the vendee refuses to accept and pay for them pursuant to agreement, and who thereafter holds them as the agent or trustee of the vendee, not only may, but must, at his peril, take care of and protect the property for his principal or beneficiary, and is entitled to compensation therefor as damages consequential of the breach of the contract. This doctrine has been applied to the storage of grain and other personal property, to the feed and care of animals, and to various other expenses incident to the nature, character, and condition of the property. McCracken v. Webb, 36 Iowa, 551. In such cases the loss is the natural result of the breach of the contract, and is so near in its casual sequence to the injury or wrong that the law takes it in the account in its estimate of what is just compensation. Spelling on Private Corporations, at section 501, says: "After a call has been made, the corporation has a cause of action against the shareholder at the time of making it; and this cause of action cannot be extinguished except by its consent. But between the immediate parties the transferrer has recourse against his immediate transferee for such calls and assessments as he has been compelled to pay pending registration,"—citing Castellan v. Hobson, L. R. 10 Eq. Cas. 47. The case cited fully sustains the doctrine enunciated in the text. Were the rule otherwise, one who contracts for the purchase of stock in a corporation to be delivered in the future, upon which he is certain assessments will be levied, may, by violating his contract to receive the stock, devolve upon the vendor the necessity of paying the assessment, and then, if the stock has not been sold, tender payment and demand his stock; or where payment has been made, and the stock delivered, he may, by neglecting his manifest duty to have a transfer made upon the books of the corporation, compel the transferrer to pay future assessments. Such is not the law. One who contracts to purchase stock on a given date must take it at the time indicated in his contract cum onere; and, if he fails to do so, he is liable, not only for the purchase price and interest, but for all assessments levied upon the stock after his breach of the contract which his vendor is compelled to pay thereon. It follows that the court below erred in sustaining the demurrer to the supplemental complaint, and that portion of the judgment appealed from should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer of defendant Havermale to the supplemental complaint, with leave to answer, and that the issues tendered by such supplemental complaint be tried on the merits.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the judgment of the court below as is appealed from is reversed, and the cause remanded, with directions to the court below to overrule the demurrer of defendant Havermale to the supplemental complaint, with leave to said Havermale to answer, and that the issues tendered by such supplemental complaint be tried on the merits.

(4 Cal. Unrep. 733)

Ex parte MURPHY. (No. 21,146.)

(Supreme Court of California. Aug. 4, 1894.)

HABEAS CORPUS—RETURN — EXPIRATION OF SENTENCE—ESCAPES.

When in habeas corpus the sheriff returns that he holds the prisoner by virtue of a commitment to the house of correction for three years, and the commitment bears a date more than three years old, the court cannot consider an unauthenticated statement of dates when the prisoner escaped and was recaptured, and of the date when his term will end, the same being pinned to the sheriff's return, as proof that the prisoner has not in fact served his term.

In bank.

Habeas corpus ex parte Thomas Murphy. Petitioner discharged.

G. E. Colwell, for petitioner.

PER CURIAM. The petitioner was convicted of grand larceny, in the superior court of the city and county of San Francisco, March 1, 1889, and on March 9, 1889, was sentenced to be confined in the house of correction of said city and county for the term of three years. Upon his petition and averment that he is illegally restrained of his liberty by the sheriff of said city and county, a writ of habeas corpus was issued out of this court, directed to said sheriff, and to the said writ the sheriff made return that he holds the petitioner by virtue of a commitment issued under the aforesaid judgment, said commitment consisting of a certified copy of the judgment. As the commitment bears date March 9, 1889, it appears upon its face that the period of confinement for which the petitioner was sentenced has expired, and, as the sheriff presents no other authority for restraining him of his liberty, it follows that he is entitled to be discharged. It was suggested at the first hearing of the matter that the petitioner had in the meantime escaped from the house of correction, and that he had not in fact been confined for the full period of his sentence. Thereupon leave was given to the sheriff to amend his return, for the purpose of showing these facts, but he has failed to make such showing, and again returns that he holds him by virtue of the original commitment. There is attached, by a pin, to the amended return filed by the sheriff, what purports to be a list of dates at which the petitioner escaped, and was recaptured, and the statement of the time when his term of confinement will expire. This list or statement is signed "Chas. Gildea, Supt.," but is not authenticated in any other mode, nor is it in any way referred to by the sheriff, and cannot be considered as giving to that officer any authority to retain the petitioner in his custody. The petitioner is discharged.

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103 Cal. 441

CLUGSTON v. GARRETSON. (No. 19,313.)

(Supreme Court of California. July 27, 1894.)

SLANDER — WORDS ACTIONABLE PER SE — CHARGING ARSON.

It is actionable per se to charge one with setting fire to a wood yard in which is located a warehouse, as such act is arson, under Pen. Code, §§ 447, 448.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by B. D. Clugston against G. G. Garretson to recover damages for slander. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Conklin & Hughes and V. E. Shaw, for appellant. Works & Works and D. L. Withington, for respondent.

VANCLIEF, C. Action for damages alleged to have been suffered by plaintiff in consequence of defamatory words spoken by defendant of and concerning the plaintiff. The following is a copy of the complaint: "(1) That on the 7th day of March, 1893, a warehouse in a yard owned by the Pacific Wood and Coal Company was set on fire, and it was suspected that it had been feloniously set on fire. (2) That on the 7th day of March, 1893, at San Diego, the defendant, in the hearing of C. K. Stewart and sundry other persons, spoke of and concerning the plaintiff the false and scandalous words following, to wit: 'Clugston set fire to the yard; set fire all along here.' And that upon the 8th day of March, 1893, in the presence of Thomas Croghan and sundry other persons, the said defendant spoke of and concerning the plaintiff the false and scandalous words following: 'Clugston made a good job of it. Clugston set the yard afire. He was seen going out of the yard ten or fifteen minutes before the fire broke out.' And upon the 8th day of March, 1893, in the presence of Herman Mosher and sundry other persons, the said defendant spoke of and concerning the plaintiff the false and scandalous words following, to wit, 'Clugston set the fire.' (3) That the defendant meant thereby, and was so understood by those hearing him, that the plaintiff had feloniously set fire to said yard. (4) That the said words were false and defamatory. That the plaintiff has sustained damage by reason of said false and scandalous words in the sum of twenty thousand dollars. Wherefore the plaintiff prays judgment against the defendant in the sum of twenty thousand dollars." Defendant demurred to the complaint on the ground "that it does not state a cause of action." The demurrer was overruled, and defendant answered as follows: "Comes now the defendant, and by leave of court files this, his amended answer, and admits the allegations of paragraphs 1 and 3 of said complaint; admits that he spoke concerning the plaintiff the words alleged in paragraph 2 of said complaint to have been spoken by him. But denies that said words, or any of them, were either false, scandalous or defamatory; on the contrary, this defendant, upon information and belief, alleges that each and all of said words charged to have been spoken by him are true. Defendant denies that plaintiff has sustained damage by reason of said words used by defendant, or any of them, in the sum of twenty thousand dollars, or any other sum. And, further answering, defendant avers: That at the time at which said words were spoken by him certain litigation was pending between plaintiff and this defendant, with others, over an election of a board of directors of the Pacific Wood and Coal Company, and involving the right to possession and control of the said yard, and this defendant, with his associates, had acquired possession and control of said yard, and was in possession at the time of said fire, to wit, March 7, 1893; that by reason of this, defendant and his associates being in control and possession of said yard, and by reason of defendant and others then in possession of said yard preventing said Clugston from gaining control and possession thereof, and carrying on the wood and coal business in the name of said Pacific Wood and Coal Company, he, the said Clugston, became greatly angered and exasperated, and made numerous threats of doing bodily harm to this defendant and others in control of said yard as well as the management of the business of said company, and at divers times expressed himself, in substance, 'that he would rather see the property destroyed than be in the possession and control of defendant and his associates,' all of which was known to this defendant at the time he spoke the words set forth in paragraph 2 of said complaint." The jury returned a general verdict for plaintiff, assessing the damage at $800; and also a special verdict on issues submitted by the court to the effect: (1) That at the times the words were spoken, and at the time the answer was filed, the defendant believed the words spoken were true, and that facts known to defendant and information given to him warranted such belief; (2) that defendant was not guilty of actual or express malice, and that nothing was found or allowed as exemplary damages; (3) that before filing his amended answer the defendant endeavored in good faith to ascertain whether the charge made by him against the plaintiff was true; (4) but that the words spoken were false. Judgment was rendered for plaintiff in accordance with the general verdict, and defendant brings this appeal from the judgment on the judgment roll containing a bill of exceptions to instructions given to the jury at request of the plaintiff.

1. It is contended that the court erred in overruling defendant's demurrer for the reason that the words alleged to have been spoken by defendant are not per se actionable. It is claimed that the words spoken charge plaintiff with having set on fire only the yard in which the warehouse stood, and that setting fire to a yard is not arson nor any other crime. This, I think, is erroneous in two respects: In the first place, the yard in which the warehouse is alleged to have been set on fire should be regarded prima facie as "appurtenant to or connected with" the warehouse, and therefore within the definition of the word "building" given in section 448 of the Penal Code; and the yard being so appurtenant to or connected with the warehouse, the setting of it on fire was arson. Pen. Code, §§ 447, 448. In the second place, it is alleged that "a warehouse in a yard * * * was set on fire," and that on March 8th, in the presence of Mosher and others, defendant said, "Clugston set the fire." Under the circumstances alleged, these words obviously meant that Clugston set fire to the warehouse, and must have been so understood by Mosher and others to whom they were spoken; and no innuendo was necessary to show the meaning. That he had said to others on March 7th that "Clugston set fire to the yard all along here," and "made a good job of it," is not inconsistent with what he said to Mosher and others on the next day. It was not necessary to allege that the warehouse was consumed or destroyed by the fire. Pen. Code, § 451. If distinct causes of action are not separately stated, or not stated with sufficient certainty, these defects were waived. Code Civ. Proc. § 434. As having a general bearing on the question of sufficiency of the complaint, the following cases are referred to: Chamberlain v. Vance, 51 Cal. 75; Fleming v. Albeck, 67 Cal. 226, 7 Pac. 659; Thompson v. Barkley, 27 Pa. St. 263. I think the complaint is sufficient to stand the test of a general demurrer.

2. The only ground of objection to instructions given to the jury is that they assume that the words admitted to have been spoken under the circumstances alleged in the complaint and answer imputed to plaintiff the crime of arson. As above shown, the words alleged to have been spoken are actionable per se. The answer expressly admits the speaking of the words under the circumstances alleged in the complaint, and alleges no circumstance tending to show that they were spoken, or intended to be understood, in any other than their proper and ordinary sense; but does allege circumstances in mitigation, tending to show that defendant had reason to believe that plaintiff did set fire to the property, and a motive for imputing the crime to him. The first two instructions given embody and sufficiently exemplify the only ground of objection to instructions. They are as follows: "This is an action for slander for words alleged to have been spoken by the defendant, charging the plaintiff with the crime of arson. The defendant admits the speaking of the words, but alleges that the words spoken were true, and sets up certain mitigating circumstances." "Under these pleadings no proof was necessary on the part of plaintiff to make out his case. The defendant having admitted the speaking of the words, the law presumes that the words were both false and malicious. Therefore the burden of proving the truth of the words or any facts tending to mitigate the damages was on the defendant." At request of defendant the court, among others, gave the following instructions: "If the jury do not find the plea of justification to be true, but do find the defendant guilty, then the jury, in estimating the amount of plaintiff's damages, may take into consideration any facts proven tending to show whether or not the utterance of the words complained of was made by the defendant in the belief that they were true. Though the jury may believe from the evidence that the defendant was guilty of speaking the words charged in the complaint, and that said words are untrue, still, if the jury find from the evidence that the words were spoken without actual malice on the part of defendant, but in good faith believing them to be true, then, and in that case, the verdict of the jury should be confined to the actual damages sustained by plaintiff." I think the jury were properly instructed, and that the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 498

MODOC COUNTY v. SPENCER et al. (No. 18,291.)

(Supreme Court of California. Aug. 6, 1894.)

COUNTIES—EMPLOYING COUNSEL IN CRIMINAL CASES.

1. Neither under County Government Act, § 25, subd. 17, empowering the board of supervisors to direct the management of suits to which the county is a party, and to employ counsel to assist the district attorney therein, nor under Id. subd. 36, empowering it to authorize the district attorney to appoint an assistant, if need be, nor under any inherent general power undefined by statute, has the board power to employ counsel to assist in the prosecution of criminal cases.

2. In a suit by a county through its district attorney to restrain the treasurer from paying a warrant the payee of the warrant is a proper party defendant.

Department 1. Appeal from superior court, Modoc county; C. L. Claflin, Judge.

Suit by the county of Modoc against Spencer & Raker and others for injunction. Judgment for plaintiff. Defendants appeal. Affirmed.

Spencer & Raker and Clarence A. Raker, for appellants. G. D. Goodwin, E. E. Copeland, and Atty. Gen. Hart, for respondent.

VAN FLEET, J. The substantive question in this case is as to the power of a board of supervisors to employ counsel on behalf of the county to prosecute or assist in the prosecution of criminal cases. The board of supervisors of Modoc county, on the 7th day of July, 1891, adopted an order or resolution in the following terms: "Upon motion, and with full consent of the board, it is ordered that the firm of Spencer & Raker be, and are hereby, employed and appointed as assistant counsel with the district attorney to aid in the prosecution of all criminal cases now pending before the superior court of Modoc county, at the agreed sum of $600 as full compensation for all services." And thereafter, on the 9th day of October, 1891, as a sequence of the foregoing, adopted a further order or resolution, of which the following is a copy: "On motion of Supervisor Wylie, seconded by Supervisor Cannon, it is ordered that the auditor be instructed to draw a warrant on the treasurer for three hundred dollars, as part payment for legal services rendered by Spencer & Raker for the county, in conformity with a previous order of the board of supervisors made, employing the said Spencer & Raker to assist the district attorney in the prosecution of criminal cases pending in the superior court of Modoc county, California, against Denis O'Brien and T. B. Reese." In pursuance of this last-recited order the auditor drew his warrant in favor of said Spencer & Raker as therein directed, and this action is brought by the county, through its district attorney, to restrain the treasurer from paying it. Judgment went in favor of the county, from which defendants appeal. If the board had no power to employ counsel for the purposes indicated, the judgment is right; otherwise not. We can find no authority in the law to sustain the action of the supervisors in the premises. Boards of supervisors are creatures of the statute, the constitution (article 22, § 5) providing that the legislature shall provide for their election or appointment, and prescribe their duties. The authority for any act must, therefore, be sought in the statute. The only provisions looking to such power as was here attempted to be exercised which have been called to our attention are found in section 25 of the county government act (St. 1891, pp. 304–307), which takes the place of the provisions of the Political Code on the subject. Subdivision 17 of that section gives the board power "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same." Subdivision 36 of the same section gives it power "to authorize the district attorney to appoint an assistant district attorney, if in their judgment it may be necessary, for the proper discharge of the duties of the district attorney, and to allow such assistant district attorney such compensation for his services as they may determine, not to exceed, unless otherwise in this act provided, the sum of fifteen hundred dollars per annum." It cannot be successfully contended that the first of these provisions gives any warrant for the action of the board in this case. That provision is evidently intended to empower the supervisors to protect the rights of the county in any litigation it may have involving its property or other substantial rights. The power is in terms restricted to suits "to which the county is a party," and while possibly, in a proper case, it might be construed to include actions or proceedings in which the county, while not nominally a party, nevertheless has a direct, substantial interest or right of property involved, it can have no application to the character of cases referred to in the orders of the board in question. The county was in no sense a party to those cases, nor had it any rights litigated therein. They were criminal cases, prosecuted in the name and on behalf of the people of the state. They involved no interest of the county in any sense other than such interest as the county had in common with every other county and all the people of the state in upholding the administration of the law. The fact that the county, as an instrument of the law, pays the expense of criminal prosecutions, confers no such right or interest as that contemplated by the act. It is equally apparent that subdivision 36 has no application to the facts. That provision contemplates the appointment by the district attorney, under authorization of the supervisors, of an assistant district attorney, who takes an official oath as an officer of the county, and under the authority, direction, and control of his principal assists in the performance of any and all duties pertaining to the office. It does not contemplate the employment by the supervisors of special counsel, who may or may not be acceptable to the district attorney, to take part in particular cases. There is no sort of analogy between the purpose of subdivision 36 and that aimed at in the proceedings of the board in this instance, and the suggestion that the action of the board may be upheld as a substantial compliance with that provision is without weight. In fact, it does not seem to be very seriously contended that either of these provisions warranted the act of the board, but it is strongly urged, in effect, that it was within the inherent, general power of the board, in the absence of special provision, to provide for the proper prosecution of these cases. But we know of no such inherent or undefined power in the board of supervisors. Their powers being purely statutory, their every act must find its warrant in the statute, either expressly or by necessary implication. Robinson v. Supervisors, 16 Cal. 208; San Joaquin Co. v. Jones, 18 Cal. 327; Foster v. Coleman, 10 Cal. 279; Linden v. Case, 46 Cal. 171. The legislature having specified certain cases in which such power may be exercised, there is no implication that she intended it to be exercised in others. "Expressio unius est exclusio alterius." In fact an examination of all the provisions of the statutes bearing upon the subject leads to the conclusion that it never was intended that the board of supervisors should be permitted to control or interfere with criminal prosecutions or with the district attorney in their management. The district attorney, in the discharge of the duties of his office, performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While, in the former capacity, he represents the county, and is largely subordinate to and under the control of the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state. Const. art. 6, § 20; County Government Act, § 136. If he fails for any reason to appear at the trial in a criminal case for the discharge of his duty, the court is authorized to designate some competent attorney to take his place for the occasion (Pen. Code, § 1130); and if at any time it is deemed essential for the public service that he have assistance in this behalf it is made the duty of the attorney general to go to his aid (Pol. Code, § 470, subd. 7). It is said that what was done here has been frequently done by boards of supervisors in other counties. We are not disposed to question this assertion, nor the perfect good faith of the board in this instance. Many acts done by boards and officers in the supposed discharge of their duty and in the best of faith do not find sanction in the law, and for a time pass current because unchallenged; but that fact cannot weigh in favor of their validity when eventually called into question. The action of the board, being without authority, was void, and created no legal claim against the county. "It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and, if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability." Linden v. Case, supra.

The other questions, as we have indicated, do not demand extended notice. The demurrers were properly overruled. The complaint stated a cause of action, and, while Spencer & Raker were perhaps not necessary parties, they were nevertheless proper ones. The answer did not contain any defense to the action, and the court did not err in its disposition of it. Nor was there any substantial error in the manner of entering judgment; it was in effect a judgment on the pleadings. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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103 Cal. 484

RIALTO IRRIGATING DIST. v. BRANDON et al. (No. 19,341.)

(Supreme Court of California. July 20, 1894.)

EMINENT DOMAIN—RIGHTS OF IRRIGATION COMPANY—PLEADING—EVIDENCE.

1. Laws 1887, p. 29, authorized plaintiff to construct waterworks for irrigation, and section 12 gave it power to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works * * * and all necessary appurtenances." *Held* to authorize taking land for constructing a pipe line.

2. The complaint alleged that, in order to properly irrigate the lands in the district, it was necessary to construct a pipe line across defendant's land, which adjoins the district. *Held* sufficient to show the use a public one, and the taking necessary.

3. It was proper to admit the decree of the superior court confirming the proceedings for plaintiff's organization to establish the facts therein stated.

4. It was not necessary to show there was no other way than the one designated by which the water could be brought.

Department 1. Appeal from superior court, San Bernardino county; C. W. Rowell, Judge.

Action by the Rialto Irrigating District against J. R. Brandon and others to condemn a right of way for a pipe line over defendants' land. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph R. Brandon, for appellants. Walter Bordwell, for respondent.

VAN FLEET, J. Plaintiff is an irrigation district formed under the law of 1887 (St. 1887, p. 29), commonly known as the "Wright Act," having its location in San Bernardino county. In constructing its works for the purpose of supplying water for irrigation purposes to the inhabitants of the district, it was found necessary, to complete a proper irrigation system, to lay a certain pipe line, described in the complaint, across lands belonging to the defendants. This action was brought for the purpose of condemning a right of way for such pipe line. Judgment went for plaintiff, condemning the necessary way, and assessing damages for the taking in favor of defendants, with costs. The appeal is from the judgment and an order denying a new trial. The appeal is without merit.

1. The demurrer to the complaint was properly overruled. The objection that power is not given under the act to condemn property for the purposes sought is untenable. The argument is that the act provides only for the construction of ditches and canals, and that this does not include pipe lines. The act provides for the construction of a "system of works" to irrigate the lands within the district, and by section 12 the board is given the right to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works * * * and all necessary appurtenances." This language is broad enough to include pipe lines, flumes, or other conduits usually employed in works of the kind for conveying water, even if not necessarily included in the terms "ditches and canals." The complaint, after alleging plaintiff's organization into an irrigation district, and the purpose of its organization, shows that the object sought by the use is to provide water for irrigating lands within the district, particularly describing such lands; that the defendants own the land over which the right of way is sought, particularly describing it, and that such land adjoins plaintiff's district, and constitutes its boundaries on two sides,—the north and west; that, in order to properly irrigate the lands in the district, it is necessary to construct the pipe line (which is particularly described) across the defendants' land at the point designated; and that the right of way is sought for the purposes of establishing and maintaining such pipe line. The complaint is also accompanied by proper maps, which are made part of it, showing survey and delineation of the proposed line upon the ground. This was sufficient to show that the use is a public one, and that the taking is necessary to such use. Cummings v. Peters, 56 Cal. 596. There is nothing in the further point urged against the complaint. The rule there contended for is not a rule of pleading, but of evidence.

2. It was not error to admit the decree of the superior court confirming the regularity of the proceedings for plaintiff's organization as an irrigation district to establish the facts therein decreed. The proceeding in which that decree was rendered was a proceeding in rem, had and authorized for the express purpose of fixing the legal status of the corporation, and that decree concluded the whole world upon all the questions involved. Crall v. Irrigation Dist., 87 Cal. 140, 26 Pac. 797.

3. The evidence was sufficient to sustain the finding that the right of way was a public use, and a necessity. It was not necessary for plaintiff to show that there was absolutely no other way but the one designated in its complaint by which the water could be brought on its land. The fact that it might have been possible, as shown by the evidence, by going a long way around, and condemning other lands, at a much greater expense, to accomplish the purpose sought, is immaterial. We have examined the various other assignments, and do not regard them as requiring special mention. We find no error in the record, and the judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

103 Cal. 503

In re YOAKAM'S ESTATE. (No. 19,383.)

(Supreme Court of California. Aug. 6, 1894.)

NEW TRIAL—NOTICE OF MOTION—SPECIFICATIONS.

1. Code Civ. Proc. § 659, subd. 4, providing that when the motion for new trial is to be made on the minutes, for insufficiency of the evidence to justify the verdict, the notice must specify the particulars in which the evidence is alleged to be insufficient, does not require said notice to be more specific than so as clearly to show the court and adversary the points relied on.

2. Where the record does not state the evidence given at the trial, the supreme court may presume that it authorized the court to order a new trial, under Code Civ. Proc. § 662, of its own motion, for manifest passion or prejudice.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

In the matter of the estate of Emily R. Yoakam, deceased, on contest as to undue influence used in procuring execution of will. Trial by jury, and verdict for contestant. New trial granted, and contestant appeals. Affirmed.

Clarence A. Miller, for appellant. McLachlan & York, for respondents.

BELCHER, C. Emily R. Yoakam died in the county of Los Angeles, leaving an alleged last will which was dated March 4, 1893. The respondents filed in the court below the said will, and their petition asking that the same be admitted to probate. In due time the appellant appeared and contested the probate thereof, upon the grounds, among others, that its execution was procured by the undue influence of certain persons, none of whom were named therein as legatees or executors. A general denial of all the allegations contained in the written grounds of opposition was filed by respondents. By agreement, the issue as to the alleged undue influence in procuring the execution of the will was submitted to a jury, and by their verdict the jury found in favor of appellant on that issue. Subsequently, on motion of respondents, the court made and entered its order granting a new trial of the contest, and from that order this appeal is prosecuted. The notice of the motion for a new trial stated that the motion would be made upon the minutes of the court, and upon the ground that the evidence was insufficient to justify the verdict. Appellant contends—and this is the only point made for a reversal—that the notice did "not properly or at all specify the particulars in which the evidence was alleged to be insufficient, as required by subdivision 4 of section 659 of the Code of Civil Procedure, and that the motion should therefore have been denied." The specifications contained in the notice are as follows: "The evidence was insufficient to justify said verdict, in this: The evidence showed that the said alleged will was signed by the testatrix, in the presence of the subscribing witnesses thereto, on the 4th day of March, 1893, and that she at that time requested said subscribing witnesses to sign the same as witnesses, and that they signed the same on that day, as such witnesses, at her request, and in her presence; that the said decedent, at the time of the signing of the said alleged will, declared the same to be her will, and that she was at that time, and always, of sound mind, and competent to make a will, and that she was not at that time, or ever, under undue influence or influenced by fraud; that there was no undue influence, or any influence, exerted at that time, or ever, over decedent, in the making of said alleged will, or with reference thereto, by Dr. Hodge, Henrietta Davis, Minda Davis, D. W. Davis, or either of them, or by any one, and that the evidence shows that the said alleged will provides for an equitable distribution of the estate of the decedent among the proper subjects of her bounty, and is fair and just in its provisions."

The object of the specifications required by the statute is clearly to direct the attention of the court and adverse party to the particular point on which the evidence is claimed to be insufficient, and when this object is accomplished they will be held sufficient. McCullough v. Clark, 41 Cal. 298; Eddelbuttel v. Durrell, 55 Cal. 279; Newell v. Desmond, 63 Cal. 242. The specifications complained of are in substance not unlike those approved in Harnett v. Railroad Co., 77 Cal. 32, 20 Pac. 154; and, as said in that case, "it would be difficult to state in more specific terms the particular points of insufficiency on which the moving party proposed to rely in its proceeding for a new trial." In our opinion, therefore, they must be held sufficient to meet the requirements of the statute. Besides, the record contains no statement of any of the evidence given at the trial, and, so far as we can know, it may have been such as would have authorized the court, under the provisions of section 662, Code Civ. Proc.,[1] to grant a new trial on its own motion, without any application therefor. But the rule is well settled that all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear in the record. We advise that the order appealed from be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

103 Cal. 530

DAVIS v. HART. (No. 19,401.)

(Supreme Court of California. Aug. 13, 1894.)

Appeal—Failure to File Brief—Reversal.

On appeal, where respondent fails to file a brief or make oral argument, and the findings are attacked for insufficiency of evidence to uphold them, the judgment will be reversed.

Department 2. Appeal from superior court, Kern county; R. A. Conklin, Judge.

Action by Alfred A. Davis against Josiah H. Hart. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

A. Rousseau and J. A. Haralson, for appellant. Mahon & Laird, for respondent.

FITZGERALD, J. There is no brief on file by respondent, nor was the case orally argued in his behalf. As the record shows that the findings are attacked by the specifications on the ground of the insufficiency of the evidence to support them, it follows, on the authority of Richter v. Irrigation Co. (Cal.) 36 Pac. 96, that the judgment and order appealed from should be reversed. So ordered.

We concur: McFARLAND, J.; DE HAVEN, J.

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[1] Code Civ. Proc. § 662, permits the court, of its own motion, to grant a new trial when the jury has so plainly disregarded the instructions or the evidence as to satisfy the court that they misunderstood the instructions, or acted under passion or prejudice.

103 Cal. 594

BANK OF SAN LUIS OBISPO v. PACIFIC COAST STEAMSHIP CO. (No. 19,363.)

(Supreme Court of California. Aug. 22, 1894.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—LIMITATION OF ACTIONS.

Under Code Civ. Proc. § 359, requiring actions to enforce a liability against stockholders of a corporation to be brought within three years after the liability is created, an action to enforce the liability on a note of a corporation must be brought within three years of its date.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the Bank of San Luis Obispo against the Pacific Coast Steamship Company. There was a judgment for plaintiff, from which defendant appealed. Reversed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondent.

BELCHER, C. This action was commenced on the 3d day of June, 1890, to recover from the defendant, as a stockholder in the San Luis Hotel Company, a corporation, its proportion of an indebtedness alleged to be due from said hotel company to the plaintiff. It is averred in the complaint that at all the times mentioned therein the capital stock of the San Luis Hotel Company was $75,000, divided into 750 shares of the par value of $100 each, and that the defendant was the owner of 92.14 shares of the said stock; "that on the 30th day of December, 1886, said corporation, the San Luis Hotel Company, borrowed from the plaintiff, and the plaintiff loaned and advanced to it, said San Luis Hotel Company, the sum of $29,177.66, and on said day the said San Luis Hotel Company gave its promissory note to the plaintiff for said sum of $29,177.66, which note is in the words and figures following, to wit" (then setting out a copy of the note, dated December 30, 1886, and payable six months after date). It is further averred that on or about the 11th day of April, 1890, an action was commenced against the said hotel company to recover the amount due on said note for principal, interest, attorney's fees, and costs, and that, on or about the 30th day of the same month, judgment was duly made and given in said action against the defendant therein, and in favor of the plaintiff herein, for the sum of $8,237.93; that afterwards an execution was issued upon the said judgment, and returned wholly unsatisfied, and that the proportion of said indebtedness for which the defendant was individually and personally liable was $2,105.07, with interest thereon from the date of said judgment; and that no part thereof had been paid. The defendant demurred to the complaint upon the grounds that the cause of action was barred by the provisions of subdivision 1 of section 338, and by the provisions of section 359, of the Code of Civil Procedure. The demurrer was overruled, and the defendant then answered, and, among other defenses set up, pleaded in bar of the action the same provisions of the Code. The case was tried, and the court found, among other things, that the action was not barred, and that the plaintiff was entitled to judgment for the sum of $1,251.63, with costs. Judgment was accordingly so entered, from which the defendant appeals.

The demurrer should have been sustained. The action was commenced more than three years and five months after the date of the note set out. The cause of action appeared, therefore, on the face of the complaint, to be barred by the statute of limitations. It must now be regarded as settled law in this state that the liability of a stockholder of a corporation to pay his proportion of its corporate debts is one created by statute, and an action to enforce that liability must be brought within three years after the cause of action accrues. Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335. In the case last named, it was held that the liability of a stockholder of a corporation upon a note given by the corporation is created, within the meaning of section 359 of the Code of Civil Procedure, at least as early as the date of the note; and the statute of limitations commences to run in favor of the stockholder from the date of its execution, and not from its maturity, regardless of how long the liability of the corporation to actions may be postponed by agreement of the creditor. The judgment should be reversed, and the cause remanded.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded.

4 Cal. Unrep. 741

ULLRICH v. SANTA ROSA NAT. BANK.

(No. 15,624.)

(Supreme Court of California. Aug. 20, 1894.)

PARTIES—PRESUMPTIONS ON APPEAL.

1. In an action to recover money deposited by plaintiff with defendant under an agreement that it is to be paid to a third person on condition that the latter deliver a deed to plaintiff within a certain time, such person is not a necessary party.

2. Where, on appeal, the record does not contain the evidence, and findings of fact were waived, it will be presumed that the allegations of the complaint were proven, and that the affirmative allegations in the answer were not.

Department 1. Appeal from superior court, Sonoma county.

Action by one Ullrich against the Santa Rosa National Bank. There was a judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Swain and J. A. Barham, for appellant. Albert G. Burnett and J. M. Thompson, for respondent.

HARRISON, J. It is alleged in the complaint that on the 9th of December, 1892, the plaintiff deposited with the defendant the sum of $750, and that at the same time it was agreed between him and one Hattie C. Brown that she would, within three weeks from that time, "furnish" the plaintiff with a deed of conveyance of certain land in Sonoma county, and that thereupon the defendant should pay her the money so deposited, and that if she should fail to so furnish the deed the defendant should return the money to the plaintiff; that said money was accepted by the defendant upon and subject to this condition and agreement; that Mrs. Brown has entirely failed to furnish the deed; that on the 26th of September, 1893, the plaintiff demanded of the defendant the return of the money, which was refused; and that the defendant, at the time of such demand, knew that Mrs. Brown had failed to furnish the deed. Judgment was asked against the defendant for the amount so deposited with it. The defendant demurred to the complaint upon the ground that there was a defect of parties defendant, in that Mrs. Brown was a necessary party to the suit. The demurrer was overruled, and the defendant answered the complaint, denying all its allegations, and setting up certain affirmative matters of defense. The cause was tried by the court without a jury. Findings of fact were waived, and judgment was rendered for the plaintiff, as prayed in his complaint. The defendant has appealed from the judgment upon the judgment roll alone, without any bill of exceptions.

1. The demurrer was properly overruled. The complaint does not show that Mrs. Brown was in any way interested in the matter in litigation, or that her presence was necessary to a determination of the rights of the plaintiff and defendant to the money in controversy. The allegations of the complaint are to the effect that the money had been received by the defendant from the plaintiff upon the condition and agreement that, if Mrs. Brown did not furnish to the plaintiff a certain deed within three weeks from the date of the deposit, the money was to be returned to the plaintiff, and that she had not furnished such deed. This is but the ordinary averment of an agreement for the payment of money upon the happening of an event, and that the event had happened. If these averments are true, the defendant is liable to the plaintiff for the money.

2. If there were any facts, not appearing upon the face of the complaint, which would render Mrs. Brown a necessary party, whose presence was essential to the determination of the controversy, those facts could have been presented by the defendant in its answer; and the court would thereupon, upon its motion, have ordered her to be brought in as a defendant. Code Civ. Proc. § 389. So, too, if Mrs. Brown had set up any claim to the money held by the defendant, the defendant could have alleged that fact in its answer; and if it could have shown the facts required by section 386, Code Civ. Proc., it could, under the provisions of that section, have had her substituted as a defendant in its place, and procured a discharge from any liability for the money. Defendant did not, however, pursue either of these courses, but chose to defend its right to retain the money by a mere traverse of the allegations of the complaint.

3. As the record does not contain any of the evidence at the trial, and as findings of fact were waived, we must assume, in support of the judgment, that the allegations of the complaint were sustained by the proofs, and that the affirmative allegations of the answer were not so sustained. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

103 Cal. 541

ESREY v. SOUTHERN PAC. CO. (No. 15,440.)

(Supreme Court of California. Aug. 15, 1894.)

RAILROAD COMPANIES — INJURIES TO PERSON ON TRACK — PROXIMATE CAUSE — FINDING — SUFFICIENCY OF EVIDENCE — WILLFUL NEGLIGENCE — QUESTION FOR JURY.

1. Plaintiff negligently went between defendant's railroad track and a high platform in front of moving flat cars. The track and platform were about three feet apart, and she stood in the space between them while one or more cars passed her, and was seen by the brakemen. A box car, wider than the flat cars, was

then attached, and moved in the opposite direction until it struck plaintiff. *Held*, that the facts justified a finding for plaintiff.

2. It appeared that after plaintiff was struck she threw herself on the ground, to save her life, and the brakeman saw her, and gave the engineer an additional signal to proceed, and the train moved on. *Held*, that the question of the wantonness of defendant's employés was for the jury.

3. In an action against a railroad company for personal injuries caused by its negligence, an amendment alleging that the acts of defendant were willfully done does not materially alter the cause of action, so as to make a plea of limitations available.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Nannie Esrey against the Southern Pacific Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Foshay Walker, for appellant. Justin Jacobs and Bradley & Farnsworth, for respondent.

GAROUTTE, J. Plaintiff recovered a judgment for damages against defendant for personal injuries sustained by being struck by a moving car of defendant. Defendant has appealed from the judgment and order denying a motion for a new trial. The case has once been before the court (88 Cal. 399, 26 Pac. 211), and a detailed statement of the facts may there be found. For our present purposes, the following facts, as testified to by plaintiff, are deemed material: Upon attempting to leave the depot grounds of defendant, and with a view of going around the end of the depot platform, plaintiff crossed the railroad track, and thereupon found herself between the outside rail of the track and the platform of the depot, which platform was about five feet in height, and the width of this intervening space was about three feet. At this moment of time a train came backing towards her, composed of flat cars, which prevented her going further; and for her own safety she stood against the side of the platform, with the object of allowing the cars to pass by. The original width of this space being but three feet, and the cars extending some distance outside and beyond the track, it is apparent that plaintiff, at this time, was in such close quarters as to be not only in an unpleasant position, but, it may be said, a dangerous one; and it will be further conceded that she found herself in that position by reason of her own thoughtlessness and want of care. One or more cars passed her at this time, and there is no question but that the two brakemen, and possibly the engineer and fireman, saw her standing in this position. The train was backed a short distance beyond the point where she stood, when it stopped a moment. A box car was attached thereto, and it then started to retrace its course. When the box car came to the point where plaintiff was standing,—it being wider than the flat cars, and leaving a space next to the platform of not more than 14 inches,—it inevitably struck her, and the injury resulted.

Upon the foregoing state of facts, we think the jury entirely justified in finding a verdict in favor of plaintiff. By her own negligence she placed herself in a position of danger, but defendant was aware of her danger, and did not exercise ordinary care to protect her from the danger that surrounded her. Under these conditions the law gives the injured person a right of action. This right of action is based upon the principle that a failure to exercise ordinary care by a defendant, under such circumstances, amounts to a degree of reckless conduct that may well be termed willful and wanton; and, when an act is done willfully and wantonly, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Some text writers and courts declare the same principle, in another form, by holding that under these circumstances the contributory negligence of the party injured is not the proximate cause of the injury, but that the negligence of the defendant, being the later negligence, is the sole proximate cause. As has been said by one of our law reviews, "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." As fully sustaining these general principles, see Shear. & R. Neg. § 99; Cooley, Torts, p. 674; Romick v. Railroad Co., 62 Iowa, 167, 17 N. W. 458; Williams v. Railroad Co., 72 Cal. 120, 13 Pac. 219; Needham v. Railroad Co., 37 Cal. 409; Robinson v. Railroad Co., 48 Cal. 423; Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834.

In addition to the foregoing statement of facts, it further appears that after plaintiff had been struck by the car, and had thrown herself upon the ground to save her life, the brakeman saw her in this most dangerous position, and instead of stopping the train, and removing her from still greater threatened calamities, he gave an additional signal to the engineer to proceed, and the train moved on, plaintiff remaining in this dangerous position. Even though the employés were not aware at this time that she had been injured by the car, we think, taking this circumstance into consideration, in connection with all the other circumstances which we have stated, the question as to the wantonness and willfulness of the employés' acts in moving the train was a question of fact, which the jury were well justified in finding against the defendant. To commit an act recklessly is to commit it wantonly; and in this case the manner in which this train was moved after the box car was attached, the employés knowing the dangerous position of the plaintiff at the time, indicated such a spirit of reckless indifference on their part towards the plaintiff's safety that the jury were justified in saying that their act was willful and wanton; and it was a most fortunate circumstance that plaintiff's life was not the forfeit of defendant's conduct.

In view of the suggestion of the court made at the time the case was previously before us, the plaintiff, prior to the present trial in the court below, amended her complaint by charging the acts of the defendant to have been willfully and wantonly done. Conceding this form of allegation necessary to support the judgment,—and the law of the case would seem to so declare,—still we do not think the cause of action has been materially altered by the amendment, and consequently the plea of the statute of limitations is not well taken. The amendment pertains wholly to the manner in which the injury was inflicted, and actual damage is all that is sought to be recovered. The gist of the action is a claim of actual damages for personal injuries inflicted by defendant's moving cars, and these are the facts found stated in the original complaint. Appellant, to support its contention, relies upon various cases cited from the later Indiana Reports. The courts of that state, in declaring the law upon this question, have drawn the lines very closely around the injured party, and have declared the law against him in cases where we think the better doctrine, and the one most generally approved, would have declared in his favor. In this state the principle recognized and adopted does not go to the lengths found in the language of those decisions. And the case of Railway Co. v. Bryan, 107 Ind. 51, 7 N. E. 807, seems to state the rule more liberally in favor of a plaintiff seeking to recover for personal injuries upon the present lines than has been done by other Indiana cases preceding it.

The appeal from the order denying the motion for a new trial has been heretofore dismissed, and, as a result, it will not be necessary to consider some of the questions discussed in appellant's original brief. But, regardless of the claim upon the part of the respondent that the evidence cannot be considered upon this appeal, as will be observed, we have carefully considered it. We think the motion for a nonsuit was properly denied, and that there is no valid objection to the law given to the jury.

Whatever may have been said by the court in the former appeal as to the character and weight of evidence was said expressly in view of the fact that the willfulness and wantonness of the acts of defendant were not matters before the court; and for these reasons we are not called upon to compare the evidence disclosed by the record in that case with the evidence now before us, for the purpose of showing any existing differences therein, and thus avoiding the binding effect of the principle of the law of the case. It is conclusively shown that the evidence was considered in the light of the complaint then before the court, and in that light alone, when we look to the language of the opinion. It is there said: "But the defendant's employés saw her in time to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and, if necessary, compelled her to get out of harm's way." If such was the duty of the brakemen (and we have no doubt of it), the defendant was liable in damages for a violation of that duty; for the brakemen did not stop the train, and allow or compel the plaintiff to remove from her dangerous situation. And the language used by the learned commissioner indicates that if the complaint had been sufficiently broad in its allegations the judgment would not have been reversed. For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(103 Cal. 528)

WHITE v. HARRIS et al. (No. 19,339.)

(Supreme Court of California. Aug. 13, 1894.)

STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—VALIDITY.

1. Failure to form a district on which should be chargeable the expense of constructing a sewer, as provided by Act March 18, 1885, does not render void an assessment for a sewer, as Act March 18, 1885, as amended by Act March 14, 1889, authorizes the construction of sewers without the formation of such district.

2. Under Act March 18, 1885, providing that the superintendent of streets shall fix the time for the commencement of work to be performed under a contract for the construction of sewers, "which shall not be more than 15 days from the date of the contract," a contract providing that the work shall be commenced within 15 days sufficiently fixes the time.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by S. White against Charles T. Harris and others. From a judgment for defendants, plaintiff appeals. Reversed.

John T. Jones, for appellant. Wells, Monroe & Lee, Allen & Flint, and M. T. Allen, for respondents.

FITZGERALD, J. Action to foreclose a lien alleged to have been created by an assessment upon the defendants' lot for the construction of a sewer in front thereof, and along the streets described in the complaint. A general demurrer to the complaint was sustained by the court, and, upon plaintiff declining to further amend, judgment was given for the defendants, from which judgment plaintiff appeals upon the judgment roll alone.

The only ground urged here, upon which the complaint was held to be insufficient by the court below, is that it failed to allege the formation of a district upon which should be chargeable the expense and cost of constructing the sewer, as required by section 27 of the act approved March 18, 1885. As this act and the act amendatory thereof, approved March 14, 1889, furnish, independent of the section referred to, ample authority for the construction of sewers by a city without the formation of a district to be assessed for that purpose, and also provide for the payment of the expenses and costs thereof by an assessment upon the lots or land fronting upon the streets along which such sewer is constructed, it follows that the court below erred in sustaining the demurrer on this ground.

The remaining point raised in support of the demurrer, that the contract under which the sewer was constructed did not fix the date for the commencement of the work, as required by section 6 of the said act of 1885, is not well founded. The contract set out in the complaint provides as follows: "Work to be commenced within fifteen days." Section 6, referred to, provides that the superintendent of streets "shall fix the time for the commencement [referring to the work to be performed under the contract], which shall not be more than fifteen days from the date of the contract." The word "time," as here used, was not intended to mean a particular day to be fixed by the superintendent of streets for the commencement of the work, but that the time fixed by him for that purpose should not be more than 15 days from the date of the contract. Let the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: McFARLAND, J.; DE HAVEN, J.

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103 Cal. 548

PEOPLE v. CURRY. (No. 21,110.)

(Supreme Court of California. Aug. 16, 1894.)

CRIMINAL LAW—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—DEFENDANT AS WITNESS—INSTRUCTION.

1. The denial of a new trial will not be disturbed where there is evidence to sustain the verdict.

2. It is not reversible error to charge that "the defendant in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness," where the charge defines expressly the relation.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Matthew Curry was convicted of robbery, and appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

R. A. King and C. C. McComas, for appellant. Atty. Gen. Hart, for the State.

PER CURIAM. The defendant was convicted of the crime of robbery, and appeals from the judgment and order denying his motion for a new trial. It is insisted that the evidence is insufficient to support the verdict. The sufficiency of the evidence has been passed upon by the jury, and again by the trial court when considering the motion for a new trial, and under such circumstances we are averse to nullifying their action. The evidence of the prosecuting witness, especially as strengthened by that of the police officer, is ample to sustain the verdict. The venue also is sufficiently shown by the record.

The court instructed the jury that "the defendant in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness; and in considering the weight and effect to be given to the testimony of this defendant, in addition to noticing his manner," etc. (Then follows the balance of the stereotyped instruction upon this subject.) Appellant specially attacks that part of the instruction wherein the jury is told that the defendant, in testifying, occupied a different relation to the case from that of other witnesses. Inasmuch as that portion of the instruction following declares expressly wherein the defendant occupied a different relation to the case from other witnesses, and to what extent that relation might be considered in weighing defendant's evidence, no harm was done him by the giving of the instruction. Such must necessarily be so, for this portion of the instruction has been repeatedly given by trial courts, assailed by appellants, and approved upon appeal by this court. We have often suggested that the better practice would be to refrain from instructing jurors to the effect as evidenced by the foregoing instruction, but the suggestion appears to fall upon stony places, and brings forth no results. We shall limit the rule strictly as it has been heretofore declared, and new trials will be the result if those limits are overstepped to any extent. We think this case comes fairly within the rule. We find nothing further in the record demanding our attention. For the foregoing reasons the judgment and order are affirmed.

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103 Cal. 531

BROWN v. BOARD OF EDUCATION OF CITY OF POMONA. (No. 19,354.)

(Supreme Court of California. Aug. 13, 1894.)

CONTRACTS OF CITY—ULTRA VIRES—PLEADING.

As the authority of a municipal corporation to make a contract not void on its face will be presumed, the defense of ultra vires, in an action thereon, must be raised by answer.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by C. H. Brown against the board of education of the city of Pomona to recover for architect's services. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Wells, Monroe & Lee and Wm. Pollard, for appellant. W. A. Bell and C. E. Sumner, for respondent.

McFARLAND, J. The court below sustained a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action; and, plaintiff declining to amend, judgment was rendered for defendant. Plaintiff appeals from the judgment.

It is averred in the complaint that at defendant's request the plaintiff made and delivered to defendant certain plans and specifications for two public school buildings, to be built in the city of Pomona, which were duly approved, accepted, and adopted by defendant; that the services of plaintiff, in preparing and furnishing the same to defendant, were reasonably worth a certain stated sum of money; that plaintiff has demanded of defendant payment of said sum of money; and that defendant has not, nor has any one, paid the same or any part thereof, and the whole thereof remains due and unpaid. The prayer is for judgment for said sum of money. It is clear that the question here involved, and the only question upon which we can pass, is a pure question of pleading. The decisions of this court, cited by counsel for respondent, declaring the general doctrine that a contract which a municipal corporation attempts to make in violation of or beyond its chartered powers is void, are not in point, for they were made upon facts found on issues joined. No one of them, from Zottman v. San Francisco, 20 Cal. 96, to Barry v. Goad, 89 Cal. 215, 26 Pac. 785, dealt with a question of pleading such as is presented in the case at bar. It is contended by respondent that the defendant had no power to make the contract sued on; but surely, when a corporation seeks to avoid its own contract on the ground of its want of power to contract, it must make good its defense of ultra vires by plea and proof. "A contract by a corporation, which is not, upon its face, necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid." Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621; Shaver v. Mining Co., 10 Cal. 400; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; Ditch Co. v. Zellerbach, 37 Cal. 543. And with respect to mere ordinary business contracts a municipal or quasi municipal corporation stands on the same footing with other corporations. If a contract for the drawing of plans and specifications in anticipation of proceedings for the building of a schoolhouse was entirely beyond the scope of the powers of the respondent, and could not be legally made by it under any conceivable circumstances, then the point sought to be made by respondent might perhaps be raised on demurrer; but the position that respondent could not under any circumstances make such a contract is not tenable. We do not understand respondent to insist on that position, his contention being that such a contract can be made only under certain circumstances. As to the form of the complaint, we think it sufficient. "Corporations may be bound by implied contracts within the scope of their authority," and "municipal corporations are liable to actions of implied assumpsit." Dill. Mun. Corp. §§ 459, 938. And in Hunt v. City of San Francisco, 11 Cal. 258, the court said: "We have held that the common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons, and we cannot see either the necessity or propriety of holding a different rule in respect to corporations of whatever kind. The rules of pleading are general. They are designed to embrace all persons, natural or artificial, capable of suing or being sued." With the real merits of this case, as they may appear when properly presented, we cannot deal on this appeal. If the contract sued on was invalid or void, or if for any reason it was one which appellant cannot enforce, respondent can defeat the action upon sufficient answer and evidence. But we think that the court erred in sustaining the demurrer. The judgment is reversed, with directions to the superior court to overrule the demurrer to the complaint.

We concur: FITZGERALD, J.; DE HAVEN, J.

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103 Cal. 550

COFFEE v. WILLIAMS. (No. 19,316.)

(Supreme Court of California. Aug. 16, 1894.)

ACCOUNT STATED — IMPEACHMENT — PLEADING — HARMLESS ERROR.

1. Where the existence of a stated account is denied by defendant, and the only evidence of the same is the testimony of plaintiff and that of a friendly witness, evidence of the falsity of the items in the account, and the circumstances of the transaction, are admissible to show that there never was such an account.

2. Error in striking out parts of an answer is not prejudicial, where the remainder is sufficient to cover the things sought to be proven in defense.

3. Under Code Civ. Proc. § 454, in account stated, plaintiff, on demand, should furnish defendant with a copy of the stated account, though he need not furnish the original items of the open account.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by George W. Coffee against C. S. Williams. There was a judgment for plaintiff, and defendant appeals. Reversed.

E. Rousseau, for appellant. Mahon & Laird and B. Brundage, for respondent.

McFARLAND, J. Defendant appeals from a judgment in favor of plaintiff, and also from an order denying defendant's motion for a new trial. It is averred in the complaint, in brief, that on November 13, 1888, the two parties formed a copartnership in the business of farming and stock raising, which continued until June 2, 1891, when it was dissolved by mutual consent; that they contributed equal amounts of capital, and were to share equally in profits and losses; that on February 5, 1891, they had an accounting of all their partnership dealings down to that date, and thereupon "an account was stated" between them of all said dealings, and upon such statement a balance of $1,851.96 was found due from defendant to plaintiff; and "that the said defendant then and there acquiesced in said statement, and agreed to pay said balance," but has refused to pay the same, or any part thereof. It is also averred that after said February 5th, and up to June 2d,—the date of the dissolution,—there were certain other partnership transactions, upon which defendant is further indebted to plaintiff, and that there is certain partnership property remaining to be disposed of. The prayer is—First, for judgment against defendant for said $1,851.96 alleged to be due on said account stated; and, second, that an account be taken of all partnership dealings subsequent to said February 5th, and that there be a final settlement and distribution of any property left after payment of debts, etc. The alleged stated account is not set forth in the complaint. There is merely a general averment that there was such an account, and that there is due thereupon, from defendant to plaintiff, the said sum of $1,851.96. The answer admits the formation and dissolution of the copartnership at the times stated in the complaint, but avers that it included buying and selling and dealing in live stock, as well as stock raising. It denies that the parties put equal amounts of capital in the business, and avers that defendant contributed $7,310 of capital, and plaintiff only $3,110. It denies that on February 5, 1891, or at any other time, there was an accounting of all the partnership dealings, or that any account was stated between the parties, or that a balance was struck of $1,851.96, or any other sum, or that defendant acquiesced in any statement, or agreed to pay to plaintiff or to said partnership said sum or any sum of money. There are many other averments in the answer to the effect that defendant was ignorant of business, and intrusted the entire management of the partnership to plaintiff; that plaintiff, intending to defraud defendant, kept no books of accounts, and concealed from defendant the business transactions of the partnership. The following averment in the answer was, on motion of plaintiff, stricken out by the court, viz.: "That on the 5th day of February, 1891, the plaintiff and defendant were in Bakersfield, and went to the store of one Dave Hirshfeld to confer about their partnership affairs, at which time and place plaintiff procured to be written in a book, which the plaintiff then and there had, certain words and figures, an exact copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this answer. That no settlement was made on said 5th day of February, 1891, by or between plaintiff and defendant, of any partnership dealings or transactions, and no balance was figured up as to any indebtedness of plaintiff or defendant, and no promise was made by either to pay the other any sum of money whatever." The answer further avers that plaintiff made large sales of partnership property to several named persons, of which no mention is made in said Exhibit A, and specifies large items in the same which are alleged to be incorrect and false. Numerous general averments of fraud are also made in the answer, against plaintiff, and it contains other averments not necessary to be here mentioned. The court found that there was an account stated, as averred in the complaint, and gave judgment for plaintiff for its amount; and the case having been referred to take an account of the partnership dealings subsequent to said February 5th, and the referee having made his report, a final decree was entered. The main contest on the appeal is about said stated account.

The only document, or copy of a document, purporting to be the account stated, relied on by plaintiff, which we are able to find in the transcript, is the Exhibit A attached to defendant's answer. Plaintiff, so far as we have discovered, did not introduce in evidence any stated account. He offered at one time certain pages of a book, which, as we suppose, were intended to show said account; but an objection to the book was at that time sustained, and we do not find when he again offered the book, or any other writing purporting to be a stated account. Defendant demanded the account of plaintiff, under section 454, Code Civ. Proc., but it was not furnished. Plaintiff's witness, Hirshfeld, testified that he made the stated account in a book of plaintiff, and also copied it in a book of defendant; and, as Exhibit A was a copy from defendant's book, we assume that Exhibit A is the alleged account stated sued on. It is as follows:

Investment of C. S. Williams, 7,310.

	Drawn.	Credits.
	2,000.00	633.49
	2,700.00	25.00
	301.50	10.00
	109.50	30.00
	50.25	66.49
	100.00	111.00
	39.00	
	352.88	
1891.	5,698.13	875.98
Feb. 5th, Bill D. H.	170.45	31.26
Feb. 5th, Cash	500.00	220.00
Investment of Geo. W. Coffee,		3,110.00
Investment of Geo. W. Coffee,		3,000.00
		$6,110.00
	Drawn.	Credits.
	1,000.00	668.63
	100.00	
	604.04	
	684.78	
	2,388.82	668.63
Feb. 5th, Bill D. H.	117.80	

It is doubtful if the foregoing would, under any view, constitute an independent cause of action as an account stated. An account stated is a document—a writing—which exhibits the state of account between parties, and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties. And the general rule is that, when the stated account is admitted, it can be avoided only by averment and proof of fraud, mistake, etc. 6 Wait, Act. & Def. p. 424 et seq.; 1 Wait, Act. & Def. p. 191 et seq.; Hendy v. March, 75 Cal. 566, 17 Pac. 702, and cases cited. But the account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it was intended to be a final settlement up to date. And this should be expressed with clearness and certainty. The account sued on in the case at bar as an account stated is certainly very loose and unsatisfactory. But few items of account are given; there are no dates, except one; dollar marks are not even placed before the figures; and there is no balance struck or stated. It looks like a mere memorandum put together hastily for further consideration,—not like so important a writing as an account stated. It is possible, perhaps, for an account stated, which does not state a balance, to be good, if, from a calculation upon the figures given, a balance can be ascertained; but an account sent by a merchant or banker without any balance stated would be a rare document. However, a calculation of the figures written in Exhibit A will not give the balance asserted by plaintiff, viz. $1,851.96. It would differ from that result to the extent of at least $500. Plaintiff would explain that by saying that the item of $500, of the date of February 5th, accrued after the alleged settlement. Nevertheless it is part of the alleged stated account.

Assuming, however, that the paper in question is not so deficient in form that it could not, upon any proof, pass muster as an account stated, still it is clear that defendant, under the positive denials in the answer, should have been allowed great latitude in introducing evidence to disprove it; and we think that the court erred in sustaining objections to evidence which he offered on that point. The evidence of plaintiff on the point consisted of his own testimony and that of his witness, Hirshfeld, who was very friendly to plaintiff; and it was to the general effect that some time in the month of February, 1891, plaintiff and defendant, together with Hirshfeld, met at the store of the latter to "see how we stood up to date;" that they had squabbles over certain matters, but that finally, on February 5th, they settled; that what is called the account stated was made by Hirshfeld in a book of plaintiff, and afterwards copied in a book of defendant; that a balance was struck, showing that defendant owed plaintiff $1,851.96; and that defendant acquiesced therein and agreed to pay said sum. Defendant, on his part, testified that he met plaintiff at Hirshfeld's because there was some company debts to be paid,—particularly a debt to one Dinkelspiel,—and to get some idea or knowledge how the company stood; that plaintiff's books "did not show much of anything," that he could not tell anything about the account, and did not have anything he could settle by; that he had defendant charged with different sums of money which he objected to; that they then settled with Dinkelspiel, and paid his bill; that plaintiff said that Hirshfeld's bills had been forgotten, and he would bring them next morning; that he did not bring them next morning, but they settled with Hirshfeld, and then "quit." He further testified that plaintiff had sold stock, of which there was no account on his books; that defendant had trusted the whole business to plaintiff (which plaintiff admits), and that there were no accounts kept, upon which any settlement could be made; that plaintiff had put into the capital stock only $3,110, as shown by said alleged account stated, and that he had not put in the second item of $3,000, or any part of it; that the $2,700 charged to defendant should have been only $2,100, and was money paid for defendant to one Kraus; that the $2,000 charged to defendant was wholly incorrect; that various other items in said alleged stated account were incorrect; and that large transactions were not mentioned in said account. In defendant's answer, it is averred that, between the commencement of the partnership and said February 5th, plaintiff sold to certain parties named therein cattle to the amount, in money, of over $36,000. Now, as to the question whether or not there had been an account stated, as alleged in the complaint, there was the testimony of plaintiff and Hirshfeld on the one side, and the testimony of defendant on the other. Under this condition of the testimony, defendant sought to introduce evidence of circumstances which he claimed would tend to show that it was,—if not impossible,—at least highly improbable, that he ever agreed to such an alleged account stated as that averred in the complaint. This evidence was ruled out by the court upon the theory that, when there is an account stated, parties cannot go back, and attack the original items of the account, unless upon proper averment of fraud, mistake, etc. This is no doubt the rule when the account stated is admitted, but in the case at bar the main issue was the question whether there was such an account. While that issue was before the court, of course, no evidence about the original items was admissible for the purpose of surcharging the account; but in determining the existence of the stated account the court was not confined to considering the mere naked "yes" and "no" of the witnesses. The defendant had the right to show, if he could, the inherent improbability of his agreement to such an account; and, to that end, evidence was admissible of at least the general nature of the circumstances of the business between the parties, and the character of the objections made by defendant to the items of the alleged account stated. If, for instance, it be true that the item of $2,700 should be only $2,100; that the item of $2,000 is false; that plaintiff contributed only $3,110, instead of $6,110, to the capital stock; that plaintiff, who conducted the whole business, had kept no accounts, and had nothing to present as a basis of settlement; that there was over $30,000 worth of stock sold by plaintiff which formed no part of the alleged statement of account; and that defendant, in the attempts at settlement, had objected to all these things, —then these matters were proper for the court to consider in determining whether defendant acquiesced in an account so radically different from the truth, and from his own contentions. If, after considering these matters, the court should be of the opinion that there was an account stated, as alleged, it would sustain the account, without reference to the original items; and, if after such consideration it should think the preponderance of evidence to be against the stated account, it would so find, and would then order an account to be taken de novo of all the partnership dealings. But, in determining the first question before it, was there an account stated, as averred? the court erred in ruling out a great deal of evidence offered by defendant.

There were about 70 rulings of the court, sustaining objections to questions asked by defendant, each followed by an exception. Some of them were asked in cross-examination of plaintiff's witnesses, and others of them were asked of defendant and his witnesses. They are too numerous to be each noticed here. Some of them were, perhaps, for special reasons, properly ruled out, but most of them should have been admitted. What we have said will clearly enough show our views on the subject, namely, that evidence touching the nature of the partnership business of plaintiff and defendant, and the character of certain items put in and omitted from the alleged account, is admissible upon the point whether or not there ever was such an account stated as that relied on by plaintiff. A few instances of objections sustained will be sufficient to illustrate our meaning. Upon cross-examination of plaintiff an objection was sustained to this question: "He put in considerably more property than you did?" Plaintiff, having testified that he did not know if there was any indebtedness due the firm from third persons when the alleged account was taken, but there might have been, was asked by defendant this question: "Then it was taken into the account, if you talked it over?" and objection was sustained. Objection was also sustained to this question asked of plaintiff: "I will ask you if there was not considerable difficulty about a certain transaction, in which Mr. Charley Kraus had received some money from Mr. Williams, and that there was a variance between your accounts and Mr. Williams' of $600?" Also, to the following question asked of plaintiff's witness, Hirshfeld: "Do you know how much money has been paid in by either of the firm previous to that settlement?" Also, to the question: "Now, this $2,700. What was that?" Objection was sustained to this question asked of defendant: "Now, that first item, $2,000. State what you know about that?" Also, to the question: "I will ask you, Mr. Williams, if, on the 5th day of February, 1891, at the store of Dave Hirshfeld, any account was settled or gone into in relation to the number of cattle bought and sold, or the amount of money received from the sales of cattle of the partnership?" Also, to the question whether there was any account or settlement on that day of partnership money. Also, to the question whether there was any settlement or computation of amounts due to outside parties. Also, to the question, "Was there any settlement as to how much Mr. Coffee or Mr. Williams, or either of them, or both, owed to Mr. Hirshfeld for partnership goods bought previous to that time?" Also, to the question, "I will ask you, Mr. Williams, if you ever made any further efforts in adjusting the matter in regard to that $2,700?" Hirshfeld, having been recalled by plaintiff, and having stated on cross-examination that he had made the accounting between the parties on February 5th, and found the balance of $1,851.96, was asked this question: "Have you in your possession the amounts and items from which you struck that balance?" and objection to the question was sustained. Defendant, having testified that he did not acquiesce in the statement copied in his book by Hirshfeld, and that "the items of that statement were discussed by Coffee and me," was asked by his counsel this question: "State what items, and what was said," and an objection to this question was sustained. Objection was also sustained to the following question: "State, Mr. Williams, what was the point of difficulty, and, if it is so that you were eight or ten days laboring on that settlement, what was the difficulty?" (Plaintiff had testified that they were eight or ten days in settling.) The witness Hirshfeld, having testified that his books showed how much money he had paid out on the checks of each party and of both parties, was asked how much had been so paid out on each party's check, and objection was sustained. Objection was also sustained to the question, how much money he had received from each party. The court also refused to allow defendant to prove by the witness Dinkelspiel that he had received into his possession over $17,000 of the funds of the partnership of plaintiff and defendant, and sustained an objection to this question asked of the witness Briggs: "State, Mr. Briggs, whether or not Mr. Coffee told how much he had made by selling the cattle of the partnership." The foregoing questions, and many others of a similar kind, should have been allowed. It would certainly be difficult to believe that the defendant acquiesced in the alleged account stated, and promised to pay the alleged balance, if the things which he sought to prove are true. The errors committed in excluding said evidence are clearly material, and make necessary a reversal of the judgment and order appealed from.

We do not think that the appellant was prejudiced by the order of the court striking out of his answer the matter hereinbefore shown to have been stricken out, for the answer was left sufficiently full to cover the things sought to be proven in defense.

We do not think that the attempted averments of fraud in the answer were specific enough to warrant a defense upon that ground.

The respondent should have given to appellant a copy of the alleged stated account sued on. He need not have furnished the original items of the open account upon which the alleged stated account was based, but a copy of the stated account itself should have been furnished.

Before another trial each party should be allowed, if he so desire, to make proper amendments to his pleadings. We cannot refrain, however, from expressing the hope that they may be able to arrive at an amicable settlement of their difficulties. Considering the confused state of their accounts, it will be hard for a court to arrive at a just solution of their contentions; and it would be better for each to concede something than to prolong expensive and perhaps ruinous litigation. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, J.; DE HAVEN, J.

103 Cal. 525

HIGH v. BANK OF COMMERCE. (No. 19,393.)

(Supreme Court of California. Aug. 13, 1894.)

EXECUTION — SUPPLEMENTARY PROCEEDINGS AGAINST SUPPOSED DEBTOR OF EXECUTION DEBTOR—EVIDENCE.

In supplementary proceedings, evidence that some time prior to the execution there probably was a small balance in a bank, on open account, in favor of one of the execution debtors, will not warrant the supreme court in holding that the bank was indebted to defendant in execution.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by John E. High against the Bank of Commerce, a corporation, as a supposed debtor of Comstock & Trotsche, copartners, against whom plaintiff had obtained a money judgment, on which execution was issued. From a judgment for defendant, plaintiff appeals. Affirmed.

David L. Withington, for appellant. Luce & McDonald, for respondent.

McFARLAND, J. Plaintiff appeals from a judgment in favor of defendant, and from an order denying a motion for a new trial. Plaintiff, having a money judgment against Comstock & Trotsche, copartners, and having procured an execution to be issued, and claiming that the defendant was indebted to Comstock & Trotsche, proceeded under section 720 of the Code of Civil Procedure, and procured an order allowing him to sue the defendant, and thereupon he commenced this action. The court found that, at the time the said proceeding was instituted, defendant was not indebted to said copartners, or either of them, and did not have any money or property belonging to them. Assuming that the transcript shows upon what grounds the motion for a new trial was made or denied, still the only point made by appellant is that the findings are not sustained by the evidence. The evidence is very meager; and we would not be warranted in holding that the court below should have found some indebtedness from respondent to the said copartners, or that there was money of the latter in the hands of the former. There is some evidence tending to show that, at a time prior to the proceedings supplementary to execution, there probably was a small balance in the bank, on open account, in favor of one of the said copartners; but the presumption that "a thing once proven to exist continues as long as is usual with things of that nature" is shown by human experience to be not applicable to a balance in one's favor in a bank. There is nothing in the point that a general denial did not raise the issues passed upon by the court. Neither was the order of the judge on the proceedings supplementary to execution an adjudication of the rights of the parties. "His only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court," and, if he chose so to do, to forbid a transfer pending the action. McDowell v. Bell, 86 Cal. 616, 25 Pac. 128. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

BAILIFF v. POWERS et al. (No. 15,552.)

(Supreme Court of California. Aug. 15, 1894.)

TRIAL—FAILURE TO MAKE FINDINGS.

A judgment will not be reversed because of a refusal to find upon a material issue, unless the record shows that there was evidence to sustain the finding.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Bailiff against Powers and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

James W. Oates, for appellant. Geo. Pearce, for respondents.

PER CURIAM. The appeal is from the judgment alone, upon the judgment roll, without any bill of exceptions. The only point urged by the appellant, for a reversal, is that the court failed to find upon all of the issues in the case. A failure to find upon a material issue will not, however, authorize a reversal of a judgment, unless it appears from the record that there was evidence before the trial court from which it could make a finding upon such issue. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Dolliver v. Dolliver, 94 Cal. 646, 30 Pac. 4; Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836. As the record in the present case fails to show that any evidence was introduced upon these issues, it follows that there was no error in failing to make findings thereon. The findings fully support the judgment, and it is affirmed.

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103 Cal. 519

HERMAN v. SANTEE et al. (No. 19,357.)

(Supreme Court of California. Aug. 13, 1894.)

WRITS — AMENDMENT OF RETURN — NOTICE OF MOTION.

1. Where a summons has been properly served, but the proof of service is defective, the court may, after judgment, allow an amended affidavit of service to be filed nunc pro tunc as of the date of the judgment. Reinhart v. Lugo, 24 Pac. 1089, 86 Cal. 395, disapproved.

2. Where, on the return day of a motion, the adversary of the moving party, without any previous notice, makes another motion, and the same is, without objection, argued at length, and a general exception taken to the granting thereof, notice of such motion will be deemed to have been waived.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Minnie J. Herman against Milton Santee and others to foreclose a mortgage. A motion by plaintiff for leave to file an affidavit of service nunc pro tunc as of the date of judgment was granted, and defendant Milton Santee appeals. Affirmed.

David L. Worthington and Works & Works, for appellant. Conklin & Hughes, for respondent.

BELCHER, C. This action was brought to foreclose a mortgage given to secure payment of a promissory note made by the appellant, Milton Santee. On September 8, 1892, a decree of foreclosure was entered as prayed for, reciting that the "defendants have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and made default in that behalf, and that the default of each defendant for not appearing and answering unto plaintiff's complaint has been duly and regularly entered herein." Subsequently, appellant gave notice of a motion to vacate and set aside the decree, so far as it provided for a deficiency judgment against him, upon the ground that previous to the institution of the action he had been discharged from the indebtedness sought to be enforced, by a discharge in insolvency. The motion came on to be heard on September 1, 1893, both parties being present in court by their attorneys. Before the hearing commenced, the respondent, without any previous notice, presented to the court an amended affidavit of service of the summons and complaint in the case, and asked for an order that the same be filed nunc pro tunc as of September 8, 1892, and made a part of the judgment roll. The attorney for appellant objected to the order asked for, and stated that "as the decision of the motion would, in his judgment, be decisive of the motion made to vacate the judgment by defendant Santee, he would like permission to introduce his authorities upon the motion before the court." Thereupon, the motion was argued "at length," and during the course of the argument the attorney stated that he appeared as amicus curiae. After the argument was concluded, the court granted the motion, and the appellant excepted to the ruling. The appeal is from the judgment, and the order granting respondent's motion.

The summons was served by a person other than the sheriff, and the affidavit of service, as originally made and returned, was defective and insufficient, because it did not state that the affiant was over the age of 18 years at the time of the service. The appellant contends that, because the affidavit of service was insufficient, the clerk had no authority to enter the default, and the court had no jurisdiction to enter the judgment, and that both the default and judgment were void. It is true that the clerk was a mere ministerial officer, and could perform only ministerial duties. Conceding, therefore, that in the absence of due proof of the service of the summons the clerk had no right to enter the default, still that fact is unimportant, and can cut no figure in the decision of the case. A valid judgment by default may be rendered by the court, though no formal default has been entered. "The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment." Drake v. Duvenick, 45 Cal. 463.

The important question, then, is, was the judgment void? Section 416 of the Code of Civil Procedure declares that, "from the time of the service of the summons and of a copy of the complaint in a civil action, * * * the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings." In Pico v. Sunol, 6 Cal. 295, it is said: "Jurisdiction of the person of defendant is acquired by the service of process, and dates from such service, and not from the return." And in Drake v. Duvenick, supra, it is said: "The fact of service was material, and from the time service was made the court was deemed to have acquired jurisdiction. The return of service might be formal or informal, perfect or imperfect. Still, if service were in fact made, the court acquired jurisdiction of the person of the defendant." So, in Estate of Newman, 75 Cal. 220, 16 Pac. 887, it is said: "It is the fact of service which gives the court jurisdiction, not the proof of service." The amended affidavit of service, which the court allowed to be filed, was in all respects in proper form, and showed that the appellant was regularly served with a copy of the summons and complaint. None of the facts stated in the affidavit are controverted; and it must be held, therefore, that from the time of the service the court acquired jurisdiction of the parties to the action.

The question then arises, did the court err in allowing the proof of service to be amended and filed nunc pro tunc as of the date of the judgment? Upon this subject, Mr. Freeman, in his work on Judgments (4th Ed., § 89b), states the law as follows: "If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted, or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus, if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment, as if filed before its entry." In opposition to this view, and in support of his theory, appellant cites Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, in which, on page 401, 86 Cal., and page 1089, 24 Pac., it is said: "The default and judgment were void, not because there was no service, but because there was, at the time of entering the same, no proof of service." This language is not in harmony with the weight of authority upon the subject, and in our opinion it does not state the law correctly. The case is reported in the American State Reports (volume 21, p. 52), and, in a note commenting upon it, it is said: "The court declares, in effect, that it is not the service of process which gives courts jurisdiction, but the proof of such service; that if the proof is defective it is immaterial that the service was perfect; and, the proof being imperfect, there is no way in which the judgment can be sustained by showing the facts regarding the service of process as they really existed when it was entered. The very reverse of this we apprehend to be the law. It is the fact of service of process which confers jurisdiction, and it is a familiar practice in California, as well as elsewhere, when the proof of such service is absent or defective, to permit it to be amended or supplied." And again: "To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void;" citing Allison v. Thomas, 72 Cal. 562, 14 Pac. 309, and numerous other cases. We conclude, therefore, in view of the authorities, that the judgment in question was not void, and the court did not err in permitting the amended affidavit of service to be filed.

It is further claimed that the application to file the amended affidavit was without notice, and the order authorizing the filing was therefore erroneous. But, conceding that previous notice of the application should have been given, still we are unable to see that appellant was in any way prejudiced by the failure. He was present in court when the motion was made, and raised no such objection then. On the contrary, he proceeded to argue the question at length, and, when it was decided against him, took a general exception to the ruling. This was in effect a waiver of notice, and appellant cannot now be heard to complain of the action of the court on this ground. We discover no prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 508

PEOPLE v. MOORE. (No. 21,087.)

(Supreme Court of California. Aug. 11, 1894.)

SODOMY—INFORMATION—SUFFICIENCY — CONDUCT OF TRIAL—CHALLENGE OF JURORS—FAILURE TO INFORM DEFENDANT OF HIS RIGHTS.

1. An information which charges that defendant committed the crime against nature in and upon the "person" of Carl K. sufficiently

states that it was committed with a human being, as distinguished from an animal.

2. Where defendant has no counsel, it is reversible error for the court to fail to comply with Pen. Code, § 1066, which provides that, before a juror is called, defendant must be informed that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

William H. Moore was convicted of the crime against nature, and appeals. Reversed.

Wm. Fitzgerald, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. Appellant was convicted of the crime against nature, and was sentenced to suffer the very severe penalty of imprisonment in the state prison for the term of 41 years. He appeals from the judgment.

The appellant had no counsel in the court below. Consequently, there is no statement or bill of exceptions before us, and, of course, no evidence. Afterwards counsel took an appeal for appellant, and is compelled to rely upon the judgment roll, or what is called in section 1207 of the Penal Code a "record of the action." This includes only the indictment or information, a copy of the minutes of the plea or demurrer, a copy of the minutes of the trial, the instructions given or refused, and a copy of the judgment. The offense charged in this case is, in its nature, coarse and detestable; but it is an offense easily charged, and difficult to disprove. It affords great facility for a false accusation made for the purpose of revenge and injury, and usually its proof depends mainly upon the testimony of an accomplice. These considerations, and the very severe penalty imposed, induce us to look closely into the only record which appellant's counsel on the appeal could bring here.

We are disposed to think that the objections to the sufficiency of the information are not good. The averment that the alleged crime was committed "in and upon the person of Carl Kohler" sufficiently states that it was committed with a human being, as distinguished from an animal. We think also, that the jurisdiction of the case in Kern county sufficiently appears from the face of the information. The crime is alleged to have been committed on a car; and whether or not the information would be good under section 783, Pen. Code, upon the theory that the jurisdiction was in any county through which the car passed in the course of its trip, we think that it sufficiently avers the offense to have been committed in Kern county. Appellant objects to the instructions of the court upon the subject of reasonable doubt; but, considering them all together, they are not erroneous.

We think, however, that under the circumstances of this particular case the judgment should be reversed for the failure of the court to inform the appellant of his rights, as provided in section 1066 of the Penal Code. That section is as follows: "Before a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn." In all the decisions of this court, which have been called to our attention, where this section of the Code was under review, it has been held that a failure to comply with it is error, although, in those decisions, the failure was held not to be prejudicial, because in each case the defendant had been represented by counsel competent to protect his rights, and the right of challenge had been exercised. In People v. Mortier, 58 Cal. 266, the court, speaking of the provision of the Code, say: "The object of this provision of the law is to protect the rights of the defendant in the matter of challenging jurors. He should be informed of the fact that if he desires to challenge any particular juror he must exercise that right before the juror is sworn; but it appears from the record in the case that the defendant's rights in this respect were fully understood by him and his counsel, and the privilege of challenging jurors was exercised to a large extent in the case. It is true that the court omitted a duty imposed by law, but it clearly appears that the defendant was not in any manner prejudiced by the error complained of." In People v. O'Brien, 88 Cal. 489, 26 Pac. 362, the above language was quoted approvingly, the court holding, also, that under the facts in that case the error was not prejudicial. See, also, People v. Ellsworth, 92 Cal. 596, 28 Pac. 604. But the facts in the case at bar are materially different from those in the cases above noticed. Here the appellant had no counsel in the trial court, and did not exercise the right of challenge. There is nothing in the record to show that he was not prejudiced by the failure of the court to give the information required by the statute to be given,—nothing which enables us to avoid the general presumption that error is prejudicial. See People v. Gaines, 52 Cal. 479. The general rule that every one is presumed to know the law cannot be successfully invoked in a criminal case against a statute which provides that the defendant must be specially instructed as to what the law is on a particular point.

The minutes of the court, of the date of May 22, 1893, contained on pages 3, 4, and 5 of the transcript, show what was done at the trial, from the calling of the cause to the return of the verdict,—all occurring on said May 22d. Commencing on page 12 of the transcript, there is some printed matter without date, in which there is a statement that on May 22d there were certain conversations between the court, the counsel for the people, and the defendant, about the jurors. Following this, on page 14, there is matter which shows that there was a session of the court on December 30, 1893, —more than seven months after the trial, and after the appeal had been taken,—at which certain minutes of the trial were ordered corrected; and, so far as it can be ascertained from the transcript, the said statement, commencing on page 12, was ordered to be made nunc pro tunc at the said session of December 30th. This statement is relied on by respondent as showing that appellant was sufficiently informed of his right to challenge the jurors. While courts have a wide latitude in amending their records, it is extremely doubtful if a court can, in a criminal case, amend minutes which constitute part of a judgment roll after an appeal has been taken, and without notice. To do so would be, at least, the exercise of a very dangerous power. But, assuming that it can be rightfully done, we do not think that the statement in question at all shows a substantial compliance with the requirement of said section 1066 of the Code. The judgment is reversed, and a new trial ordered.

We concur: FITZGERALD, J.; DE HAVEN, J.

103 Cal. 513

PEOPLE v. MALLON. (No. 21,093.)

(Supreme Court of California. Aug. 11, 1894.)

CRIMINAL LAW—EVIDENCE—STATEMENTS MADE IN DEFENDANT'S PRESENCE—ASSAULT WITH INTENT TO COMMIT ROBBERY—INSTRUCTION—HARMLESS ERROR.

1. It is not error to admit evidence of statements made by a person indicted with the defendant on trial, and who has pleaded guilty, in the presence of defendant, where it shows what the conduct of defendant was at the time, and that he did not deny the statements. People v. Ah Yute, 54 Cal. 89, distinguished.

2. On the trial for assault with intent to commit robbery, a charge that if "you have no doubt he aided and participated in the assault, and have a reasonable doubt as to the intent of the assault, you must give him the benefit of that doubt, and in that case you must find him guilty of simple assault," did not assume any fact.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Joseph Mallon was convicted of an assault with intent to commit robbery, and he appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

Agustus Tilden, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The appellant Mallon was charged, jointly with one Foran, with assault, with intent to commit robbery, upon the person of one John Tieck, and was convicted as charged. He appeals from the judgment and from an order denying his motion for a new trial. Only two points are urged for a reversal: (1) That the court erred in admitting certain testimony of Crockett and Donovan, witnesses for the prosecution; and (2) that the court erred in giving a certain instruction, which, it is contended, assumed that an assault had been committed.

It is doubtful if the record shows any sufficient objection to that part of the testimony of Crockett and Donovan which is claimed to be inadmissible; but, assuming that it does, we do not think that there was error in admitting said testimony. These witnesses were allowed to testify, among other things, to certain statements made by the said Foran (who had pleaded guilty) in the presence of appellant; and it is this part of their testimony that is claimed by appellant to have been improperly admitted. This testimony, standing by itself, and without any connection with the conduct of appellant when the alleged statements were made, would no doubt have been clearly hearsay and inadmissible. But it is established law that while a statement made in the presence of the accused is not admissible as being itself evidence of any fact narrated in such statement, it is admissible, primarily, for the purpose of showing that the accused acquiesced in the statement, either by express assent or by silence, or by such conduct as fairly implied assent. People v. McCrea, 32 Cal. 98; People v. Estrado, 49 Cal. 171. Such testimony should, no doubt, be received guardedly. If not followed by any proof of the conduct of the accused, it should be stricken out; and, if requested by the defendant's counsel (which was not done in the case at bar), the court should instruct the jury that such statement was limited as evidence to the purpose above indicated. But it is not error to admit such statements in the first instance. In the case at bar, we think that it clearly appears what the conduct of defendant was when Foran was making his statements, and that he did not deny them. During the testimony of Crockett as to said statements, and after an objection had been made by defendant's counsel, the court said, "I assume that what the defendant at bar said and did in the course of that conversation will come out;" and the court then asked the witness, "What did the defendant here on trial,—what did he say?" to which the witness responded, "He didn't say anything when he told him that." And the witness afterwards said: "We were all together in one group. The defendant Mallon said nothing." The witness Donovan, after testifying to certain statements made by Foran to defendant, said that "He didn't answer at all," and, further, that when the witness asked the defendant, "You were there?" he replied, "Do you suppose I was a damn fool, to tell you I was there?" The case at bar, therefore, is not within the principle of People v. Ah Yute, 54 Cal. 89, invoked by appellant. In that case Mr. Justice Ross, delivering the opinion of the court, said that certain statements made in the presence of the defendant were hearsay and inadmissible because they stood "without any proof whatever as to the conduct by the defendant in reference to those accusations," and distinguished the case from People v. McCrea and People v. Estrado, which were approved. As, therefore, the rulings of the court below are not erroneous upon the ground taken by appellant, it is not necessary to inquire whether or not the said statements of Foran were admissible upon the ground of a proven conspiracy between the latter and the appellant to commit the crime charged.

2. The instruction complained of is as follows: "In case you have no doubt he aided and participated in the assault, and have a reasonable doubt as to the intent of the assault, you must give him the benefit of that doubt, and in that case you must find him guilty of simple assault." We do not see that this instruction assumes any fact. It is contended that it assumes that there was an assault committed, but if that be conceded it could in no way have prejudiced appellant. It was clearly shown, and undisputed, that an assault was committed on Tieck by Foran, with whom appellant entered Tieck's store, and that it was committed in the presence of appellant. Appellant testified to that himself. Judgment and order appealed from affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

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103 Cal. 582

WICKERSHAM v. CRITTENDEN et al.

(No. 19,340.)

(Supreme Court of California. Aug. 17, 1894.)

JUDGMENT — ALTERATION AFTER AFFIRMANCE ON APPEAL.

A minority stockholder in a bank, in certain actions on behalf of himself and other stockholders against C., the majority stockholder, the bank, and other defendants, recovered judgments against C. "to and for the use of" the bank, and "to be paid to" the bank "for its use and benefit," together with "his costs and disbursements herein taxed," at sums stated. *Held*, that the trial court could not, after such judgments were affirmed on appeal, on plaintiff's petition, order the clerk to pay plaintiff his attorneys' fees in such cases out of the money paid to the clerk on the judgments.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Two actions by A. G. Wickersham against James L. Crittenden, the Bank of San Luis Obispo, and others, in which there were judgments against defendant Crittenden for the use of defendant bank. From an order requiring the clerk to pay plaintiff $1,000, as attorneys' fees, out of money paid to the clerk on such judgments, defendants appeal. Reversed.

Graves & Graves and James L. Crittenden (Henry S. Foote, of counsel), for appellants. Lippitt & Lippitt and Wilcoxon & Bouldin, for respondent.

McFARLAND, J. This is an appeal by the appellants, Crittenden and the Bank of San Luis Obispo, from an order of the superior court directing its clerk to pay certain moneys to the respondent, Wickersham, for attorneys' fees alleged to have been paid out by him to his attorneys in certain actions. Wickersham and Crittenden were stockholders in the Bank of San Luis Obispo, a corporation; Crittenden owning a fraction over one-half of the capital stock of the bank, and Wickersham owning about two-thirds of the other half. They disagreed about the business and management of the bank, and Wickersham brought two actions against Crittenden, the bank, and certain other defendants. He alleged in his complaint in each action that he brought it for himself and stockholders other than the defendants. In one of the actions he recovered judgment, "to and for the use of the Bank of San Luis Obispo," against Crittenden, for $548.19, together with "his costs and disbursements herein, taxed at the sum of $111.30." In the other action he recovered judgment against Crittenden for $2,716.78, "to be paid to the defendant the Bank of San Luis Obispo, for its use and benefit," and "his costs herein, taxed at the sum of $69.40." In each case an appeal was taken to this court, and the judgment was affirmed. When the remittiturs went down to the superior court, Crittenden paid the amounts of the judgments "into court" for the satisfaction of the judgments; by which is meant, we suppose, that he paid the money to the clerk of the court. Afterwards, Wickersham filed a petition in the court, in which he stated that the moneys recovered on said judgments were for the benefit of the said bank and all its stockholders, and not for himself alone, and that he had paid out to his attorneys in said actions certain amounts of money; and he prayed for an order that he be paid the amount of the attorneys' fees out of the said money paid in by Crittenden, which, it seems, was still in the hands of the clerk. The bank and Crittenden appeared and demurred to the petition; but, after a hearing and the introduction of evidence, the court made an order that the clerk pay to Wickersham $1,000 as attorneys' fees in said two actions, and that he pay the balance of said money to said bank. It is not necessary to determine here whether or not in said two actions, which were practically between the main stockholders of a corporation contending for the control of its management and business, the prevailing party was entitled to recover attorney fees in addition to statutory costs and disbursements. The judgments as rendered in the superior court were affirmed in this court, and were, of course, final judgments, and they did not include attorneys' fees.

They directed the moneys recovered, together with the stated costs, to be paid to the bank; and the superior court could not, upon petition or motion, change or modify these final judgments by ordering the moneys recovered to be disposed of in any way other than provided in the judgments themselves. If respondent has any legal claim against the bank for money advanced to attorneys for conducting said actions, he must prosecute that claim by an ordinary civil action against the bank; but he cannot, upon motion, have a final judgment substantially opened and changed so as to include his claim. The cases cited by respondent (Alemany v. Wensinger, 40 Cal. 294; In re Paschal, 10 Wall. 493; and Trustees v. Greenough, 105 U. S. 527) are not in point. Those cases merely declare the principle that in a proper case a trustee may be allowed, out of the trust fund, attorneys' fees expended in the necessary preservation or management of the fund; but there was no point made in them as to the method or procedure by which the allowance could be obtained, and in neither of them was an order like the one in the case at bar involved, made after a final judgment had been affirmed by the appellate court, and when there was no continuous administration of a trust. In those cases the order was made during the pendency of the litigation, and became part of the final judgment. The order appealed from is reversed.

We concur: FITZGERALD, J.; DE HAVEN, J.

(103 Cal. 497)

Ex parte THOMAS. (No. 21,157.)

(Supreme Court of California. Aug. 4, 1894.)

ADULTERY—WHAT CONSTITUTES.

Mere adultery, without open and notorious cohabitation, is not a criminal offense in California (St. 1871-72, p. 380), and a conviction thereof is void.

In bank.

Petition by one Thomas for a writ of habeas corpus, for the purpose of obtaining his discharge from the custody of the sheriff of San Francisco county, Cal., to which he was committed on being convicted of adultery. Writ granted, and petitioner discharged.

Geo. W. Monteith, for petitioner. W. S. Barnes, for respondent.

PER CURIAM. The return to the writ of habeas corpus issued herein shows that the petitioner was convicted in the police court of the city and county of San Francisco of the crime of adultery, and thereupon sentenced to be imprisoned in the county jail for one year, and that he is now held in custody under commitment based upon said judgment. The judgment is void. Adultery is not made a crime by any statute of California. It is the living together in open and notorious cohabitation and adultery that is made criminal by the statute (St. 1871-72, p. 380), and it has been rightly held that mere adultery, without the notorious cohabitation, does not constitute the offense (People v. Gates, 46 Cal. 53). The judgment being void, the imprisonment is necessarily unlawful, and the prisoner must be discharged. It is so ordered.

(103 Cal. 506)

QUINT v. HOFFMAN et al. (No. 18,306.)[1]

(Supreme Court of California. Aug. 8, 1894.)

IRRIGATION DISTRICT — COLLATERAL ATTACK—EXCESSIVE LEVY OF ASSESSMENTS — VALIDITY—INJUNCTION AGAINST COLLECTION—WHEN REFUSED.

1. The organization of an irrigation district cannot be collaterally attacked in an action by landowners to enjoin the collection of assessments by the officers of the district.

2. Under the Wright act (section 22), which provides that the board of directors of an irrigation district shall levy an assessment "sufficient to raise the annual interest on the outstanding bonds" of the district, such board has no power to levy an assessment in excess of such an amount.

3. A landowner cannot enjoin the collection of an excessive levy of assessments by the board of directors of an irrigation district until he has paid the amount the board had the power to levy.

Department 1. Appeal from superior court, Glenn county; Seth Wellington, Judge.

Action by Herman Quint against George W. Hoffman and others, claiming to act as directors of the Central irrigation district, P. H. Graham, claiming to act as collector of such district, and others, to enjoin defendant Graham from selling lands for assessments levied in the year 1892. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

Geo. H. Maxwell, Maxwell & McEnerney, R. A. Long, G. D. Dudley, and Maxwell, Dorsey & Soto, for appellant. Johnson & Johnson and R. Percy Wright, for respondents.

GAROUTTE, J. This is an action commenced by the plaintiff to enjoin the defendant P. H. Graham, as collector of Central irrigation district, from selling any lands of the plaintiff, and of others similarly situated, for assessments levied in the year 1892. A temporary injunction was issued upon the filing of the complaint, which was subsequently dissolved upon the ground that the facts stated therein were not sufficient to entitle the plaintiff to the relief demanded, and thereupon this appeal was taken from such order of dissolution. The only question presented by this appeal is, does the complaint state sufficient facts to entitle the plaintiff to a perpetual injunction?

1. The organization of the Central irrigation district is assailed, and it is insisted that the validity of that organization may

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[1] For opinion modifying judgment, see 37 Pac. 777.

be attacked collaterally in this proceeding by showing that the board of supervisors acted without their jurisdiction in effecting its organization. This position cannot be maintained. An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. People v. Irrigation Dist., 98 Cal. 206, 32 Pac. 1047, and cases there cited. Corporations organized under the act of the legislature popularly known as the "Wright Act" being public corporations, it is immaterial whether they be corporations de jure or de facto. That is a matter which cannot be inquired into upon a collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the de jure character of the corporation. This principle must be considered settled law in this state. Dean v. Davis, 51 Cal. 411; Reclamation Dist. v. Gray, 95 Cal. 601, 30 Pac. 779; Swamp-Land Dist. v. Silver, 98 Cal. 53, 32 Pac. 866. If appellant's contention goes to the extent that this corporation is not even a corporation de facto, the allegations of the complaint are not sufficient to support such contention.

2. It is insisted that plaintiff is entitled to the relief sought, upon the ground that the levy of the tax was at a rate greater than is authorized by the Wright act. This assessment was levied under section 22 of that act, which provides that "the board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds." In pursuance of this provision the board of directors made, and had entered upon its minutes, the following order: "The assessment book of Central irrigation district for the year 1892-3 having been completed, and the assessments of property therein having been equalized, and it appearing therefrom that the total assessed value of property in said district for the year 1892-3 is the sum of $2,643,217, the board of directors proceed to consider the amount required to be raised in order to meet the annual interest on bonds of said district during said year. After due deliberation thereon, it is ordered by the said board of directors of said Central irrigation district that an assessment be, and the same is hereby, levied and ordered collected on each $100 assessed valuation of property in said Central irrigation district, for district purposes aforesaid, for the fiscal year 1892-3, as follows, to wit: for bond fund, $1.55 on each $100; total levy of assessment for the purpose before mentioned, $1.55 on each $100." The bonds issued by and outstanding against the district amounted to $574,000, and the amount of money necessary to be raised to pay the interest upon said bonds, at the rate fixed by the act itself, would be $34,440; yet the amount which would be raised under the aforesaid levy would exceed that sum by more than $5,000. While the views we entertain upon another branch of the case prevent plaintiff from securing the relief in this action desired, still the question here presented as to the true construction of section 22 of the Wright act may be said to be directly involved in a proper solution of this litigation, and the question is not only a new one, but one so important to both taxpayers and corporations that we deem it advisable to consider it at the present time, in order that these district corporations, in the future, may so shape their course as to keep within their powers under the law. This board of directors is a creature of the statute, and it can do nothing unless authorized by the statute. Its powers are limited, special, and express, and it can assume no power by inference or implication. It exceeded its power in making a levy of $1.55 upon the $100. The statute says it had the power, and it was its duty, to levy an assessment sufficient to pay the annual interest. But it exceeded its power by levying an assessment largely in excess of that amount. By this section of the act, certain burdens only could be cast upon the land of the taxpayers of the district, and they had the right to insist upon a rigid compliance with this provision of the statute, and that no additional burdens be had, for it is the only section of the act providing for the levying of a tax and the raising of money regardless of the advice or wishes of the parties who are called upon to pay that tax. Money raised under this section of the act can be applied to but one single purpose. The law contemplates no other application of it. Again, the interest upon the bonds must be paid semiannually, and the amount to be raised is a matter of exact mathematical computation. The tax is levied upon the real estate of the district, and, when the assessment has been made and equalized, it would seem the rate to be levied is a matter readily ascertainable. The board has no right to assume that the tax upon any particular tract of land will not be paid by the owner, or by a sale of the land itself. The question of the amount to be raised is not one of discretion, but of pure legal right. If the board could fix the rate at $1.55 per $100, it would have the same right to double that rate, and thus entirely disregard its statutory authority. This it cannot do. In acting under this section, as well as its conduct of all other affairs of the district, it must ever keep its eye upon the statute. The statute furnishes the only road upon which it may safely travel. All others not only lead to danger, but their use is forbidden to it by the law. It is evident in the present case that the board adopted the course laid down in section 41 of the act, and deducted 15 per cent. from the assessment roll for anticipated delinquencies. But the error of the board lies in the fact that the provisions of section 41 are not

applicable to section 22. Neither does section 22 contain any authority for a deduction based upon anticipated delinquencies. The lawmaking power, in enacting section 41, appeared to recognize the fact that special authority was necessary to justify the course followed in fixing the rate as there declared; but, whether the omission to insert a similar provision in section 22 was intentional or not, it is not our province to decide. Certainly, no good reason is apparent why the provision, if a salutary and necessary one, should be found in section 41, where small amounts of money are contemplated to be raised by taxation, and be absent from section 22, which not only provides for the payment of interest upon all bonds issued, but for the payment of the bonds themselves. It cannot be held that a judicial discretion is vested in the board of directors to fix the levy at any rate which it might deem sufficient to raise the amount necessary to pay the annual interest. The legislature has no power to vest a board with any such discretion. Such a construction of the provision would render it unconstitutional. The principle here involved was directly adjudicated upon in the case of Houghton v. Austin, 47 Cal., at page 652. It was there held that the legislature could not delegate this power to any board or person. The provision of the statute then under consideration provided that the state board of equalization, after allowing for delinquencies in the collection of the taxes, should fix a rate sufficient to raise the amount of revenue directed by the legislature. It was held in that case that the board had no authority to make any estimate for delinquencies in collection. In the act under present investigation, there is not even an attempt of the legislature to clothe the board with authority to take into consideration, in making the levy, any question as to anticipated delinquencies. For the foregoing reasons, we conclude that the board of directors exceeded its power in fixing the rate at $1.55 upon the $100.

3. Notwithstanding the levy was in excess of the power of the board, and the tax was more than plaintiff could be compelled to pay, still he owed the district a portion of the tax levy, upon his own showing; and he will not be heard, in a court of equity, until he has paid the amount the board had the power to levy upon his land. The amount which he honestly owes the district was readily ascertainable, and he should have paid it. It was a matter of computation equally as exact as the computation showing that the levy was at too high a rate; and upon the elementary principle that, if a part of a tax is valid and authorized, such portion must be paid before a party will be allowed to come into a court of equity to make complaint, we think plaintiff is entitled to no relief in this action. Gas Co. v. January, 57 Cal. 614; Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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103 Cal. 563

PEOPLE v. SMITH. (No. 21,080.)

(Supreme Court of California. Aug. 17, 1894.)

FORGERY—INDICTMENT—EVIDENCE.

1. An indictment for passing a forged check, which fails to state that defendant knew the same was forged, is defective.

2. Where forgery of a check is charged in the first count of an indictment, and the passing of it is charged in the second, the allegations of the first count cannot be read with the second, for the purpose of supplying a defect therein.

3. Where, on the trial of an indictment containing two counts, one of which is defective, evidence pertinent to both is received under a ruling that both are good, a verdict will not be sustained because the evidence is sufficient to sustain a conviction on the count which is good.

4. Where an indictment for forgery charges that the name forged was "R. S. S.," proof that the name was "R. G. S." is sufficient, as the middle initial of a name is not material.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

S. A. Smith was convicted of forgery, and appeals. Reversed.

A. M. Johnson, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. Defendant was convicted of the crime of forgery, and appeals from the judgment and from an order denying a new trial. There were two counts in the information filed against him. In the first it is charged that he did on or about November 6, 1893, willfully, unlawfully, knowingly, and feloniously, and with intent then and there to defraud, prejudice, and damage R. S. Southerland and the Santa Rosa Bank (a corporation, etc.), falsely make, forge, and counterfeit a certain check, in the words and figures as follows, to wit: "Santa Rosa, Cal., Nov. 6, 1893. No. 191. Santa Rosa Bank, pay to John W. Fields, or bearer, $17.50 dollars. R. S. Southerland. [Indorsed] J. W. Fields." The second count charges that defendant did thereafter, and on the 8th day of November, 1893, "utter, publish, and pass, as true and genuine, a certain forged, false, and counterfeit check, which said check was the same check referred to in the first count of this information, which check is in the words and figures as follows [then follows a copy of the check, precisely as in the first count], with intent thereby to prejudice, damage, and defraud the said R. S. Southerland and the said Santa Rosa Bank." The information closes in the usual form. It will be perceived the second count fails to aver that the defendant passed as true the check, "knowing the same to be false," etc., as specified in section 470 of the Penal Code. No objection was taken to the information, by demurrer or otherwise. At the trial, defendant, by his counsel, objected to evidence under the second count of the information, upon the ground that said second count did not state a public offense, in that there was no allegation that defendant knew the check was forged. The objection was overruled, and an exception noted. Evidence was received upon said second count. The ruling of the court admitting such evidence is assigned as error.

To constitute forgery by uttering or passing of a forged instrument, as defined in section 470 of the Penal Code, three important factors are requisite: (1) It must be uttered, published, passed, or attempted to be passed, as true and genuine; (2) it must be known by the person uttering or passing it to be false, altered, forged, or counterfeited; (3) it must be with intent to prejudice, damage, or defraud some person. These three essential elements going to constitute the crime must all be present, and must all be substantially charged in the indictment or information. In the present information the second prerequisite, viz. knowledge on the part of defendant of its falsity, is not charged. The contention of the respondent is that the clause in the second count of the information, that the "said check was the same check referred to in the first count of this information," is such a reference to the first count as serves to incorporate its allegations in the second count, and hence that the second count is sufficient. The language used will bear no such construction. Its object is apparent. Either to forge a check, or to pass it with guilty knowledge, etc., is a forgery. Each may be charged singly as constituting the crime, or, if charged together, they constitute but one offense. A single offense may be charged in separate counts without being amenable to the objection of charging more than one offense, to do which is interdicted by our Penal Code. In People v. Shotwell, 27 Cal. 394, it was held that where the forgery of a check was charged in one count, and the passing of a check in another count, they would not be presumed to be the same instrument or to constitute the same offense, even though copies of the check were set out in each count, and were alike verbatim et literatim. Since that decision, it has been the practice in criminal pleading, in such cases, to use apt expressions showing that the offense specified under different statements or counts is one and the same. The expression quoted from the second count of the information serves to fill this office of showing the offense to be the same as that specified in the first count, and nothing more. It follows that the second count of the information failed to state an offense, and the proffered testimony relating thereto should have been rejected. This was a defect which was not waived by a failure to demur, but one which went to the very essence of the cause of action, and which might be raised at any point in the progress of the case. Pen. Code, § 1012. Some of this testimony was no doubt admissible in support of the first count of the information. The possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor. So, too, the declaration of the defendant that he had worked for Southerland; that the latter had no money to pay him, and had given him the check, etc.,—was admissible under the charge of forgery. Com. v. Talbot, 2 Allen, 161. But when it was admitted as evidence of uttering and passing as genuine under the second count, and when the court refused the instruction of defendant that the second count of the information charged no offense, and that defendant could not be convicted thereunder, it was manifest error. It may be claimed that, conceding the error, there was one good count in the information, with ample evidence in its support, and hence that the judgment is supported by the good count, and will not be reversed. At common law it was held that where an indictment contained two counts, and at a trial no evidence was introduced in favor of one of them, a general verdict and judgment would be upheld upon the ground that the presumption will prevail that the judgment of the nisi prius court was rendered upon the good count, and not upon the unsupported one. This case differs materially from those involving that question. Here there are two counts,—one good and the other bad. The court holds them both good. There is a verdict of guilty upon both counts, upon which judgment is pronounced. Error has intervened, and the good cannot be separated from the bad. The presumption must be that as both were held good, and evidence introduced in support of both, the judgment is upon both, and hence that it is erroneous. See People v. Mitchell, 92 Cal. 590, 28 Pac. 597. For this error the judgment and order appealed from should be reversed, and a new trial had, or the information set aside and a new information filed, as the court below may determine.

There is another question raised by appellant which may come up on a second trial, and which will be briefly noticed. The information charged the defendant with forging a check, signed R. S. Southerland, with intent to defraud R. S. Southerland and the Santa Rosa Bank. The testimony at the trial showed that "R. G. Southerland" was the true name of the party whose name was sought to be forged, and appellant claims the variance was fatal. (1) At common law the name of an individual consists presumptively of one Christian, baptismal, or given name, and also one surname, family name, or patronymic. (2) The common law recognized but one Christian name. Hence, the middle name or names, or the middle initial letter or letters, of a person's name, are not material, either in civil or criminal proceedings; and a variance between the pleading and proof in respect to such middle names or initials is, in this country, as at common law, regarded as immaterial. Massachusetts is an exception to this rule. People v. Ferris, 56 Cal. 442; People v. Lockwood, 6 Cal. 205; People v. Boggs, 20 Cal. 433; Miller v. People, 39 Ill. 457; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Langdon v. People, 133 Ill. 382, 24 N. E. 874; State v. Smith, 12 Ark. 622. The identity of R. G. Southerland as the party intended in the forged instrument was complete. There was no error in the admission of evidence or instructions under this head.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial had, or the information set aside, and a new information filed, as the court below may determine.

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103 Cal. 577

PEOPLE v. LANDMAN. (No. 21,115.)

(Supreme Court of California. Aug. 17, 1894.)

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF INTENT—ASSAULT WITH INTENT TO KILL.

1. On a trial for assault with intent to murder, a charge that, if defendant voluntarily assaulted the prosecuting witness with a deadly weapon, in such manner that the natural consequences would be the death of the witness, then the law presumes that the defendant intended to kill the witness, is error, as the question of intent is one of fact, to be decided by the jury.

2. In order to convict of assault with intent to kill, the facts proven must be such that if death had resulted from the assault the same would have been murder.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Gustave Landman was convicted of assault with intent to commit murder, and appeals. Reversed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of an assault with intent to commit murder, and now prosecutes this appeal from the judgment and order denying his motion for a new trial. At the request of the prosecution the court gave the jury the following instruction: "Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant, at the time and place alleged in the information, voluntarily assaulted the prosecuting witness with a deadly weapon, in such a manner that the natural and ordinary consequences of such assault would be to kill the said witness, Stanovitch, then the law presumes that the defendant intended to kill the said witness, Stanovitch; and, unless it appears from the evidence that the intention of the defendant was other than his acts indicated, the law will not hold him guiltless." It is now argued by the attorney general that the foregoing instruction should not be construed as an attempted exposition of the law bearing upon the specific offense charged in the information, but that it related and was pertinent to other and lower offenses necessarily included therein, and that as to such offenses it stated the true rule. To support his contention he says the "intent" to which the instruction was directed was "the intent to kill," and not the "intent to murder." Again, he says the word "guiltless" does not refer to the offense of assault with intent to commit murder, but that such portion of the instruction means that the defendant will not be held guiltless of any and all offenses. We think the argument unsound. In the first place, there is no such offense designated in our Criminal Code as an assault with a deadly weapon with intent to kill. The entire instruction is framed with a view of enlightening the jury upon a question of law as to the intent to kill; and, upon respondent's construction, it would be uncalled for and not demanded by the exigencies of the case, for an intent to kill is only material in this case when we view such an intent as one to commit murder. Again, the fair interpretation of the language of the court is that, under the circumstances depicted by the evidence stated, the defendant could not be held guiltless of the specified crime charged in the information. A jury would so understand it beyond any doubt. Looking at the instruction from this standpoint, it is clearly erroneous, for it trenches upon the province of the jury in passing upon matters of fact. In the offense here charged a specific intent is the all-important element, and it is essentially a question of fact for the jury to decide. When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent, and therein is found the vice of the present instruction. The saving clause found in the latter portion of it does not cure the objection we have suggested. If it serves any purpose whatever, it casts upon the defendant the burden of introducing evidence to disprove a state of facts created by a presumption of law, and no such burden can be cast upon a defendant in a case charging an offense of the present character. Of course, under these circumstances, a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact, to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends. As fully and entirely supporting these views, we cite Roberts v. People, 19 Mich. 401; Patterson v. State, 85 Ga. 131, 11 S. E. 620; Lawson, Pres. Ev. p. 271; People v. Mize, 80 Cal. 42, 22 Pac. 80.

The court refused to give the following instruction asked by the defendant: "In order to justify a verdict of guilty of the crime of assault with intent to commit murder, the facts and circumstances proven in a case must be such that if death had resulted from the shooting the crime would have been murder, and not manslaughter; for if the crime, in a case of death, would have been only manslaughter, the defendant cannot be convicted of the offense charged." This instruction should have been given, for it is sound law. If death should result from an assault with intent to commit murder, no case can be imagined where the assailant would not be guilty of the crime of murder. Indeed, the death of the party assaulted is the only element necessary to change the offense from assault with intent to commit murder to that of murder. It may be suggested that the converse of this principle does not necessarily follow, to wit, if the killing is murder there must necessarily have been an intent to commit murder. See People v. Mize, 80 Cal. 42, 22 Pac. 80. For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

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103 Cal. 588

RAMBOZ v. STOWELL. (No. 19,345.)

(Supreme Court of California. Aug. 18, 1894.)

ESTOPPEL BY DEED.

Where a married woman represents that she is a widow, and, for a valuable consideration, executes a deed of land as a single woman, and after her husband's death, without consideration, deeds the land to her daughter, who has actual notice of the prior deed, the daughter is estopped from denying that her mother was a widow when the prior deed was executed.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Jane Ramboz against N. W. Stowell to quiet title to land. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Davis & Matthews and C. C. Stephens, for appellant. Wm. D. Stephens, for respondent.

VANCLIEF, C. Action to quiet title to a lot of land in the city of Los Angeles. It is admitted that Margaret J. Starkey was the owner of the lot in question on June 13, 1878, as her separate property, and both parties claim title from her. On that day, Mrs. Starkey, for a valuable and sufficient consideration, signed, sealed, and delivered to Helen L. Grinnell a deed of the lot, the acknowledgment of the execution of which was certified by a notary public (A. C. Holmes) in the form required for an unmarried woman, and not otherwise, and the deed was recorded on the same day. On September 19, 1887, Helen L. Grinnell, in consideration of $11,000, conveyed the lot to defendant by deed recorded October 4, 1887. On May 13, 1891, Mrs. Starkey, for the nominal consideration of $100, but without any valuable consideration, conveyed the lot to plaintiff, who is her daughter, and who, on the following day (May 14, 1891), commenced this action. At the date of the deed to plaintiff she had actual notice of the prior deed of her mother to Helen L. Grinnell. The trial court gave judgment for defendant upon a finding that the plaintiff was estopped from denying that Mrs. Starkey was a widow at the time she acknowledged her deed to Helen L. Grinnell; and whether or not this finding is supported by the pleadings, and is justified by the evidence, are the only questions requiring special consideration.

That the answer states facts sufficient to constitute an estoppel, within the rule deducible from the cases of Reis v. Lawrence, 63 Cal. 129, and Hand v. Hand, 68 Cal. 135, 8 Pac. 705, I have no doubt.

As to the sufficiency of the evidence, it is admitted that Mrs. Starkey was married to Thomas Starkey, in Ohio, in 1844; that she and her husband lived together until some time in 1869, when they separated at Chicago, Ill.; that in 1870 she came to Los Angeles, in this state, where she continuously resided until 1880, except that in 1877 she visited Chicago for about three weeks, and there met her husband, who remained with her during that visit; that her husband was never in this state; and that he died in 1885. It also appears that she went to Arizona in 1880, and returned to Los Angeles in 1884, where she has ever since remained. The court found that she abandoned and deserted her husband in the state of Illinois in 1869, and this finding seems fairly inferable from the admitted fact that she left him in that state, there being no evidence that he ever left or deserted her. J. S. Severance testified, in substance, that during the year 1878 he was agent for Helen L. Grinnell, who then and ever since resided in New York; that, as such agent, he attended to and conducted the transfer of the premises in question from Mrs. Starkey to Helen L. Grinnell, which was consummated by the acknowledgment of the deed on June 13, 1878; that during the negotiations for that transfer, and before the acknowledgment of the deed, Mrs. Starkey told him that she was a widow, and in a previous transaction with her she had expressly represented herself to be a widow; and that he never had any notice that she was a married woman at the time she executed the deed to Helen L. Grinnell, until since the commencement of this action. A. C. Holmes, the notary by whom the acknowledgment was certified, testified that, in taking acknowledgments of women, it had been his invariable custom to ask them whether or not they were married, and to take and certify their acknowledgments accordingly, and that, from the form in which he had certified the acknowledgment of Mrs. Starkey, he was positive that she must have informed him that she was not married; otherwise, he would have drawn the certificate in the form required by law for married women, and would not have drawn it in the form in which it is. Of all this he was very positive, although he did not remember that particular transaction. Then, to prove that Mrs. Starkey had generally represented herself to the public as a widow, other witnesses were called and examined, as follows: G. W. Gillette testified that, while he was county recorder, in 1875, Mrs. Starkey acknowledged a mortgage before him, in the body of which she was described as "a widow," and in the certificate of acknowledgment he had certified that she "declared herself to be a widow," and that he would not have so certified if she had not so declared, but that, independently of the record, he had no very distinct recollection of the particular transaction. J. J. Warner, who was a notary in 1876, testified that in that year Mrs. Starkey acknowledged a deed before him, in the certificate of her acknowledgment of the execution of which he had described her as "a widow;" that, although he had no recollection of having so described her, "the word 'widow' could not have been inserted in the certificate unless the party making the acknowledgment had told me, then and there, that she was a widow." E. H. Owen testified that, as deputy county clerk, he had taken the acknowledgment of Mrs. Starkey to the execution of a deed in 1875, certified in the form required for unmarried women, and that he would not have taken it in that form without having asked her the question whether she was married or not. Messrs. Gillette, Severance, and Owen each testified that he had done considerable business with and for Mrs. Starkey, and had been well acquainted with her, and had always understood, from what she said or did, that she was a widow. In rebuttal of the foregoing, Mrs. Starkey flatly denied that she had ever in any manner represented herself to be a widow or unmarried prior to the death of her husband. Horace Hall, who had acted as attorney for Mrs. Starkey, testified that in 1877 or 1878 she sold a lot to Mrs. Osterman, and during the transaction the attorney for Mrs. Osterman asked her whether she was a widow or a married woman, and she answered that "she did not know whether she was wife or widow; that her husband disappeared some years before, and she did not know whether he was living or dead." Mrs. Mary Hall testified that she had taken a deed from Mrs. Starkey in 1876, and that Mrs. Starkey never represented to her that she was a widow, but always told her that she was married. There is no evidence, however, that either Mr. or Mrs. Hall ever communicated the facts to which they testified to any other person, nor does it appear how the deeds referred to by them were acknowledged, or that Mrs. Starkey ever acknowledged any instrument as a married woman. I think the evidence for defendant tended to prove that, before and at the time she executed the deed to Helen L. Grinnell, Mrs. Starkey falsely represented to Severance, the agent of Grinnell, that she was unmarried, intending thereby to deceive them, and that they and the defendant acted upon such representations, believing them to be true, not only in paying the purchase money, but in paying all the taxes and street assessments during the period of 13 years immediately prior to the commencement of this action, and without notice of the falsity of the representations, or that Mrs. Starkey intended to lay any claim to the land. The evidence of intentional misrepresentation is considerably stronger than in the case of Reis v. Lawrence, supra, wherein there appeared to be no reason to doubt that Mrs. Lawrence honestly believed that she had been divorced from her husband.

Certain evidence objected to by plaintiff's counsel was admitted temporarily, with the understanding that the court would pass upon the objections before judgment, and it appears that the court did not afterwards expressly decide whether the evidence objected to was admissible or not; and this is assigned as error for which the judgment should be reversed. All the evidence thus admitted was either properly admissible or harmless; so that, even if the court erred in failing to decide the questions raised, the plaintiff could not have been injured thereby. I think the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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103 Cal. 585

In re MUERSING'S ESTATE. (No. 18,311.)

(Supreme Court of California. Aug. 18, 1894.)

ADMINISTRATION—QUALIFICATIONS OF ADMINISTRATOR—PUBLIC ADMINISTRATOR.

1. Code Civ. Proc. § 1738, providing that the public administrator must not be interested in the expenditures on account of any estate he administers, does not disqualify a public administrator, who, before his appointment, furnished the coffin for deceased.

2. A nonresident is incompetent to nominate an administrator.

Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Application for letters of administration on the estate of H. W. Muersing, deceased. From an order denying his application, and appointing the public administrator, F. V. A. De Stuers appeals. Affirmed.

J. W. Knox, for appellant. T. C. Law and W. A. Nygh, for respondent.

VAN FLEET, J. H. W. Muersing died intestate in the county of Merced, leaving an estate therein, but no relative resident of the state, his next of kin being his father, a nonresident. Two applications were made for letters of administration upon the estate,—one by A. G. Clough, as public administrator of the county; the other by one F. V. A. De Stuers, basing his right to administer upon the request and nomination of the father of deceased. The court appointed Clough, the public administrator, and denied the application of De Stuers, and the latter appeals from the order.

The point relied upon by appellant for a reversal of the order is the alleged incompetency of Clough, the public administrator, to administer upon the estate, by reason of the fact that he held a demand against the estate which would have to be paid during the course of administration. The fact upon which this objection was based, as disclosed by the evidence, was that the undertaking firm of Clough & Nordgren, in which the respondent, Clough, was a partner, had furnished the coffin and burial outfit for the deceased, for which they would have to be paid out of the estate. Appellant contends that, by reason of this fact, respondent is disqualified from administering the trust, and relies upon the provisions of section 1738 of the Code of Civil Procedure as sustaining this contention. But that section has no application. It provides that "the public administrator must not be interested in the expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with any one who is so interested." It is apparent that this section does not undertake to state a rule of disqualification, but simply prescribes a very salutary rule of official conduct to govern the public administrator in the discharge of his duty, and prevent his trafficking to his advantage in the estate. It does not render incompetent as administrator one who, under the circumstances disclosed here, or otherwise, becomes a creditor of an estate before his appointment, but furnishes a ground upon which, for a violation of its provisions, the administrator would be subject to removal. There is nothing in this section, nor in the various other provisions of the Code relating to estates of deceased persons, which have been called to our attention, tending to sustain the theory that the mere fact of being a creditor of, or having a demand against, an estate, disqualifies one from appointment as administrator. Section 1369, Code Civ. Proc., prescribes the grounds which render one incompetent to serve as administrator, of which this is not one, and the courts have no right to add to the disqualifications prescribed by the legislature. In re Bauquier, 88 Cal. 312, 26 Pac. 178, 532, and cases there cited.

Appellant seems to have abandoned any claim of right to letters based upon the nomination of the father, since that feature of the case is mentioned only incidentally in his statement of facts, and is not recurred to in the points. If it is to be regarded as a point made in the case, however, there is nothing in it. The evidence shows that the father lives in Holland, and, upon the death of his son, sent a cablegram requesting the appointment of De Stuers as administrator of the estate. Conceding that this was an authorized way to make such request, and that it was properly before the court for consideration, it had no legal significance. The father, not being a resident of the state, was not competent or entitled to serve as administrator. Code Civ. Proc. § 1369. And, being incapable himself of administering, it was not competent for him to nominate an administrator. Estate of Beech, 63 Cal. 458; Estate of Kelly, 57 Cal. 81; Estate of Morgan, 53 Cal. 243. The court was therefore bound to disregard the request. Not being incompetent, the public administrator was entitled to letters, as against the appellant. Code Civ. Proc. § 1365. Order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

103 Cal. 431

CURRIER v. HOWES et al. (No. 19,213.)

(Supreme Court of California. July 26, 1894.)

RIGHT OF WAY—LANDS BOUNDED BY ALLEY—EXTENT OF EASEMENT.

1. Where an owner of land lays off an alley extending into such land, marking its boundaries by fences, and conveys lots bordering thereon with an express grant of right of way through such alley, the rights of purchasers are presumed to extend to the limits of the alley so designated.

2. Where the owner of land establishes an alley extending across the rear of a lot subsequently conveyed, with a right of way "to and from said lot" through such alley, the right of way extends along the whole rear of such lot.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by A. T. Currier against F. C. Howes and others. There was a judgment for plaintiff, from which defendants appealed. Affirmed.

Allen, Conrey & Miller, for appellants. Brunson, Wilson & Lamme, for respondent.

SEARLS, C. This is an action to restrain the defendants from obstructing an alley or private way, and from taking or holding possession thereof, excavating therein, or erecting buildings thereon, etc., and to recover damages for injury thereto. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment rendered thereon in favor of the plaintiff for $10 as damages, and enjoining the defendants as prayed for in the complaint. The defendants appeal from the final judgment, and support their appeal by a bill of exceptions.

In 1866, George O. Tiffany was the owner in fee and possessed of certain land in Los

Angeles, bounded on the north by Third street, on the east by Spring street, and on the west by Fort street (now known as "Broadway"), which land he subdivided and sold in lots to sundry persons. Either for his own convenience, or to enhance the price of lots, or from some other cause, said Tiffany laid out an alley 10 feet in width from Fort street, running east, and extending either to the rear of lot 13, or across the entire rear of lot 13, where it terminates in a cul de sac. In other words, it is a blind alley, open at one end only. Plaintiff and the defendants here, or some of them, are seised and possessed of lots in this tract of land, holding by sundry mesne conveyances under said Tiffany. As there is no question made in regard to the regularity of the chain of title from Tiffany to the parties herein, for brevity's sake it may be said plaintiff is seised of a lot or lots of land bounded on the north by Third street, and extending southerly to the line of the alley, under a deed executed May 16, 1874, by said Tiffany, which contains the following clause: "Also the right of passage by alley way ten (10) feet wide from Fort street to the rear of said lot for passage to and from said lot, but for no other purpose;" or, as contained in a deed from the same grantor, executed June 5, 1874, to remedy some supposed defect in the former deed: "This conveyance to include the right of passage of alleyway ten (10) feet wide from Fort street to the rear of the premises hereinbefore described for passage to and from, but for no other purpose." Defendants are seised and possessed under Tiffany, by conveyance executed October 12, 1876, of a lot or lots fronting on Spring street, and extending back west along the south line or rear of plaintiff's lot, and are the owners and holders of the fee of the alleyway. The several conveyances relating to title were duly recorded at or about the date of their execution. Defendants, about October, 1889, entered upon the east 40 to 45 feet of what is claimed to be the alleyway, and commenced the construction of a brick building thereon, which, if completed, will occupy the whole of the same along the rear or south line of plaintiff's lot, except 15 to 20 feet thereof at the southwest corner thereof.

The case, as presented, involves two principal questions: (1) The first being whether, as a matter of fact, the alleyway extended from Fort street, to and along the entire rear or south end of plaintiff's lot to the southeast corner, or whether it terminated at or near the southwesterly corner thereof. (2) As to the construction to be given to the clause in the deed of conveyance whereby plaintiff is granted the right of passage through the alley.

As to the first question it may be said that the allegation of the complaint is that the alley extends along the entire rear or south line of plaintiff's lot, which is 60 feet in width. The finding of the court sustains the allegation. This finding, like most of the others, is challenged by the defendants as not being sustained by the evidence. It must be admitted that the testimony in the case is more than usually indefinite and unsatisfactory. It would throw much light upon the case if it fixed the dates of facts more particularly. The testimony, as it is, tends to show that, commencing with 1872, Tiffany began to sell lots bounded by this alley, and continued so to do for, say, five years, during which time he sold all the land bordering on the alley in question, consisting of seven or eight lots, in all of which cases except two he granted a right of way through this alley by deed, and in the excepted cases he granted the fee to the alley, and in one of them such fee was granted subject to the easement. It also appears that the alley in rear of plaintiff's lot was fenced throughout and on both sides, from the southeast corner of plaintiff's lot to Fort street, prior to 1879 or 1880, but the time at which such fence was constructed does not appear. The plain inference is that it was so fenced, at least on the south side, by Tiffany, as the fact does appear that it was fenced when the land now owned by defendants vested in his immediate grantee under a mortgage in 1879, and the evidence tends to show that it has been bounded by fences ever since, except as to unimportant breaks. There was also testimony going to show that the alley has been used for the purposes of ingress and egress, and as a passageway, by the persons living along it, the defendants included. The evidence was sufficient to support the finding. There was certainly a substantial conflict in the evidence, and, as we are not authorized in such cases to disturb the findings of the court below, it can subserve no useful purpose to state the testimony of defendants, or to comment upon it. It has been held by this court that, where lots are laid off and sold as per a map fronting upon what purports to be a street, it amounts to a dedication of the street as to the purchasers. Stone v. Brooks, 35 Cal. 489; People v. Reed, 81 Cal. 70, 22 Pac. 474; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839. It must follow upon principle, that where the owner of land lays off an alley through, or extending into, said land, and designates its boundaries and extent by substantial fences, and conveys lots bordering upon such alley with an express grant of a right of way for egress and ingress through such alley, the rights of the purchasers will be presumed to extend to the limits of the alley thus designated.

2. As to the second proposition, the contention of the defendants and appellants is that the grant of a right of passageway for passage "to and from said lot" cannot be construed so as to grant a right of way "along" the whole length of the rear of the lot, when the language is "to and from" the rear.

Brossart v. Corlett, 27 Iowa, 288, and Somerset v. Railroad Co., 46 Law T. (N. S.) 883, are cited in support of this contention. The case last cited is not at hand. Brossart v. Corlett was a case in which one Lyon, the owner of certain lots in a block of land in Iowa City, sold a portion thereof, and conveyed with the following reservation to himself: "The said Lyon reserving to himself, his heirs and assigns, the right of way to and through said above-described premises for wagons and foot passengers, from Washington street to the eastern boundary of his (Lyon's) premises, situate on said lots 5 and 6, forever." The object of the action was to have a way opened over the land conveyed by Lyon, not only to the eastern boundary thereof, but along the line of his own land, and upon that conveyed. Defendant had judgment, and on appeal such judgment was affirmed. The court said: "The rule, we grant, is that an easement appurtenant to an estate is so to every part thereof, whatever the subdivision at the time or subsequently. But it is just as true that the servient estate is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement." The court then proceeds to reason that in the light of the surrounding circumstances, one of which was the construction given by the parties to the reservation by their acts for 8 to 17 years, the language used must be, under the circumstances of that case, construed to mean "to the line of plaintiff's land," and not "along such line after reaching it." Dillon, C. J., dissented from the majority of the court. It will be observed that the above case was one in which the grantor reserved a right of way or easement in land conveyed by him, and that in such cases covenants and reservations in case of doubt are construed more strongly against the covenantor or grantor. The general principle is "that, if an easement becomes appurtenant to an estate, it follows every part of the estate, into whomsoever hands the same may come by purchase or descent." Washb. Easem. (4th Ed.) p. 42. And, where the owner of land to which a right of way is appurtenant sells or devises it in separate parcels to different persons, it is held that each of such persons acquires a right of way as appurtenant to his particular part of the land. Lansing v. Wiswell, 5 Denio, 213; Watson v. Bioren, 1 Serg. & R. 227; Codling v. Johnson, 9 Barn. & C. 933; Hill v. Miller, 3 Paige, 253. And if, as in this case, the easement is acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time requisite to create a prescriptive right, will destroy the right granted. Washb. Easem. (4th Ed.) pp. 717, 718, and cases cited.

The court having found that the alley in question, extending across the rear of the plaintiff's lot, was laid out by George O. Tiffany, the owner of all the land in question, "for the use and occupation of such persons as might thereafter purchase parts or portions of land fronting or bounded by said lane or alley," etc., and the said Tiffany having conveyed the lot owned by plaintiff with the right of ingress and egress, as hereinbefore specified, the conclusion is irresistible that plaintiff is entitled to ingress and egress to and along the entire rear line of the lot so conveyed, and that the attempt of defendants to construct a building upon a portion of such alley in rear of plaintiff's lot was in violation of his easement or right of way therein. Appellants claim that the testimony fails to show that the alley was laid out by Tiffany for the benefit of parties who should thereafter purchase lots bordering upon it. We may concede the point, and the fact remains that there was evidence to show that he laid out the alley for that or some other purpose, and having done so, and conveyed the abutting lots with a right of way through the alley, and the same result follows. It was there as a patent fact, and the right conveyed, in view of the facts, must be construed in favor of plaintiff to extend to it as such existent fact. There was evidence that at one time a chicken house about 15 feet by 10 was constructed upon the extreme easterly end of the alley by placing a roof upon the fences, and by a partition at the west end thereof, and that it was finally removed by the owner of the fee of the alley; but how long it remained cannot be determined from the testimony, as neither the date of its construction or removal is given. This was doubtless evidence tending to show that the land was not subject to an easement, but it was by no means conclusive. The same may be said of an orange or lemon tree, or both, said to have stood in the alley. There were three exceptions taken to the introduction of evidence, none of which are important, and, as they are not urged here by appellant, they need not be discussed. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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103 Cal. 536

HOWARD v. McCHESNEY. (No. 19,334.)

(Supreme Court of California. Aug. 14, 1894.)

PROCESS — SERVICE OF SUMMONS BY PUBLICATION —SUFFICIENCY.

1. A decree of foreclosure is not void for insufficiency of the affidavit of a publication, to be for two months in a certain weekly newspaper, where the affidavit stated that the summons was published therein every week and weekly for more than two months from the 26th day of November, 1891, to the 11th day of February, 1892, although the affidavit also contains a

statement of publication on each seventh day between the two dates except one; the previous direct statement not being overcome by the subsequent statement.

2. It was competent for the court to allow in evidence a second affidavit showing that publication was made on the date omitted in the enumeration made in the first affidavit.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Proceeding by Bryant Howard against J. H. McChesney to set aside a decree of foreclosure entered against him by default. From an order denying the motion to set aside such decree, plaintiff appeals. Affirmed.

E. W. Hendrick, for appellant. E. W. Britt, for respondent.

McFARLAND, J. This is an appeal by the defendant, McChesney, from an order denying his motion to set aside a decree of foreclosure entered against him by default. His motion is not based upon section 473, Code Civ. Proc. He does not ask to be allowed to answer to the merits. It was not made until more than a year after the rendition of the judgment. It rests entirely upon the theory that the judgment is absolutely void, and could, therefore, be set aside at any time on motion. Service was had on appellant by publication, and he bases his contention that the judgment is void upon the ground of the insufficiency of the affidavit of publication made before the entry of the decree, and attached to the judgment roll. The publication was, by the order of the court, to be for two months in a certain weekly newspaper; and the affidavit stated that the summons was published in said newspaper every week and weekly "for the period of more than two months from the 26th day of November, 1891, to the 11th day of February, 1892, viz." Then follows a statement of each seventh day between said two dates, except that the 21st of January, 1892,—a regular day for the issuance of said paper,—was omitted from the enumeration. The omission of that day is the only alleged defect in the affidavit. Before the motion to vacate was heard, the court allowed the person who made the first affidavit to file a second one, which showed that publication was made on said January 21st. The order must be affirmed. The judgment is not void on its face. It contains a recital of due service, and there is nothing in the record inconsistent with such recital. The previous direct statement in the affidavit that summons was published each week for two months between two named dates is not overcome and rendered valueless by the subsequent statement under a videlicit. The most that can be said about the affidavit is that it is ambiguous. That which follows a videlicet does not destroy that which precedes it. The general rule, rather, is that, if repugnant to the preceding matter, it will be rejected. Brown v. Berry, 47 Ill. 177; 2 Abb. Law Dict. 447, 635. Moreover, the court clearly had the right to allow in evidence the second affidavit which cleared away any possible doubt which there might be about the meaning of the first. See Herman v. Santee (decided August 13th by department 1 of this court) 37 Pac. 509, and cases there cited. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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4 Cal. Unrep. 736

QUILL v. JACOBY et al. (No. 19,330.)

(Supreme Court of California. Aug. 18, 1894.)

VENDOR AND PURCHASER—RESCISSION OF CONTRACT—PERFORMANCE.

1. In an action to rescind a contract for the sale of land, which provided that the grantor was to build a levee along a river, whether the levee was completed within a reasonable time is a question for the court sitting as a jury; and, in the absence of any proof of damages to the grantee from failure to complete the same a finding that it was completed within a reasonable time will not be disturbed, though the work was not completed for four years.

2. Where a contract for the conveyance of land facing on a street provides that a levee shall be constructed on the "west side of the said tract" which side faces a street, the construction of the levee in the center of the street is a compliance with the provision.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by James Quill against A. Jacoby and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

M. C. Hester, for appellant. Graff & Latham, for respondents.

SEARLS, C. On the 13th day of July, 1887, James Quill, the plaintiff and appellant herein, entered into two written contracts with A. Jacoby and L. Thorn, the defendants and respondents, by each of which the plaintiff agreed to purchase, and the defendants to sell and convey, a specified lot in the "Jacoby and Thorn Subdivision," in the city of Los Angeles. For one lot appellant was to pay $800,—$300 down, and the remainder in two equal payments of $250 each, at six and twelve months, respectively. For the other lot he was to pay $700 in three equal installments,—one at the date of the execution of the contract, and the others at six and twelve months, respectively. One of the lots was designated as "Lot 4," and the other as "Lot 3," both in block L of said tract. The deferred payments were to bear 10 per cent. interest per annum. The contracts were identical in date and form, except as to description of lots and the amounts of payment. Respondents were to convey the lots to appellant upon payment of the final installment of the purchase price. The contract contained the following further stipulation: That respondents would construct and build a levee along the west side of said tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, and, if the last payment hereinbefore provided for should grow due before said levee has been accepted by the city as completed, then the last payment above referred to shall be deferred until said levee has been accepted by the proper officers of Los Angeles city, but shall be immediately due and payable on the acceptance of said work by the authorities of the city of Los Angeles." The agreement further provided that completion of the levee at an earlier date should not cause the last payment to become due before the expiration of the year from the date of the agreement as therein specified. Appellant made the payments, except the last, which was postponed until January 6, 1891, by reason of the nonconstruction of the levee, at which last-mentioned date appellant served upon respondents a written offer to relinquish and transfer to them all his interest in the lots under the contract, and demanded a repayment of the money by him paid on account of the contracts, specifying the sums so paid, which being refused, this action was brought to recover the money thus paid, aggregating $1,107 and interest.

Defendants in their original answer admitted the levee was not constructed; averred that a reasonable time for the construction thereof had not elapsed; averred that it was impracticable to construct such levee until its continuation above and along Los Angeles river was built; averred their willingness to construct it as soon as the connections could be made; averred a contract between the city of Los Angeles and a railroad company, by which the latter was engaged in building the whole of the levee in question, including that along the west side of the lots. The answer also denied an offer to rescind, retransfer, etc. By a supplemental answer defendants averred the completion and acceptance of the levee on or before April 11, 1892. The cause was tried by the court without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of the defendants for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The eighth finding of the court, which involves the main question in the case, is as follows: "That the levee along the west side of said tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, is fully completed, and was in process of completion prior to the 1st day of January, 1891; and the commencement of the construction of said levee and the completion thereof were within a reasonable time after the making of said contract by and between the plaintiff and defendants." The objections made to this finding are: (1) That the evidence shows that no levee has ever been made along the west side of the tract mentioned in the contracts; (2) that the evidence and pleadings show that prior to January 6, 1891, no levee had been commenced along the west side of said tract; (3) that the evidence shows that nearly four years elapsed after contract made before completion of levee, and that it could have been built in three months. It appears from the evidence that the land agreed to be conveyed to plaintiff lies on the east side of the Los Angeles river, fronting upon a street or boulevard of, say, 100 feet in width, running between it and the river; that a levee in front of lot 3, in block L (lot 4 being in the rear of lot 3, and not fronting on the boulevard), would be of no avail to keep out the water of the river unless continued up the river, say, one mile; that about the time of the execution of the agreement a plan was devised for the construction of the levee by property owners in interest, and a contract was let for the work, under which a levee was constructed from the upper end to within about 3,000 feet of this tract, when the work ceased from the difficulty in getting timber and lumber. Defendants afterwards sought to obtain the necessary timber and lumber, but failed to do so. They subsequently agreed with the Los Angeles Terminal Railway Company that the latter should construct the embankment or levee, and have and use it as a roadbed for its railway. The embankment is from 8 to 10 feet high. The exact time of its construction in front of plaintiff's lot only appears inferentially from the testimony of H. F. Stafford, as engineer and a witness for plaintiff, who says that on the 24th of September, 1891, he "made a survey of the land and of the levee that has been constructed by the Terminal Railroad along that portion of the subdivision showing blocks * * * and L., as the same is delineated on the map." It was therefore constructed prior to September 24, 1891. It will be observed that the agreement specified no time within which the levee was to be built. If constructed within the year, it did not hasten the date of the last payment for the land; but, if not constructed and accepted within the year, the effect of the delay was to defer such last payment until the levee was completed and accepted by the city of Los Angeles. What was a reasonable time for the construction of the levee (conceding that question to be involved) depended largely upon the magnitude and character of the work to be performed, and all the surrounding circumstances. The facts entering into the question were peculiarly within the province of a jury, or the court sitting as such, and in the absence of any allegation or proof of advantages which would have accrued to appellant, by an earlier construction of the levee, or of damage to him by the delay, we are not prepared to say that the finding of the court is contrary to the evidence. Non constat but that the fact that the last payment was deferred until the levee was completed may have fully compensated appellant for the delay.

The objection that the finding that the levee was "in process of completion prior to the date of the rescission of the contract by appellant" is contrary to the admission of the answer, and the evidence is technically correct. The answer admits that defendants had not commenced the construction of the levee, but avers that the railroad company had commenced building it on the 10th day of November, 1890, and had been continuously engaged thereat up to the time of answer, all of which it averred was well known to plaintiff, and in the supplemental answer they aver its completion. No part of it in front of the lots in question had been constructed up to January, 1891. The further objection that no part of the levee was ever constructed "along the west side of said tract" is without merit. Appellant contends that it should have been along the west line of the "boulevard," whereas in fact it was in front of lot 3, and on or near the center of the boulevard. Lot 3, as indicated on the map referred to in the agreement, lies on the east side of, and fronts on, the boulevard. We may indulge the presumption that a conveyance of the lot will include the fee to the middle of the street, but know of no presumption under which it can be made to include the whole of the street. The embankment, being at this point apparently in the middle of the boulevard, must be on or near the line. The object of the levee was no doubt to protect the land from overflow from the river, and there is no suggestion that it is not efficacious to that result. The question whether or not the boulevard includes a portion of the river is one not raised by the pleadings, and, if raised, could cut no figure in the determination of the question involved here, for the reason that the failure of title, if any, is not of any land agreed to be conveyed. Upon the facts as found by the court, the conclusions of law are correct. Indeed, it may well be doubted whether, assuming the facts to be as stated in the complaint, a case is made under which plaintiff was authorized to rescind the contract. "Where the failure be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed," a rescission cannot be had. Pars. Cont. (8th Ed.) p. 679. In Franklin v. Miller, 4 Adol. & E. 599, Littledale, J., says: "It is a clearly-recognized principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." It would seem that, when the parties stipulated that the last payment upon the land should be deferred until the levee was constructed, they agreed upon the consequences which should follow a failure to construct the levee, and that in such a case, there having been no time specified within which it was to be constructed, the delay should not, unless greatly extended, give a right to a rescission. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

In re LOWENTHAL. (No. 21,090.)

(Supreme Court of California. Aug. 23, 1894.)

DISBARMENT OF ATTORNEY—WHEN GRANTED.

An application to disbar a lawyer for appropriating funds collected by him will not be entertained till the truth of the matter has been settled in a criminal prosecution, or in an action to recover the money. Wyatt v. Stephens (Cal.) 36 Pac. 586, followed.

Application to disbar H. H. Lowenthal, an attorney at law. Application denied.

J. D. Sullivan and Herbert Choyinsky, for relator.

PER CURIAM. This is an accusation against an attorney at law, charging him with a breach of professional duty to his client. After the filing of the accusation, it was considered by the court in connection with a similar charge against Stephens, and the citation was denied upon the grounds stated in the decision in that case. 36 Pac. 586. It seems, however, that, by some inadvertence, no order has been formally entered in this case. Citation denied.

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103 Cal. 611

WOODRUFF et al. v. PERRY et al. (No. 19,405.)

(Supreme Court of California. Aug. 25, 1894.)

IRRIGATION TAX—VOID ASSESSMENT — ENJOINING SALE.

Where an assessment for irrigation purposes is void because not authorized by vote of the electors of the district, a sale thereunder will be enjoined, as such invalidity would not appear in the tax deed.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Woodruff and others against Wesley Perry and Otay Irrigation District to enjoin a sale under a tax levy. There was a judgment for plaintiffs, from which defendants appeal. Affirmed.

C. H. Rippey and D. L. Withington, for appellants. D. L. Murdock, for respondents.

DE HAVEN, J. The assessment referred to in the complaint, not having been authorized by a vote of the electors of the Otay Irrigation District, was illegal, under the rule announced in the case of Tregea v. Owens, 94 Cal. 317, 29 Pac. 643; and inasmuch as the invalidity of such assessment would not appear upon the face of the deed to be given the purchaser at the sale, on account of the tax levied by such assessment becoming delinquent, the plaintiffs are entitled to the injunction given by the judgment appealed from. Pixley v. Huggins, 15 Cal. 127; Burr v. Hunt, 18 Cal. 303. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

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103 Cal. 607

ABBOTT v. 76 LAND & WATER CO. (No. 18,287.)

(Supreme Court of California. Aug. 25, 1894.)

MALICIOUS CONVERSION—PUNITIVE DAMAGES—SUFFICIENCY OF EVIDENCE.

A judgment for punitive damages, in an action for the malicious conversion of certain wheat, peaceably taken by defendant under a bona fide claim of title, and by the advice of reputable counsel, will be set aside, where the only evidence of malice is a statement made by defendant at the time,—that it was too rich for plaintiff to litigate with.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by O. L. Abbott against 76 Land & Water Company. There was a judgment for plaintiff, from which defendant appeals. Reversed.

W. S. Goodfellow and L. L. Cory, for appellant. Thompson & Thompson and Geo. B. Graham, for respondent.

McFARLAND, J. Action to recover for the wrongful conversion by defendant of certain wheat alleged in the complaint to have been the property of plaintiff, and to have been of the value of $305. It is averred that the wheat was taken maliciously, and for the purpose of oppression. The jury returned a verdict for plaintiff in the sum of $5,827, for which amount judgment was rendered for plaintiff. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

Of course all of the verdict over and above $305 (assuming the wheat to be of that value), and 7 per cent. per annum interest thereon, was for punitive damages, or smart money; and we see no evidence in the record warranting such a verdict, or any verdict at all, not confined to compensation for the actual detriment suffered by respondent on account of the conversion of the wheat. The admitted facts are that in December, 1885, appellant, being the owner of a certain tract of land, made a lease (or cropping contract) thereof to respondent for a term ending October, 1886. The lease granted the privilege of extending it for two years, and also an option to respondent to purchase the land at a certain price. Before the expiration of the first term a second lease was made by appellant to respondent, which did not state the option to purchase. Under this lease or cropping contract one-fifth of the wheat raised on the land annually was, when sacked, to be the property of the appellant. Respondent contended that under these leases he had the option of purchasing the land under the second lease. During the running of the second lease he offered to purchase the land at the price named in the first lease,—the land having greatly increased in value,—and appellant denied his right to purchase; and in July, 1888, respondent commenced an action to compel appellant to convey to him the said land. The action was decided in the trial court in favor of respondent, and was, upon appeal, affirmed by this court in January, 1891. 87 Cal. 323, 25 Pac. 693. In August, 1888, the appellant took the wheat sued for in this present action. It was taken from said leased or cropped land; appellant claiming to own it, as one-fifth of the wheat raised that year, and belonging to appellant. There is nothing to show that the appellant did not, in perfect good faith, litigate respondent's right to purchase the land from which the wheat was taken. He was advised by eminent counsel that respondent had not such right, and the question presented was one about which lawyers might well differ. See Abbott v. Water Co. (Cal.) 36 Pac. 1. And there was no evidence which justified the jury in finding that the act of taking the wheat was malicious, or done for the purpose of oppression. Appellant claimed, and in good faith, so far as it appears, that it owned the land and the wheat, and demanded it of respondent, who denied its right to take it, and forbade the removal of the wheat. Appellant's agents then went some distance, to the city of Fresno, to consult their counsel, who advised them what to do. He told them that the wheat belonged to appellant; that, if the wheat was taken away by respondent, appellant would lose its rent; that they should go and take the wheat, if they could do so peaceably, but not to use force; and that, if they could not get it peaceably, to come back, and he would commence legal proceedings. Acting on this advice, appellant's agents went to the land on another day, and, no other person being present, they took the wheat. No threats, violence, or force was used. Of course, as the litigation about the option to purchase the land terminated long afterwards in favor of respondent, appellant is liable for the value of the wheat taken; but the verdict is, confessedly, for over $5,000 more than such value. The respondent testified that, when he was about to commence his action to enforce his right to purchase the land, one of the officers of the appellant said to him that the appellant was too rich for him to litigate with; and this item of testimony seems to be about the only basis of a verdict for nearly 20 times the amount of the detriment suffered by respondent. There was some evidence erroneously admitted as to certain matters occurring long after the taking of the wheat, and with reference to differences between the parties about other property; but even that evidence, if it had been properly admitted, would not have justified the verdict in this case. As to the act of taking the wheat, upon which this present action is founded,—to which alone the evidence should have been confined,—there is nothing in the record to warrant the jury in finding that it was not done under a bona fide claim of right, and without malice or oppression. Respondent was therefore entitled only to compensation for the conversion. Indeed, the verdict was in the teeth of the following instruction given in the trial court: "You are further instructed that the defendant had a perfect legal right to rely on the advice of its attorneys, and that if you find from the evidence that P. D. Wigginton was a reputable attorney in the state of California, and he gave certain advice to the defendant corporation, which it followed in good faith, and that in so following such advice the defendant took the wheat as shown by the evidence, then in that event the defendant did not act maliciously, and the plaintiff can recover of the defendant only the actual damage suffered by reason of the conversion." See Selden v. Cashman, 20 Cal. 57; Dorsey v. Manlove, 14 Cal. 553; Phelps v. Owens, 11 Cal. 23. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

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103 Cal. 538

JOHNSON v. YUBA COUNTY. (No. 18,290.)

(Supreme Court of California. Aug. 15, 1894.)

ELECTION—LIST OF NOMINATIONS—PUBLICATION—STATUTE—CONSTRUCTION—EXPENSE — LIABILITY OF COUNTY—ACTION—PLEADING.

1. Pol. Code, § 1194, as amended by Act March 20, 1891, p. 168, provides that at least 10 days before an election the county clerk shall publish in two newspapers the nominations to office certified to him by the secretary of state, and those filed with him; that he shall make not less than two publications before election day, one being on the last day the paper is issued before election day; and that the list of nominations published shall be arranged in the order and form in which they will be printed on the ballot. *Held*, that the statute does not require the publication of a separate list of nominations for each political subdivision of the county having offices to fill, but requires only the publication of one general list.

2. The cost of such publication is a county charge.

3. In an action against a county to recover for publishing such list, plaintiff need not allege that there is money in the county treasury to meet the demand, or that the allowance of the demand would not exceed the limit of liability which the county is authorized to contract for the fiscal year.

Department 1. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Frank W. Johnson against the county of Yuba, Cal., to recover for services rendered in publishing certain lists of nominations, as required by statute. From orders sustaining a motion to strike parts of the complaint, and sustaining a demurrer to and dismissing the complaint, plaintiff appeals. Reversed.

W. H. Carlin, M. E. Sanborn, and Richard Belcher, for appellant. E. P. McDaniel and J. H. Craddock, for respondent.

VAN FLEET, J. The superior court did not err in striking from the complaint the matter objected to as irrelevant and redundant. The action was to recover for services rendered in publishing the list of nominations required to be published by the county clerk, under section 1194 of the Political Code, for the general election in November, 1892, in the county of Yuba. The allegations contained in the matter stricken out proceeded upon the theory that the statute required the publication of a separate list of the nominations, complete in itself, for each of the political subdivisions of the county having offices to fill; each list to contain, besides the names of those nominated for state and county offices, only the names of the district or township nominees in the county to be voted for in a particular district or township, and, in pursuance of this theory, alleged the publication of 13 separate lists,—1 for each of 2 supervisor districts, and 1 for each of 11 judicial townships. The statute will bear no such construction. It provides that: "At least two days before an election to fill any public office, the county clerk of each county shall cause to be published in at least two newspapers of general circulation within the county the nominations to office certified to him by the secretary of state, and also all those filed with the county clerk. He shall make not less than two publications in each of such newspapers before election day, one of such publications being made upon the last day upon which such newspaper is issued before the day of election. The list of such nominations published by the county clerks of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot." Reasonably construed, this language contemplates the publication of one general list of all nominations upon which the people of the county will be called to exercise their choice. The evident purpose of the statute is the education of the voters of the county in their duties as electors, by informing them of the names of those proposed for their suffrages for the various offices to be filled at the ensuing election, and the general order and form in which the names will appear on the ballot to be voted, that the voters may thus be afforded the opportunity to acquaint themselves with the character and fitness of such nominees, and how to mark their tickets, thus enabling them to more readily and intelligently discharge their duty on the day of election. This purpose is as well subserved by the publication of one general list embracing all the nominations as it would be by the mode adopted by appellant's assignor. It is not, as appellant erroneously contends, an exact copy or fac simile of the official ballot that is to be published, but a "list of nominations." Nor is it contemplated, apparently, that the information to be furnished by such publication will be necessarily as exact in all respects as that to be had by the voter from an inspection of the "sample ballot" provided for in section 1210, Pol. Code, to be furnished to voters five days before election, or the official ballot to be voted on election day, but is rather to prepare the mind of the voter in a general way, as above indicated, for a more ready understanding of such official ballot, when he comes to vote. To adopt a construction which would sustain the attitude of appellant would be simply to impose an unreasonable burden of expense upon the taxpayers without any corresponding benefit. The matter, being irrelevant to the cause of action stated, was properly reached on a motion to strike out.

We think, however, that the complaint was not open to the objections raised by the demurrer, and that the latter should have been overruled. The objection that the cost of the publication provided for by the act is not made a county charge is untenable. It is a part of the county advertising, and falls within the provisions of subdivision 23, § 25, of the county government act (St. 1891, p. 305), by which the supervisors are authorized to provide for such advertising. Nor is it any ground of demurrer that it is not alleged that there was money in the county treasury to meet the demand, or that the allowance of the demand against the county would not exceed the limit of liability which the county was authorized to contract for the fiscal year. This was purely matter of defense, if it existed. Johnson v. Sacramento Co., 65 Cal. 481, 4 Pac. 463. We think the other objections urged to the complaint equally untenable. Judgment reversed and cause remanded, with directions to the lower court to overrule the demurrer.

We concur: HARRISON, J.; GAROUTTE, J.

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103 Cal. 631

PEOPLE v. WELLS. (No. 21,089.)

(Supreme Court of California. Aug. 31, 1894.)

PERJURY—EVIDENCE.

In a prosecution for perjury for testifying on the trial of one D. for the larceny of a cow, that he met the cow going towards D.'s house early in the morning, and that D. took it up, corroborative facts are insufficient without direct testimony of one witness that such meeting did not take place.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

John Wells was convicted of perjury, and appeals. Reversed.

Frank H. Short, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant has been convicted of the crime of perjury, and now appeals from the judgment and order denying his motion for a new trial. Section 1968 of the Code of Civil Procedure provides that perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances. This declaration of the Code clearly means that the falsity of the accused's statements must be shown to the jury by the positive testimony of two witnesses, or of one witness and circumstances corroborating the statement of such witness, in order that the defendant may be legally convicted of the crime of perjury. In other words, the law prescribes a different rule of evidence in this class of cases, both as to the kind and amount, as compared to the great majority of violations of the law. The rule is different as to the kind of evidence, for positive evidence is absolutely necessary, and circumstantial evidence alone is never sufficient. Again, for nearly all violations of the law the evidence of one credible witness is sufficient to support a conviction, but in prosecutions for perjury the rule is clearly to the contrary.

In the present case, one Dillwood was upon trial charged with grand larceny in stealing a cow, the cow being found in Dillwood's barn about 11 o'clock a. m., and having been stolen some miles away upon the previous night. The defendant in this case appeared at the trial as a witness in Dillwood's interest, and testified that, about 8 a. m. of the same morning, he was traveling in his cart upon the public highway near Dillwood's house, and met this cow upon a bridge, the cow then going towards Dillwood's house, and that he then saw Dillwood drive the cow into his barn, and at that time Dillwood stated that the cow was not his cow. It was alleged in the information that this testimony was false, and the charge of perjury is based thereon. We will not enter into a discussion as to the materiality of this evidence as bearing upon the grand larceny charge, but will concede it to be material. It is then left for us to consider the sufficiency of the evidence introduced at this trial to support the verdict.

As we have already suggested, in order that the evidence may be sufficient, there must be positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial. For instance, to support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that place, or that the cow was not there; and the same rule is equally applicable to the remaining portions of the alleged false testimony. The corroborating circumstances disclosed by the record are sufficiently established, but the one witness to furnish the positive testimony of the commission of the perjury was not produced at the trial. The record discloses no witness who testifies that the aforesaid meeting between the defendant and the cow did not take place. The falsity of defendant's statements as to the alleged meeting may well be termed the "corpus delicti," and in cases like the present the corpus delicti must be proven by the positive evidence of at least one witness. The defendant's testimony given in the grand larceny case, and as set out in the information, is only proven to be false by incidents and circumstances occurring at other times and places; and, while such evidence in a case of the present character is proper as furnishing the corroborating circumstances required by the section of the Code we have quoted, it in no sense takes the place of the positive and direct evidence of one witness as to the corpus deliciti demanded by the statute. As supporting the general principle that the direct testimony of one witness is necessary to prove the charge of perjury, see 1 Greenl. Ev. § 257, and 3 Russ. Crimes, marg. p. 78. In the case of U. S. v. Wood, 14 Pet. 430, it is held that a person may be convicted of perjury upon certain kinds and classes of documentary evidence, and thus the offense be proven without the testimony of a living witness; but it is said in that case: "It must be conceded no case has yet occurred in our own or the English courts where a conviction for perjury had been had without a witness speaking to the corpus delicti of the defendant, except in a case of contradictory oaths by the same person." As to whether or not a confession of the defendant would be sufficient evidence to stand in lieu of the testimony of the one witness we are not called upon to decide, as the evidence found in the record pertaining to an alleged confession is wholly insufficient to prove it. For the foregoing reasons, the judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; FITZGERALD, J.

103 Cal. 634

TEMPLE ST. CABLE RY. CO. v. HELLMAN et al. (No. 19,136.)

(Supreme Court of California. Aug. 31, 1894.)

SET-OFF—CORPORATIONS—CONTRACTS—BURDEN OF PROOF—BREACH OF CONTRACT.

1. Where a railroad company, as an inducement to establish a baseball park, to increase its traffic, executes its note, and exacts in return a contract secured by a bond providing for the payment of the note on failure to perform the contract, the principal and sureties, when sued on the bond, are entitled to set off against the amount of the note, with interest, any money paid pursuant to the contract.

2. The giving of a note by a street railway for the purpose of increasing its legtimate business is not ultra vires.

3. After defendant has by its contract admitted the execution of a note by plaintiff in pursuance of the contract, the burden of proof to show want of authority in executing it is on the defendant.

4. Where a contract made in consideration of a note stipulates that action may be taken immediately after its breach, a prior payment of the note is not necessary to recovery on the contract.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action on a bond by the Temple Street Cable-Railway Company against Marco Hellman and others. Judgment for plaintiff. Reversed.

Graff & Latham, for appellants. Chapman & Hendrick, for respondent.

BEATTY, C. J. On May 5, 1890, the plaintiff was a corporation owning and engaged in operating a street railway at Los Angeles, and the defendant Marco Hellman was conducting a baseball park on First street, in that city. For the purpose of increasing the traffic on its road, the plaintiff, at the date mentioned, executed to Hellman its negotiable promissory note for $5,500, payable in two years, with interest at the rate of 10 per cent. per annum, which he transferred to a third party, who, at the commencement of this action, was the owner and holder thereof. In consideration of the receipt of this note, Hellman on his part agreed, among other things, to discontinue the playing of baseball at the First street grounds, and within 60 days to establish, and for two years thereafter to maintain, a first-class baseball park on a tract of land adjacent to plaintiff's line, of which he had become the lessee. He further agreed to give at the new grounds not less than 104 games of baseball or other equivalent entertainment each year, to provide suitable accommodations for the public, and to pay over to the plaintiff monthly 10 per cent. of the gross receipts for admissions. The other defendants, in order to induce the plaintiff to enter into this contract and to execute its said promissory note to Hellman, became his sureties on a bond in the penal sum of $7,000, conditioned for the faithful performance by him of the principal contract, or, in case of the violation of any of its stipulations, to save the plaintiff harmless on account of its promissory note. Hellman having failed to complete his preparations to open the new grounds within 60 days, he and his sureties, on July 5th, obtained an extension of time until August 1st, and on the 2d of August they obtained a further extension of time until October 1st. Both of these extension agreements were in writing, and contained various stipulations in regard to continuing the games at the First street grounds, division of the gate receipts, indemnity to plaintiff for loss of fares, and other matters not requiring special notice. In addition to these things, Hellman and his sureties, at the time of obtaining the second extension, executed a new contract of indemnity to the plaintiff, which, after referring to and reciting the more material portions of the various contracts, etc., above mentioned, contains, among others, the following stipulation: "That in case said Marco Hellman fails to perform any of the agreements mentioned in the said contract of May 5, 1890, as modified by the agreement of extension of July 5, 1890, and this agreement, or fails to perform any of the covenants on his part contained in the agreement of July 5, 1890, or this agreement, at the time in said contract or in said agreements mentioned, they will pay the amount of the note mentioned in the said contract and the interest therein provided, and said company shall have the right to immediately begin suit against said Marco Hellman and the sureties on said bond to recover the amount of the said note and the interest therein provided. This provision shall not be construed a waiver of any other right of action which the said company may have for breach of said contract of agreement." Hellman never complied with his agreements, but, after giving only about a dozen entertainments, abandoned the enterprise, and forfeited his lease. Thereupon, on September 2, 1891, and before the plaintiff's note had been paid or was due, this action was commenced against Hellman and his sureties. Plaintiff recovered a judgment for $6,737.50, from which, as well as from an order overruling their motion for a new trial, the defendants appeal.

Much of the argument on the part of appellants is devoted to a discussion of the nature of the action,—a point which does not seem to us to present any serious difficulty. Assuming that the plaintiff had the power to enter into this particular contract, and that its note was duly executed, it had two remedies for a breach of the principal contract by Marco Hellman,—it could either sue him for the profit it would have made by performance of his agreement, or it could sue him and his sureties on the second contract of indemnity for the amount of its promissory note for $5,500 and interest. Having this choice of remedies, the plaintiff elected to pursue the latter, and its complaint is entirely sufficient to entitle it to the relief sought. All the facts above detailed are fully set out, along with other formal allegations showing the right of the plaintiff to recover from Hellman and his sureties the amount of plaintiff's note, the proceeds of which he had received and which it had bound itself to pay. But the appellants contend that to allow the plaintiff to recover the full amount of its note and interest, after a partial performance by Hellman of his contract, and receipt by plaintiff of some of the profit and advantage of performance on his part, is unjust and unfair, and is the enforcement of a penalty or an award of liquidated damages in a case where a stipulation for liquidated damages is unlawful. They say that, upon the same theory that allows a recovery of the full amount of the note and interest after a few games had been played at the new grounds, and receipt by plaintiff of the increased fares on its road caused by the giving of such games, the like amount must have been recovered if all but the last one of the 208 games had been given, and the plaintiff had actually received a large profit from the giving of such games. In the view we entertain of the rights of the parties under the contract, this argument has no force. Whatever the plaintiff received as the result of Hellman's partial performance he and his sureties have a right to set off against the amount of the note and interest. The plaintiff, not being able or willing to prove the profits it would have made by performance on the part of Hellman, elects to resort to the bond of indemnity on account of its note. It is clearly entitled to that indemnity in full, but it is entitled to nothing more. If it has received anything from Hellman, much or little, defendants are entitled to a corresponding deduction from the full amount of the liability assumed. But it is for them to allege and prove the amount so received. If this view is correct,—and we are satisfied it is,—the case is relieved of all the difficulty suggested in the argument of counsel.

It follows, however, from this view, that the judgment of the superior court is for too large a sum. The utmost amount which the plaintiff could in any case have recovered in this form of action is $6,600; i. e. $5,500 principal, and two years' interest thereon, at 10 per cent., amounting to $1,100. The superior court seems to have added to these sums $137.50, or a quarter's interest, which is found to have been paid by the plaintiff on the note. But this quarter's interest is a part of the $1,100, and cannot be added to it. It also appears that plaintiff received from Hellman, at different times, sums amounting to $207.50, which should be deducted from the full amount of the $6,600. The amount of any increased fares that may have been received by plaintiff in consequence of the playing of a few games at the new grounds does not appear. This disposes of the principal questions discussed in the argument, but there remain to be noticed a few minor objections.

The giving of its note by plaintiff was not ultra vires. The object was to increase its legitimate business, and the case, as to this point, is within the principle of the decisions in Vandall v. Dock Co., 40 Cal. 83, and Zienwaldt v. Railroad Co., 1 Pac. Coast Law J. 123. The admissions of the defendants in the contracts executed by them were sufficient evidence prima facie to warrant the superior court in finding that the note of the plaintiff was duly executed, and renders harmless the error, if error it was, in overruling defendants' objection to the testimony of the witness Wood. After their repeated admissions of the execution of the note, the burden was on the defendants to show want of authority on the part of the officers of the corporation to execute it. It is no objection to the right of plaintiff to recover that it had not paid its note before this action was commenced. The defendants expressly agreed that the action might be immediately commenced upon the failure of Hellman to perform any of his agreements, irrespective of the payment or maturity of the note.

In accordance with the foregoing views, it is necessary to reverse the judgment, for the error of the superior court in awarding too large an amount, but it does not seem to be necessary to order a new trial. The judgment is reversed, and the cause remanded, with directions to the superior court to modify its judgment as follows: The plaintiff should have judgment for $6,600, less $207.50, —i. e. for $6,392.50,—with legal interest thereon from May 5, 1892, the date of the maturity of plaintiff's note, and costs in the superior court.

We concur: McFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.; HARRISON, J.; DE HAVEN, J.

4 Cal. Unrep. 743

PACIFIC COAST RY. CO. v. RAMAGE, Tax Collector. (No. 19,343.)

(Supreme Court of California. Sept. 1, 1894.)

RAILROAD COMPANIES—TAXATION—DOUBLE TAXATION.

When a railroad company, empowered by charter to build its road between termini in different counties, lays its tracks at one terminus on a wharf, and the whole railroad is assessed by the state board of equalization, pursuant to Const. art. 13, § 10, providing that the roadbed, rails, and rolling stock of all railroads operated in more than one county shall be assessed by that board, an assessment of the wharf by the county tax collector does not constitute double taxation, since the wharf is not a necessary part of the railroad, and brings in a separate income.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the Pacific Coast Railway Company against George W. Ramage, tax collector, to set aside an assessment. Judgment for defendant. Plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. F. A. Dorn, for respondent.

TEMPLE, C. This appeal is from the judgment and upon the judgment roll. The complaint shows that plaintiff, a corporation, is engaged in operating a steam railway between Los Olivos, in Santa Barbara county, and Port Harford, in San Luis Obispo county. The defendant is the tax collector of San Luis Obispo county. During the fiscal year of 1892–93, plaintiff was, and still is, the owner of a railway in San Luis Obispo county, 39.5 miles, and no more, of which 9 miles, and no more, were in Santa Fe school district, in said county, which said 9 miles the state board of equalization assessed for that year at $46,123.47, and no more, which taxes were paid by plaintiff. That the county assessor, in addition, arbitrarily and without authority, assessed a portion of the railroad so assessed by said state board of equalization at the sum of $6,000, upon which a tax is levied of $79.25, which is claimed to constitute a lien upon said property. There is a proper averment as to the threat of the tax collector to sell the property for the tax, and that the invalidity of the tax does not appear from the face of the assessment, and a prayer for an injunction. The answer consists of denials. The findings are as follows: "This cause came on regularly for trial before the court on the 24th day of July, 1893, upon the complaint of plaintiff and the answer of defendant, both parties being represented by counsel. Evidence was introduced by both parties, and the cause submitted for decision, and the court now finds the facts of said case to be as follows: That in the year 1874, by an act of the legislature of the state of California, entitled 'An act to provide for the construction of a railroad from the Bay of San Luis Obispo, in the county of San Luis Obispo, to Santa Maria, in the county of Santa Barbara,' approved March 27, 1874 (St. 1873–74, p. 695), John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, or their successors or assigns, were chartered and did construct a railroad extending from the town of Santa Maria to the Bay of San Luis Obispo, and extended to what was then known as the 'People's Wharf,' on said bay. That prior to the year 1874 one John Harford constructed a wharf on said bay, at a point about one mile northwest of said wharf, known as the 'People's Wharf.' That plaintiff is now, and at all the times set forth in the complaint herein was, a corporation formed and existing under and by virtue of the laws of the state of California, for the purpose of, and was and is engaged in, operating a steam railway between Los Olivos in Santa Barbara county, and Port Harford, in San Luis Obispo county. That on the —— day of ——, 1874, this plaintiff succeeded to the interest of said John Harford in and to said wharf built by him, and also to the interest of John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, and their successors and assigns, in and to said railroad, and then extended said railroad about one mile to the Harford wharf, and from time to time, prior to the year 1890, extended said Harford wharf into the Bay of San Luis Obispo, beyond low-water mark; and ever since the year 1890 the said wharf has been of the following dimensions, to wit: Commencing at the hotel, a point below low-water mark, the wharf is 16 feet wide for 452 feet, at which point it commences at 22 feet, and runs to 78 feet broad for 416 feet. It then tapers from 78 feet to 56 feet for 256 feet, and is 56 feet broad for 144 feet, at the end of which distance it broadens from 56 feet to 108 feet for 288 feet, and from which distance it is 108 feet broad to its far end, 320 feet, making a total length of 1,876 feet. That said plaintiff, prior to the year 1890, built upon and there has ever since been on the outer end of said wharf belonging to plaintiff a building as follows: A large one-story building, 60 feet broad by 228 feet long, within which is located the depot of said company, railroad office, telegraph office, station house, and waiting rooms, in a room 18x 22 feet in size. That plaintiff maintains upon said wharf its line of track, and two double switches extended to the extreme end of said wharf, for the purpose of receiving and discharging freight and passengers carried by water, and said track and switches are a portion of its main line of track. Said double switches are located on both sides of said building. That defendant is now the duly elected, qualified, and acting tax collector of San Luis Obispo county. That, for the fiscal year 1892-93, plaintiff was, and is now, the owner of a line of railway as above set forth, which measured a distance, counting from the water end of said wharf or structure to where the same crosses the line between San Luis Obispo and Santa Barbara counties, of 39.5 miles, all of which was in the first-named county, which was duly assessed for taxation by the state board of equalization, and apportioned by said board to San Luis Obispo county during said fiscal year. That thereafter, and during the time for assessment of property by county assessors, the assessor of San Luis Obispo county regularly assessed and added to the assessment of plaintiff for said year the following items: Franchise granted by the board of supervisors, $500; furniture, $250; safe and scales, $500; machinery and tools, $1,500; 3 wagons, $75; 1 A. horse, $75; 273,000 feet of lumber, $5,460; 100 cords of wood, $400; other personal property, not described, $500; wharf and warehouse at Port Harford, $6,000. That all taxes assessed as aforesaid for said fiscal year upon all of said assessments have been paid by plaintiff, except a tax of $75, levied upon 'wharf and warehouse at Port Harford, valued at $6,000,' which with costs, percentages, etc., now amounts to the sum of $79.25, which is claimed to constitute a lien on the property of plaintiff. That plaintiff owns no wharf or warehouse at Port Harford other than the one hereinbefore described, and did not own any such during said fiscal year. That said sum of $79.25 has not been paid by plaintiff because it claimed that the same was illegal and a double assessment. That defendant, as tax collector, as aforesaid, has advertised the said property last above mentioned for sale, to satisfy said last-named sum, and threatens to sell the same therefor. That, under and by virtue of the following clause in a license ordinance of the board of supervisors of said San Luis Obispo county, plaintiff pays a license tax to said county of $25 per quarter, and did so during the whole of said fiscal year. The clause is as follows: 'Every person, association, or corporation engaged in the business of conducting or carrying on a bridge, ferry, wharf, chute, or pier, for the accommodation of the public or others, for hire, whose average yearly receipts therefrom exceed $10,000, shall pay a license tax in the sum of $25 per quarter.' That plaintiff during said fiscal year did conduct a wharf as hereinbefore described, for hire, and its receipts therefrom for wharfage exceeded $10,000." Conclusions of law: "In my opinion, said wharf and building thereon was legally assessed by the county assessor, not being the class of property assessable by the state board of equalization, under section 10, art. 13, Const. Cal. See Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132. The plaintiff claims that the property is assessed double, because the number of miles of road assessed by state board in the county will, as measured on the ground, include distance enough to extend the road assessment to end of wharf. I assume, as a conclusion of law, that the mileage assessed by state board was based upon data returned by plaintiff to that board for assessment. Let judgment enter for defendant for his costs. Plaintiff will take nothing by this action."

The contention of the appellant is that the assessment of the wharf by the county assessor is double taxation; that the same was properly assessed by the state board; that the length of the wharf is included in the mileage of railroad assessed by the state board; and that, the railway having been built upon the wharf, it constitutes the "roadbed," which the state board was to assess. Const. art. 13, § 10. It is also contended that, inasmuch as the assessment includes the roadbed, the assessment is void, although it were conceded that the wharf and warehouse are something more than a mere roadbed or roadway, because the unlawful part cannot be separated from that which is lawful. California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073. The invalidity of the assessment, if any, does not appear upon the face thereof. The presumption is that it is valid. Has the plaintiff shown its invalidity? I think not. The wharf is a structure in navigable waters of the state. It could not be lawfully constructed without the grant of authority in some form from the state. The incorporation of the plaintiff did not necessarily confer upon plaintiff that right. The points between which they are authorized to construct and operate a railway are not shown further than that they are operating such a road between Port Harford and Los Olivos. Port Harford is somewhat indefinite. The wharf was constructed by a private individual, presumably under lawful authority, and apparently the wharf was purchased by plaintiff after the construction of the railway built by plaintiff's predecessors. Under such circumstances, the fact that plaintiff has since extended its track over the wharf does not necessarily imply that it rightfully did so as a part of the railway that it was authorized by its charter to build and operate. The wharf, in its nature, is not necessarily a part of a railway. This wharf pays a large income as a wharf. Had it remained the property of Harford, and the railroad been constructed upon it, the presumption would have been that the track was for the convenient use of the wharf, as well as of the railway, and it would not have constituted a part of the railway for purposes of taxation. I do not think the findings show that it does now. In the case of City of San Francisco v. Central Pac. R. Co., 63 Cal. 467, it appeared that the ferry was a part of the line of the railroad as described in its articles, and it was claimed that the ferryboat upon which the tracks were laid constituted a portion of its roadbed, but it was held otherwise. Here it is not made to appear that the wharf constitutes any part of the line of the road. The fact that the mileage assessed by the state board would include the length of the wharf is immaterial. That was undoubtedly as it was given in by plaintiff. But whatever length they gave in it could not extend beyond the two termini which are required to be fixed in their articles. I think the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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103 Cal. 568

PEOPLE v. GORDON. (No. 21,077.)

(Supreme Court of California. Aug. 17, 1894.)

Criminal Law—Reception of Evidence—Cross-Examination—Remarks of Counsel—Assault with Intent to Kill.

1. Under Pen. Code, § 1094, providing that the court may in its discretion depart from the prescribed order of evidence, its action in excluding evidence because it was not introduced in its regular order will not be disturbed on appeal.

2. On a trial for shooting, where defendant testified as to his habit of carrying a revolver, it was proper on cross-examination to ask him if he could identify as his own a revolver shown him, under Pen. Code, § 1323, providing that a defendant may be cross-examined as to all matters about which he was examined in chief.

3. A witness for the prosecution, in answer to a question on cross-examination as to whether, after the shooting, defendant did not walk up the street leisurely, replied, "No, sir; he walked as though he was a little anxious." *Held*, that a motion to strike out the answer as not responsive was properly denied.

4. A conviction will not be reversed because the prosecuting officer asked an improper question, when an objection to the same was sustained, and the jury was instructed to give it no heed.

5. Evidence as to the character of defendant must be confined to his general reputation.

6. In an action for assault with intent to kill, it was proper to refuse to charge that, if defendant was in such condition of mind from intoxication as to be incapable of forming an intent to commit the offense, the jury must acquit; as the offense includes the crime of assault with a deadly weapon, and intent is not an element of that crime.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Elmer E. Gordon was convicted of assault with a deadly weapon, and appeals. Affirmed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The appellant was tried in the superior court in and for the county of San Diego for the crime of assault with a deadly weapon upon L. D. Hauser, with the intent to commit murder, and was convicted of the crime of an assault with a deadly weapon, and was by the judgment of the court sentenced to imprisonment for the term of one year in the state prison at San Quentin. The appeal is from the judgment, and from an order denying a new trial.

At the trial, after the prosecution and defense had introduced their testimony, and while the prosecution was introducing testimony in rebuttal, counsel for the defendant asked leave to recall, for further cross-examination, L. D. Hauser, the prosecuting witness, for the purpose of laying a foundation for impeaching said witness by showing that he had declared soon after the shooting that defendant did not fire the pistol to hit him, etc. Counsel claimed that he only received information of the existence of the declaration on the morning of the day the offer was made. The court denied the request, and the action is assigned as error. The Penal Code (section 1093) provides that, after the prosecution and defense have respectively offered their testimony, "the parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Section 1094 provides that in any case, for good reasons, the court may, in its sound discretion, depart from the order prescribed in the preceding section. The matter being confided to the discretion of the court, an appellate court cannot review the action of the trial judge, except where it is apparent there has been an abuse of such discretion. Wright v. Willcox, 9 C. B. 650; People v. Cook, 8 N. Y. 67; Williams v. Sargeant, 46 N. Y. 482. Our own decisions are full upon the point to like effect. There is no abuse of discretion shown. The reason given by the court was sufficient to authorize the refusal; and, if no reason had been given, this court could not reverse the ruling in such a case without an affirmative showing of an abuse of discretion. It follows that the error is not well assigned.

There was no error in the ruling of the

court in permitting the prosecution to ask the defendant, who was a witness in his own behalf, on cross-examination, to identify a revolver shown him, "and to tell the jury whether or not it was his revolver." Upon his direct examination he had stated that the reason he had a revolver on the day of the difficulty was that he had purchased it a few weeks earlier, and carried it nights when he went home with his money from his fruit stand, and laid it on a shelf in the morning when he came back, but that morning (the day of the difficulty) had forgotten to leave it, etc.[1] Having thus testified as to a revolver, it was proper to ask him to identify it. People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

Defendant's counsel asked a witness on cross-examination the following question, in reference to the manner in which defendant walked up the street after the shooting: "He walked up the street very leisurely, did he not?"—to which the witness answered: "No, sir; he walked as though he was a little anxious." Defendant moved to strike out the answer as not responsive, which was refused, and an exception noted. The first part of the answer was responsive to the question, and the remainder, if indefinite, might easily have been explained by a question as to the meaning of the term used by the witness. The real point of the inquiry related to the condition of the defendant as to sobriety or drunkenness at the time, and it may well have been that the witness used the expression as indicating the presence of reasoning faculties. In any event, it was of little importance.

When counsel for the defendant objected to a question asked of a witness for the prosecution in rebuttal, as to the witness having passed the place of business of Cherry within the last year or two, the court stated, "I do not see any materiality in it anyway," and sustained the objection. I agree with the court in saying that there was no materiality in the proposed testimony, and the court had an undoubted right in giving the reason for his ruling. Had the question been confined to the time when Cherry had testified to his passing his place, it might possibly have been relevant, though of little importance.

E. J. Louis, a witness for defendant, had testified in chief that he had known the defendant for about three years, and knew his general reputation for peace and quietness in that community during that time, and that it was good. Upon cross-examination the district attorney asked this question: "Don't you know as a fact that his wife procured a divorce from him on account of cruelty and inhuman treatment within the last two years?" An objection was sustained to the question, and the jury instructed to give no heed to the question. The point is still made that the conduct of the district attorney was prejudicial to the rights of the defendant, tended to prejudice the jury against him, and that the judgment for that cause should be reversed. The case of People v. Wells, 100 Cal. 459, 34 Pac. 1078, probably goes as far in the direction pointed out by appellant as any well-considered case extant. That was an aggravated case, in which the court evidently believed the public prosecutor had wantonly and repeatedly transcended the limits of a fair investigation with the object of prejudicing the rights of the defendant, and poisoning the minds of the jurors, and this court reversed the judgment. The case here is very different. No evidence of a desire or design to do injustice to the defendant is apparent. At most, all that can be said is that the district attorney asked an improper question, which was objected to, the objection sustained, and the jury instructed to disregard it. The fact that the question was improper seems to be tacitly conceded. The rule is as follows: If evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation, is inadmissible. There is no doubt that, when a witness is put upon the stand to attack or defend character, he can only be asked on the examination in chief as to the general character of the person whose character is the subject of the inquiry, and he will not be permitted to testify to particular facts either favorable or unfavorable to such person. To this extent, it is believed, there is no divergence of opinion among authors or jurists. But there are many respectable authorities to the effect that, when the witness who has thus testified is subject to cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. Having testified as to the defendant's general good character, his opinion and the value of it may be tested by asking the witness on cross-examination whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him. 3 Rice, Cr. Ev. pp. 604, 605; State v. Merriman, 34 S. C. 16, 12 S. E. 619; Jackson v. State, 78 Ala. 471; Steele v. State, 83 Ala. 20, 3 South. 547; 1 Tayl. Ev. § 352; Oliver v. Pate, 43 Ind. 132; State v. Arnold, 12 Iowa, 480; Leonard v. Allen, 11 Cush. 241; Carpenter v. Blake, 10 Hun, 358. In such cases it is not the truth of the particular facts, but circulating rumors of them, which form a part of the general repute, and go to make up one's good or bad character. The doctrine is illustrated by the case of Reg. v. Wood, 5 Jur. 225, where a witness for a defendant charged with highway robbery, having testified to the good character of the prisoner, was asked on cross-examination whether he had not heard that the prisoner was suspected of having committed a robbery in the vicinity a few years before. It was objected that this was a particular fact, raising a collateral issue. Baron Parke overruled the objection, and remarked: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." If, therefore, we concede the district attorney was wrong in putting the question, he was in such good company and backed by such an array of authority that no inference of intended oppression or injustice to the defendant can be presumed; and to suppose that the jury were unduly influenced thereby is to place a very low estimate upon their intelligence and capacity.

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[1] Pen. Code, § 1323, provides that a defendant in a criminal action cannot be compelled to be a witness against himself; but, if he offers himself as a witness, he may be cross-examined as to all matters as to which he was examined in chief.

The court instructed the jury on its own motion, and at the request of counsel for the defendant gave nineteen out of twenty-three instructions presented by him. Those given presented the case in as favorable an aspect on behalf of defendant as the law would warrant. Three of the four refused related to the intoxication of the defendant at the time of the commission of the alleged crime, and sought to establish the proposition that if defendant was in such a condition of mind, from intoxication, at the time of the alleged commission of the offense as to be incapable of forming an intent to commit the offense, or that he committed the act without being conscious thereof, or that the jury entertained a reasonable doubt as to his condition in those respects, they should acquit. In lieu thereof, the court instructed the jury in the language of section 22 of the Penal Code, and then instructed them that in the charge of an assault to commit murder the specific intent to take life is a necessary element of the crime, and that, in considering the question whether the defendant is guilty or not of this offense, they should take into consideration the question of his intoxication, etc., but that the charge also involved the charge of an assault with a deadly weapon, and that in this last charge no specific intent is necessary to constitute the crime, and hence as to that charge the question of intoxication was improper to be considered. This distinction was proper. People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Marseiler, 70 Cal. 98, 11 Pac. 503. The other instruction refused was in the following language: "In considering the testimony of the witness Hauser, as well as the testimony of every other witness, you have a right and it is your duty to consider the circumstances under which he testified, and the manner in which he gives his testimony; and if you should believe from the testimony that the letter introduced by the defendant was either written or delivered by the witness Hauser, or that it was written or delivered at his suggestion, or with his knowledge and consent, then you have a right and it is your duty to consider that fact in weighing the testimony of such witness." The instruction was objectionable, for the reason that it sought to single out the witness Hauser, and call the especial attention of the jury to him and his testimony, on account of an anonymous letter received by the witness Cherry, who is a brother-in-law of the defendant, which letter suggested that Hauser could be sent away if it was managed right, etc. There was no evidence whatever that Hauser was the author of or connected in any way with the letter, except that he had passed the place of business of Cherry two or three times on the day preceding the morning when the letter was found, under the door of Cherry. Hauser denied all knowledge of the letter, and several circumstances tended to corroborate his statement. The witness Cherry admitted that he had previously and the night after the trouble visited Hauser, and sought "to know if there was any way of getting it fixed up, if he could not withdraw the case, and he said he could not." He also testified that "Hauser never made any remark to me that would indicate that he wanted me to give him money in consideration of his not appearing in this case." The fact is very apparent that, on account of the mother and sister of the defendant, the friends of the latter were anxious to stifle a prosecution, and that the witness Hauser informed them the matter was in the hands of the law, and he had nothing to do with its adjustment. Defendant was fairly tried and convicted, upon testimony amply sufficient to uphold the verdict, and the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(104 Cal. 10)

DUNCAN v. HAWN et al. (No. 18,176.)

(Supreme Court of California. Sept. 5, 1894.)

THRESHER'S LIEN—ASSIGNMENT OF DEBT—EFFECT.

Where a lien has been acquired under St. 1885, p. 109, by person performing work in or about a threshing machine while engaged in threshing, the same passes by the assignment of the debt under which it was acquired.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by George O. Duncan against C. H. Hawn and others to foreclose a lien on a threshing machine. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Geo. E. Church, for appellants. W. D. Grady and James Gallagher, for respondent.

VAN FLEET, J. An act of the legislature entitled "An act to secure the wages of persons employed as laborers on threshing machines" (St. 1885, p. 109) provides:

"Section 1. Every person performing work or labor of any kind in, with, about or upon any threshing machine, the engine, horsepower, wagons or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services.

"Sec. 2. The lien herein given shall extend for ten days after the person has ceased such work or labor.

"Sec. 3. If judgment shall be recovered in any action to recover for said services for work or labor performed, and said property shall be sold, the proceeds of such sale shall be distributed pro rata to all judgment creditors, who have within ten days begun suits to recover judgments for the amount due them for such work.

"Sec. 4. The lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

Plaintiff, as assignee of the claims of certain laborers who had performed work of the character provided for in the act with the threshing machine of the defendants, brought this action with the 10-days limitation to enforce and foreclose a lien for the value of said labor. The court below gave judgment sustaining plaintiff's right to the lien, and directing a sale of the property for its satisfaction. The defendants appeal.

The material question involved in the appeal is whether the lien given by the statute passes by the assignment of the obligation it is given to secure, it being conceded that the assignments were sufficient in form to convey any rights which could pass under the law. There is a conflict in authority from other states as to whether statutory liens of the class created by the act in question pass by assignment of the debt; some of the authorities holding that it is strictly a personal right, and dies unless asserted in the hands of the one for whose benefit it is primarily given; while other cases hold in effect that, being given as security for the performance of the obligation, it becomes an incident which follows it upon assignment. Whatever may be the rule in other states, in the absence of statutory regulation it would seem that the Code solves the question here presented. Section 2909 of the Civil Code, speaking on the subject of liens in general, declares that "a lien is to be deemed accessory to the act for the performance of which it is security;" and section 1084 of the same Code, relating to the effect of transfer, provides that "the transfer of a thing transfers also all its incidents, unless expressly excepted." The language of section 2909 may be taken as referring to perfected and subsisting liens. It is to be observed that the statute under consideration does not give a mere right to establish a lien, but by its terms ipso facto on the cessation of work there results by operation of the statute a perfected and established lien, which subsists for a period of 10 days, without the filing of notice or other affirmative act by the laborer. Under the rule above declared, this lien becomes an incident of the primary obligation,—the debt due the laborer,—the right to which must be held to pass by assignment of the latter, unless there is something in the act creating it which takes it out of this general rule prescribed by the Code. We find no such limitation in the act. It neither in terms nor by implication tends to restrict the right to enforce the lien to the laborer. Its primary purpose is the benefit and protection of the laborer in securing his hire, and it is obvious that this purpose would be largely destroyed by any such restriction. As suggested by the supreme court of Maine in speaking of a similar lien: "The object of the statute giving the lien is to make certain the payment for the labor; * * * and it would detract much from the benefit designed to be conferred to hold that the laborer must necessarily personally incur all the delay and expense that not unfrequently arise from the tedious litigation which follows an effort to enforce a lien of this sort, at the peril of losing it altogether." Murphy v. Adams, 71 Me. 118. In that case, as here, the court were passing upon the question of the assignability of a lien of this character, and it is there further said: "The claims of laborers secured by statute lien stand substantially in this respect upon the same footing as those of mechanics. The weight of authority and reasoning is in favor of the assignability of the lien of a mechanic, and the right of his assignee to assert his claim in the same manner and to the same extent as the mechanic could." Indeed, independently of the provisions of our Code, we should be strongly inclined to the conclusion above expressed. The conflict upon the subject has doubtless largely arisen from a failure to distinguish between common-law liens, to the existence of which possession, actual or constructive, is necessary, and those liens of purely statutory origin which had no existence at common law. In the case of Rogers v. Hotel Co., 4 Neb. 57, the court, in discussing a lien given by the statute, point out this distinction, saying: "Liens of this kind are clearly defined and regulated in the civil law, but were unknown to the common law. The proceeding is entirely statutory. * * * At common law, the assignment of a chose in action was entirely prohibited. * * * Section 30 of the Code of Civil Procedure provides that the assignee of a thing in action may maintain an action thereon in his own behalf, or the name of the assignor. * * * An action of this kind can be maintained by the assignee, unless the lien is strictly personal, so that it is lost the moment it is transferred. * * * Its continuance in no sense depends on retaining possession of the property. It is as complete and ample security for the payment of the debt as a mortgage of the same interest. It depends on no contingency for its continuance during the time prescribed by the statute." In Kerr v. Moore, 54 Miss. 288, speaking of a laborer's lien under the agricultural lien law, the court said: "The lien given by law to the laborer for his wages has been properly likened to that of a mechanic or material man for what is due him. * * * The decided weight of authority and reasoning, according to our view, is in favor of the assignability of the lien of a mechanic, and the right of his assignee to assert his claim and enforce the lien in the same manner and to the same extent that the mechanic could. This view was sustained by the following authorities: Iaege v. Bossieux, 15 Grat. 83; Tuttle v. Howe, 14 Minn. 150 (Gil. 113); Skyrme v. Mining Co., 8 Nev. 219; Davis v. Bilsland, 18 Wall. 659; Ritter v. Stevenson, 7 Cal. 388; Phil. Mech. Liens, § 55. * * * This view better accords with the general policy of our law, and the spirit and purpose of the act which gives the laborer a lien, than the contrary view." Liens which are not merely declaratory of the common law do not require possession to support them. They have the same operation without possession, and the same efficacy as common-law liens have with possession, and the assignment of the claim carries with it the right to the lien. If the existence of the lien does not depend upon possession, it may be assigned. 1 Jones, Liens, §§ 104, 990. The cases relied upon by appellants do not support their contention. In Mills v. Land Co., 97 Cal. 254, 32 Pac. 169, the court simply hold that the mere right of a laborer or material man to create a lien under the mechanics' lien law is a personal right, which cannot be assigned. This is obviously correct, since, until perfected by filing proper notice, it is a mere inchoate right, personal to the individual, which he may choose to perfect or not at his pleasure, and which until perfected has no tangible existence as property, and, of course, as such, is not the subject of transfer. In Rollin v. Cross, 45 N. Y. 771, the plaintiff filed a lien for the amount of all the work done and materials furnished, both by Pick, the original contractor, before assignment, and by himself, as assignee of the contract, and the court held that the statute did not authorize a lien to be perfected by other than the one to whom the right is given by the statute. The Iowa cases are to the same effect. But the assignability of the liens of mechanics and material men, given under our statute, when duly perfected, has been sustained in this state since an early date. In Brock v. Bruce, 5 Cal. 280, it was held that the mechanic's lien law created a sort of mortgage or security, which follows the original debt or obligation; and in Ritter v. Stevenson, 7 Cal. 388, the rule applicable to the assignment of mortgage liens by assignment of the note or debt was applied to assignments of mechanics' liens. The lien under consideration, being a perfected security, is within the reason of the rule laid down in these cases. The respondent having received the assignment of the demands, and commenced his action during the life of the liens, the latter passed by the assignment, and he is entitled to enforce them. Judgment affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.

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103 Cal. 488

PEOPLE v. HAMILTON. (No. 21,060.)

(Supreme Court of California. Aug. 2, 1894.)

County Clerk — Accounting to Successor in Office—Advance Costs — Criminal Appeal—Res Judicata.

1. The clerk of San Diego county being ex officio clerk of the district court, had power, in actions in such court, to collect advance costs under St. 1875–76, p. 586, providing that the clerk of the district court might demand and receive from the parties to an action certain sums to cover costs.

2. Where a county clerk, acting in his official capacity, and under color of his office as clerk of the superior court, collects advance costs contrary to law, he must, at the end of his term, turn over to the county treasurer, and not to his own successor in office, the amount thereof remaining in his hands.

3. A decision on an appeal which involves

only the sufficiency of the information, and the jurisdiction of the court, is not res judicata on an appeal presenting the question whether the offense charged is within the statute under which the indictment was found.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

M. D. Hamilton was convicted of refusing to turn over to his successor, as county clerk, a sum of money collected in his official capacity, and appeals. Reversed.

Eugene Daney, J. L. Copeland, and E. W. Hendrick, for appellant. M. L. Ward, for the People.

SEARLS, C. The defendant, M. D. Hamilton, was county clerk of the county of San Diego for two years next prior to January 5, 1891, when his term of office expired and he was succeeded in said office by one W. M. Gassaway. He was informed against by the district attorney, under section 424 of the Penal Code, for the crime of omitting and refusing to pay over to his successor, the said Gassaway, county clerk, upon demand, the sum of $4,422.36, public money alleged to have been received by him in his official capacity as county clerk, etc. Defendant entered a plea of not guilty to the information, and upon a trial was convicted, and sentenced to two years' confinement in the state prison at San Quentin. At the proper time he moved for a new trial, which was denied, and this appeal is prosecuted from the judgment, and from the order denying a new trial.

Section 424 of the Penal Code, upon which the prosecution is based, so far as applicable to the case in hand, is as follows: "Each officer of this state, or of any county, town or district of this state, and every other person charged with the receipt, safe keeping, transfer or disbursement of public moneys, who either * * * (9) willfully omits to transfer the same when such transfer is required by law; or, (10) willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same; is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state." The contention of counsel for appellant is that the verdict is contrary to law and evidence. Their position may be epitomized thus: (1) The money in question was not public money. (2) There was and is no law requiring a county clerk, upon the expiration of his term of office, to transfer to his successor in office public money in his hands. (3) The successor in office of defendant was not authorized by law to receive the money in question, and there was no duty imposed by law upon defendant to pay over to his successor such money.

It appears that the money which it is alleged the defendant failed to account for to his successor in the office of county clerk was received by said defendant, while county clerk, as deposits from litigants, to cover anticipated costs in cases pending in the superior court of the county of San Diego; and it is contended there was not at that time any law which authorized the defendant, as county clerk, to demand or receive such deposits, and therefore, being illegally collected, no duty devolved upon him, under the law, to pay the same to his successor in office; that such money belonged to litigants, and should have been returned to them, or if received under color of office, and not claimed by such litigants, it should have been paid to the county treasurer. On March 31, 1876, a fee bill was passed by the legislature for the county of San Diego. St. 1875-76, p. 586. By section 3 of that act the clerk of the district court was authorized to demand and receive from the plaintiff in each case, at the commencement of an action, a sum of not exceeding $10, to cover costs, and from the defendant the sum of $3, etc. The statute then provided as follows: "Any excess of fees advanced by either party, on the determination of the action, shall be returned by the clerk to the party who advanced them, on demand." It seems to be conceded that under the county government act of 1885, as amended up to 1889, and during the period of defendant's incumbency of the office of county clerk, viz. from January, 1889, to January, 1891, the county of San Diego was a county of the thirty-first class. The amendments of March 16, 1889, to the county government act, fixed the salary of the county clerk and of other officers in counties of the thirty-first class, but made no provision as to the fees to be collected, and did not provide for a deposit to cover fees, except in three classes of counties, of which the thirty-first is not one. St. 1889, p. 232. There was nothing in the county government act, up to 1891, which repealed or was inconsistent with the fee bill of 1876, supra, and our attention is not called to any other statute bearing upon the question. The county clerks were ex officio clerks of the district court, in their respective counties, under our former constitution, and under the constitution of 1879 the county clerks are ex officio clerks of the courts of record in and for their respective counties. Section 14 of article 6. Article 22 also provides that all laws in force at the adoption of the constitution, not inconsistent therewith, should remain in force until altered or repealed, and section 11 of the same article provides as follows: "All laws relative to the present judicial system of this state shall be applicable to the judicial system created by this constitution until changed by legislature." The fee bill of 1876, applicable to the county of San Diego so far as it provided for the fees to be paid to the clerk of the district court, and the deposit to be made with him at the commencement of each suit therein, etc., was a law relating to the judicial system of the state, and was not only kept in force by the constitution of 1879, but made applicable to the courts organized thereunder. The conclusion is therefore reached that the defendant, as county clerk of the county of San Diego, was authorized, under the act of March 31, 1876, to demand and receive the deposits in question for the purposes and subject to the disposition therein and by law provided.

We are also of opinion the deposits were received by the clerk in his official capacity, and under color of his office as clerk of the superior court, and, if not used in the payment of fees accruing in the cases in which they were deposited, or demanded by the depositors, should have been paid over by defendant to their proper custodian. In People v. Van Ness, 79 Cal. 85, 21 Pac. 554, it appeared that the defendant, as commissioner of immigration for the port of San Francisco, had, under color of his office, illegally collected certain fees for administering oaths to ship captains, for which there was no authority of law, and this court held that "the money, having been collected under color of office, should have been paid into the state treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it. * * * It really belonged to the shipmasters of whom it was collected; but the state, in whose name and by whose authority it was pretended to have been collected, was the proper custodian of such moneys."

The next question involved relates to the duty of the defendant to turn over to his successor in office the money in question. The gravamen of the charge in the information is that it was the duty of the defendant, imposed by law, to transfer the money in question to his successor in office; that he willfully, fraudulently, and feloniously neglected and refused to transfer or pay the same to his successor, etc. We have searched in vain for any law making it the duty of the defendant to pay over public moneys in his hands to his successor in office. Section 16 of article 11 of the constitution makes it the duty of officers to deposit with the county treasurer, to the credit of the county, all moneys, assessments, and taxes belonging to or collected for the county. Yarnell v. City of Los Angeles, 87 Cal. 603, 25 Pac. 767. Section 70 of the county government act provides that the county treasurer "must receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, safely keep the same," etc. Section 165 of the same act provides that "all salaried officers of the several counties of this state shall charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except the percentage hereinbefore allowed such officers, and excepting also such fees as are a charge against the county." The county clerk of San Diego county was a salaried officer, and received no fees to his own use. Section 167 of the same act provided for a statement and affidavit upon payment to the treasurer. Under section 1014 of the Political Code, it becomes the duty of the county clerk, in common with other public officers, to surrender and deliver to his successor the possession of all books and papers pertaining to his office, or in his custody by virtue of his office; and if he willfully and unlawfully withholds any records, papers, documents, or other writings from his successor in office, he is, under section 76 of the Penal Code, guilty of a felony. The clerk is not a financial custodian of public moneys, except as to fees, etc., collected or received by him to the use of the county, and for which it is his duty to account with the treasurer on the first Monday of each month. No statute is pointed out or suggested, under which it is made his duty, at any time or under any circumstances, to pay over public money in his hands to his successor in office. The most that can be said is that the law ought to have provided, in cases like the present, for paying to the successor in the office of county clerk such sums of money placed on deposit as security for fees as have not been exhausted in payment for services rendered; but the answer is that, however desirable, there was no such law up to the date of the expiration of defendant's term of office, viz. January 5, 1891. The amendments to the county government act since the last-named date, and which, in many of the counties at least, provide for or obviate the difficulties of the present case, need not concern us at present.

It follows that defendant's successor in the office of county clerk was not the custodian of the moneys alleged to have been collected by the defendant as aforesaid during his term of office, and to neglect or refuse to pay to him the moneys in question constituted no violation of law, and the motion of counsel for defendant to advise an acquittal should have been granted; and as the court refused at the request of defendant to charge the jury that there was no law requiring the defendant to turn over to his successor in office the money in question, and as it did instruct that "the county clerk was the legal custodian of such funds, and the defendant, as such county clerk, was bound by law to pay over the same to his successor, and the latter was and is entitled to demand and receive the same," the verdict is against law and evidence. Defendant could not, under the information, be convicted for a failure to pay these moneys to the county treasurer, for the reasons: (1) He was not charged in the information with any neglect or refusal so to do. (2) There is no evidence of any such refusal, but, on the contrary, there is some uncontradicted evidence in the record that the county treasurer refused to receive such money on the ground that the fees had not been earned, and did not belong to the county.

The court below, on motion of defendant, arrested the judgment in this case, whereupon an appeal was taken to this court, and the action of the court below was reversed. The case is not reported, but may be found in 32 Pac. 526. It is claimed by counsel for the people that the very question presented here was involved in that appeal, and that, as the court held the information sufficient, it became and is the law of the case, and, even if "wrong becomes res adjudicata and final." I do not so understand the ruling. The opinion in that case, after referring to the objections made to the information, and commenting upon them, uses the following language: "Respondent further contends that, if the facts hereinbefore referred to were insufficiently pleaded, still the information does not state sufficient facts, because there was no law authorizing the clerk to receive deposits from litigants, and that, therefore, deposits received by him were illegally collected, and belonged to the depositors. But this question is not before us. This appeal involves only the sufficiency of the information and the jurisdiction of the court, while this contention assumes facts which may have been given in evidence, but which could not properly be considered upon this appeal if they were. The allegation that defendant received these moneys in his official capacity was sufficient, without referring, by title or otherwise, either to the statute under which the information was drawn, or to any statute which created a right, duty, or obligation, the antecedent existence of which may constitute a factor more or less intimately connected with the offense. As to all these the general conclusion of the information 'Contra formam statuti,' is sufficient." If the legality of the deposits with defendant was not in question, by parity of reasoning the legality of the demand and refusal to pay over the deposits by defendant to his successor was not involved. Besides, that question was not, so far as appears from the opinion, either raised or decided. It is not doubted but that a ruling by the appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case, a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. Phelan v. San Francisco, 20 Cal. 40; Davidson v. Dallas, 15 Cal. 75. But this rule does not apply to points not made or passed upon the former appeal (Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31), or to new points presented on a second appeal (Ehrlich v. Ewald, 66 Cal. 98, 4 Pac. 1062), or to questions of fact (Mitchell v. Davis, 23 Cal. 381; Sneed v. Osborn, 25 Cal., at page 629). It follows that the points made here are not concluded by the decision on the former appeal. The judgment and order appealed from should be reversed, and, as no conviction can be had under the information, the court below should be directed to dismiss the cause.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to dismiss the cause.

(106 Cal. 173)

PEOPLE v. ROYCE. (No. 21,081.)[1]

(Supreme Court of California. Aug. 14, 1894.)

EMBEZZLEMENT—EVIDENCE—SUFFICIENCY—HARMLESS ERROR — SOLDIERS' HOME — DRAFT FOR MONEY APPROPRIATED BY CONGRESS—VALIDITY

1. On the trial of R. for embezzling part of the proceeds of a draft for $10.350, drawn by the board of managers of the National Home for Disabled Soldiers on the assistant treasurer of the United States, payable to the order of M., governor of California, while defendant was treasurer of the Veterans' Home Association, a corporation organized under the laws of such state, M.'s private secretary testified that M. received a draft for such association; that he forwarded it to R.; that he had not seen it since; that it was received from the National Soldiers' Home Association; and that it was No. 71,228, on the assistant treasurer of the United States for $10,350, for the Yountville Soldiers' Home, signed by such assistant treasurer, indorsed by M. The president of a certain bank testified that the draft was deposited by R., and the entries of its description were made in the bank's books, and that on the same day it was sent to the bank's correspondent in the city and state of New York, and he had not seen it since. *Held*, that it was not error to permit such president to state also on whom such draft was drawn, against objections that it did not appear that the draft ever reached New York or was beyond the jurisdiction of the court.

2. It was shown that, at the time of the alleged embezzlement, defendant was treasurer of the Soldiers' Home Association; that such association had established its home at Yountville; and that there was no other home for soldiers there. H. testified that the draft was for the Veterans' Home Association, and in his letter transmitting it to defendant called it the "Yountville Soldiers' Home," while defendant signed the acknowledgment of its receipt as "Treasurer Veterans' Home of California." A witness testified that in the ledger of the Veterans' Home Association, under the date on which the draft was cashed, there was in his handwriting an entry of $10,310.35; that he got the information from which the entry was made from defendant; and that "the amount he gave me as the statement of that warrant was $10,310.35." The president of the bank testified that the only indorsements it kept were "R., Treasurer of Yountville Soldiers' Home, and M." *Held*, that it was not error to permit such president to also state the amount paid to defendant for such draft, against an objection that there was no evidence that the draft was the property of the Veterans' Home Association.

3. On such trial, a question arose as to a check drawn by defendant on the bank in which such draft was deposited, which the bank claimed had been returned to him. The

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[1] Rehearing granted.

state then called on defendant to produce the check, but the demand was not pressed, and the court did not require defendant to produce it. *Held* that, if such demand was erroneous, defendant was not prejudiced.

4. Act Cong. Aug. 27, 1888 (25 Stat. 450), "to provide aid to state or territorial homes for the support of disabled soldiers and sailors," after making an appropriation for such purpose, provides that payments to states and territories shall be made quarterly by the board of managers of the National Home to the officers of the states and territories entitled, duly authorized to receive them. By Act Cal. March 19, 1889, the home of the Veterans' Home Association, located at Yountville, Napa county, was recognized and declared to be a "state home for the support and maintenance of disabled soldiers and sailors," and to be under the exclusive management of the state, "by the board of directors of said association, who are hereby constituted a state board of directors for that purpose;" and the state treasurer was authorized to receive any and all money to which such home may be entitled under such act of congress. *Held*, that such draft was not void and of no value, on the ground that the money appropriated by congress, when paid, becomes the state's money, and goes into its treasury, and that it is impossible for such corporation to acquire any right to such money.

5. Nor does the fact that such draft was drawn to the order of the governor, instead of the state treasurer, as required by the act of congress appropriating the money, aid defendant; since defendant received the draft as such treasurer, and received the entire proceeds, and is estopped to deny the validity of the draft, or that the money belonged to the association.

6. The facts that defendant was only required to report to the association at stated periods, and that the time for reporting the receipt of the money alleged to have been embezzled had not arrived, do not prevent the state from showing by positive proof that defendant has embezzled it.

7. It was not necessary for the state to show that, before the finding of the indictment, defendant did not pay over all moneys received by him as treasurer of such association; nor to show what disposition he made of it after appropriating it.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

C. E. K. Royce was convicted of embezzlement, and appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The indictment charged that appellant was treasurer of the Veterans' Home Association, a corporation organized and existing under the laws of this state; and that on the 24th day of February, 1893, he embezzled the sum of $2,050, the property of said association, which came to his hands by virtue of his trust as such treasurer. The facts, as claimed by the prosecution, were that a certain draft drawn by the board of managers of the National Home for Disabled Volunteer Soldiers upon the assistant treasurer of the United States, at the city of New York, payable to the order of H. H. Markham, governor of the state of California, for the sum of $10,350, came to the hands of the defendant, as such treasurer, on the 21st day of February, 1893; that on that day he procured the Crocker-Woolworth National Bank, in San Francisco, to cash the draft, the proceeds of which he caused to be deposited to his individual account in said bank, the amount alleged to have been embezzled being part of said proceeds. The errors complained of are based upon rulings upon questions of evidence, and upon instructions to the jury.

M. R. Higgins, a witness for the prosecution, testified as follows: "I am the private secretary of Governor Markham. On or about the month of February of this year, Governor Markham received a draft for the Veterans' Home Association, which afterwards came into my hands. I don't know where that draft is now. Q. What did you do with that draft? A. I forwarded it to Mr. Royce, the treasurer of the Yountville Soldiers' Home, or the Veterans' Home Association of California, or whatever the name is. I forwarded it on the 20th of February, 1893, and think I have Mr. Royce's receipt for it, dated February 21, 1893. I have not seen the draft since. It was received from the National Soldiers' Home Association, through General Franklin, at Hartford, Conn., to whom the governor receipted for it. The draft was No. 71,228, on the assistant treasurer of the United States, for $10,350, for the Yountville Soldiers' Home, for 414 members, from October 1, 1892, to December 31, 1892, three months, at one hundred dollars per annum, no pensions retained, signed by the assistant treasurer of the United States (I don't know his name), indorsed by H. H. Markham." William H. Crocker, president of the Crocker-Woolworth National Bank, a witness for the prosecution, testified: "Q. Do you remember whether the bank cashed the draft to Colonel Royce? A. Yes, sir; I do. That was on the 21st of February, of this year. That draft was deposited by Mr. Royce. The entries of the description of the draft were made in our books, and that day sent for credit to our New York correspondent, the National Park Bank. I have not seen the draft since. Q. Now, on whom was that draft drawn?" Counsel for defendant objected to any description of the draft being given, because it did not appear that it was beyond the jurisdiction of the court. The witness, in reply to the court, said he meant the city of New York and state of New York. Counsel then added to his objection that it is not proved that it ever reached the state of New York. The objection was properly overruled. Conceding that the evidence did not show that the draft was in the state of New York, it did show that it was not in the possession of the witness, and this was sufficient for the purposes for which the evidence was intended. The defendant was not charged with embezzling the draft, but with embezzling certain moneys which he received, being the proceeds of a draft transmitted to him by Mr. Higgins; and the evidence called for was for the purpose of identifying the draft cashed by the bank as the same draft the defendant had that day received from Mr. Higgins. The object of the evidence was not to determine a contract liability created by the writing, and involving a construction of its very language, though it might have furnished evidence that the association was the owner of the proceeds. This, however, was sufficiently shown by other testimony afterwards given, but which will now be noticed as an illustration of the point under discussion. Mr. Higgins, resuming, testified: "I sent that check to Mr. Royce, by direction of Governor Markham, as his private secretary, and wrote a letter accompanying the draft. Copy of letter offered in evidence, and is in the words and figures following, to wit: 'February 20, 1893. Colonel C. E. K. Royce, Crocker Building, San Francisco—Dear Sir: I am directed by the governor to inclose you check No. 71,228, of assistant treasurer of the United States, for $10,350, for Yountville Soldiers' Home, for 414 members, from October first, 1892, to December thirty-first, 1892, three months, at $100 per annum. No pensions retained. Yours, very truly, M. R. Higgins, Private Secretary.' The witness: To that letter I received the following reply: 'San Francisco, February 21, 1893. W. R. Higgins, Esq., Private Secretary, Sacramento, Cal.—Dear Sir: I have the honor to acknowledge receipt of check No. 71,228, on assistant treasurer of the United States, for $10,350, indorsed by H. H. Markham, governor of the state of California, for the Veterans' Home of California. Very truly yours, C. E. K. Royce, Treasurer Veterans' Home of California.'" It will here be seen that defendant's letter to Mr. Higgins is an admission that as treasurer of the Veterans' Home of California he received the draft described by Mr. Higgins in his letter of transmission, and that he received it for the purposes named; and oral evidence tending to identify that as the draft delivered to the bank is primary and admissible.

In Com. v. Morrill, 99 Mass. 544, it was said: "The law generally requires the production of the highest evidence of which a thing is capable; and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from universal. For example, it does not require that a supposed writer shall be called to prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved." In the case above cited, a valise had been stolen, and was shipped by express from Massachusetts to Chicago. The express agent attached a tag to the valise marked "B. Anthony, Chicago, Ill.," as requested by the defendant. The valise was found in Chicago by a detective, who removed the tag, but at the time of the trial did not find it, and oral evidence was admitted of the writing upon the tag. An exception was reserved. The supreme court said: "In the present case the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag, with the written direction upon it, might have been more satisfactory to the jry than an oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters." In Singleton v. Barrett, 2 Cromp. & J. 368, Lord Lyndhurst said: "If a person give a receipt, you may prove the payment by parol. I have no doubt that what a party says admitting a debt is evidence, notwithstanding the promise to pay is reduced into writing." The supreme court of the United States said: "It cannot be laid down as a universal rule that, where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the receipt of money; it certainly could not be pretended that the production of this letter would be indispensable, and exclude all parol evidence of the advance." Keene v. Meade, 3 Pet. 7. In the case at bar, suppose that Mr. Higgins, instead of sending the draft to the defendant by mail, had personally handed it to him, and, having taken his written acknowledgment showing that he received it as treasurer, and the amount of it, had gone with him to the bank, and there saw him hand the same draft to Mr. Crocker, and obtain credit for the amount of it; could there be any question that such evidence would be competent to prove the identity of the draft delivered to defendant with the one discounted? If so, it was competent for Mr. Crocker to identify it by giving a description of it.

It is also contended that the court erred in overruling defendant's objection to the question, "What was the amount paid to Col. Royce for that draft?" for the reason that "there was no evidence that the draft belonged to, or was the property of, the Veterans' Home Association;" and this because defendant's receipt to Mr. Higgins was signed, "Treasurer Veterans' Home of California." This, it is said, is not the name of the corporation, and shows that the draft did not belong to the Veterans' Home Association. Mr. Crocker also testified: "The only indorsements that we kept were 'C. E. K. Royce, Treasurer Yountville Soldiers' Home,' and 'H. H. Markham.'" It was shown that, at the time of this transaction, the defendant was treasurer of the Veterans' Home Association; that the association had established its home at Yountville; and that there was no other home for soldiers at Yountville. Mr. Higgins, in his oral testimony, said the draft was for the "Veterans' Home Association," and in his letter transmitting the draft to the defendant called it the "Yountville Soldiers' Home;" while the defendant signed the acknowledgment of its receipt as "Treasurer Veterans' Home of California." But, if this evidence could create any doubt that these names were each used to designate the same association, the testimony of Mr. Horton that in the ledger of the Veterans' Home Association, under date of February 21st, in the handwriting of the witness, there is an entry of $10,310.35; that he got the information from which the entry was made from defendant; and that "the amount he gave me as the statement of that warrant was $10,310.35,"—sufficiently shows that he received it as the treasurer of the Veteran's Home Association.

It may be here stated that the proceeds of the draft, including a premium of $10.35, credited to defendant by the Crocker-Woolworth Bank, were $10,360.35, and that defendant deposited to the account of the association in the First National Bank his check on the first-named bank for $8,310.35, leaving unaccounted for the amount charged in the indictment. Upon the trial, a question arose as to a check drawn by defendant upon the Crocker-Woolworth National Bank which the bank claimed had been returned to defendant. The prosecution then called upon the defendant to produce the check. Counsel for defendant objected, and took an exception to the district attorney calling upon the defendant to produce evidence against himself. In 3 Russ. Crimes (9th Ed.) p. 233, it is said: "It has been solemnly determined that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and, in case he neglects to produce it, other evidence may be given of it." The defendant, however, was not required to produce the check. It is argued, however, that such a demand is liable to prejudice the defendant; and McGinnis v. State, 24 Ind. 503, is cited. In that case the defendant was charged with stealing a United States treasury note, of the denomination of $10. Upon appeal, it was assigned for error "that the court erred in admitting parol evidence of the contents of the United States treasury note alleged to have been stolen, no foundation having been laid for such proof, and no notice served upon the defendant to produce the note." It was held that the court could not compel the defendant in a criminal prosecution to produce an instrument in writing, in his possession, to be used against him, but that parol evidence may be given of the contents without such notice having been given. The question whether it would be error to make such demand was not before the court. In the case at bar the demand was not pressed, and we do not see how the defendant was prejudiced, even if it be conceded that such demand constituted error. The exception was to the demand of the district attorney, and not to any action of the court. If the court had directed the defendant to produce the check, or if the district attorney had commented to the jury upon the defendant's failure to produce the check, a different question would have been presented.

It is also contended that the court erred in refusing to give the following instruction, requested by the defendant: "The court instructs you, as matter of law, that the draft or check, referred to in the evidence as No. 71,228 was void and of no value, and not the subject of embezzlement." The same question was made upon the introduction of evidence, where it was said that the draft was void because "issued without any authority of law." The draft in question was drawn by the board of managers of the National Home, under section 2 of an act of congress entitled "An act to provide aid to state or territorial homes for the support of disabled soldiers and sailors of the United States," approved August 27, 1888 (25 Stat. 450). This act, after making an appropriation for that purpose, further provided: "And payments to the states and territories under it shall be made quarterly by the said board of managers of the National Home * * * to the officers of the respective states or territories entitled, duly authorized to receive such payments. * * *" By an act approved March 19, 1889, the home of the Veterans' Home Association, located at Yountville, Napa county, was recognized and declared to be a "state home for the support and maintenance of disabled soldiers and sailors of the United States," and to be under the exclusive management of the state, "through and by the board of directors of said association, who are hereby constituted a state board of directors for that purpose;" and the state treasurer was authorized and empowered to receive any and all money to which said home may be entitled under said act of congress. It is argued by appellant that this money, "when paid, becomes the money of the state, and goes into its treasury;" that "it is impossible for this corporation to acquire any right to any of the money appropriated by said act of congress." We think it clear that the act of 1889, above cited, creates the corporation a state agency for the management of the home, and the disbursement of all moneys appropriated for its support, whether by the state or the United States, or donated by individuals or societies. The act does not destroy or impair the existence or powers of the corporation. The state is limited by the act to the one specified mode of control, viz. "through and by the board of directors of said association;" and section 4 provides that "this act shall in no wise affect the title to the property of the association." It is not necessary to decide the question whether the association is the absolute owner of moneys coming to its hands, either from the state or the United States. It is authorized to receive moneys for a specified use or purpose. Conceding that it is a trustee of such moneys, its title as such trustee is quite sufficient to support an indictment for the larceny or embezzlement of the same.

It is contended, however, that money cannot be drawn from the treasury of the United States otherwise than in the manner provided by law; and the draft, having been drawn to the order of the governor, instead of the state treasurer, was void, and the United States lost nothing,—that is, that the money remained the property of the United States; that the Veterans' Home Association was not entitled to it, and its treasurer had not authority to receive the draft or obtain money upon it; and therefore the United States, though the owner of the money, could maintain no action against the association to recover it, nor could the association recover it from the defendant. The argument is ingenious, but does not aid the appellant. Whether the government was bound to recognize and pay the draft we need not consider. If the government had reclaimed the draft while it was in defendant's possession, upon the ground that it was issued without authority, it would have been a good defense to this prosecution. It was not so reclaimed, but defendant received the draft as the treasurer of the association, and received the entire proceeds; and, having received it as such treasurer, he is estopped from saying that it was not a valid draft, or that the proceeds were not the moneys of the association. If the draft was void upon its face, as contended by counsel, the defendant should not have received it; but having received it in the name and on behalf of the association, and having received the full amount of money specified in it, he cannot escape responsibility by saying either that the association was not entitled to the money, or that he was not authorized to receive it as treasurer. In Ex parte Hedley, 31 Cal. 108, it was held that if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized by the agency, he may commit embezzlement of it; and in People v. Treadwell, 69 Cal. 226, 10 Pac. 502, the defendant was the agent of Hanneke to receive money upon a claim which Hanneke held against Quinn, and received money from Quinn as such agent. Afterwards Hanneke assigned the claim to Wise, and the defendant, without informing Quinn of the assignment, continued to receive payments, receipting therefor in the name of Hanneke; and it was held that he was estopped in law from denying that the money received after the assignment he received as the agent of Hanneke. The court there quoted from Bish. Cr. Law, § 397 (in 8th Ed., vol. 2, § 364): "In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. * * * When a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal, asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" People v. Treadwell, 69 Cal. 235, 10 Pac. 502. See, also, People v. Gallagher, 100 Cal. 470, 471, 35 Pac. 80.

What we have said disposes of the defendant's requests numbered 1, 2, 3, 4, 5, and 7. Other instructions requested by defendant seem to be based upon the theory that the defendant was only required to report to the association at stated periods; that the time for reporting the receipt of this money had not arrived; and that until he had failed to account for it, or to pay it over to his successor, it could not be shown that he had embezzled it; and that in the meantime he might keep it in any safe place he saw fit. It is said in support of these propositions that the jury should know what the defendant's duties were before proceeding to determine whether he had violated his duties or his trust. There are doubtless many cases where an embezzlement can only be proved through the failure of the agent to account for or pay over the money received, but that goes only to the evidence, and not to the fact of the embezzlement, which may be proved by other evidence long before the period for accounting arrives, and before his successor could be elected or qualified. People v. Tomlinson, 66 Cal. 344, 5 Pac. 509, only decides a question of evidence, viz. that the refusal of the agent to pay over the money of his principal, when demanded by a person not authorized to receive it, is not evidence of embezzlement. Non constat that he may have in fact embezzled it before the demand, and that it was capable of other and positive proof.

The twenty-first request was properly refused. It asked the court to instruct the jury that there was no evidence that the defendant did not, prior to the finding of the indictment, pay over all moneys received by him as treasurer of the association. If the defendant, on the 24th day of February, embezzled and converted to his own use the moneys of the association, how could it affect his guilt in the eye of the law if he afterwards repented and restored the money? The court correctly charged the jury that: "When proof has been made to the satisfaction of the jury that the defendant did fraudulently appropriate to his own use the moneys of said corporation, contrary to his trust as its treasurer, it is not necessary for the prosecution to show further what disposition has been made of the money by the defendant after such fraudulent appropriation."

It is further contended that the court erred in not granting defendant's motion for a new trial, upon the ground that the verdict is contrary to law, because the court refused to instruct the jury "that the treasurer was authorized only to receive moneys appropriated or contributed to the objects of the association; and that the treasurer was not authorized, and it was no part of his trust, to receive money to which the association had no right or title; and that, if the defendant received money to which the association had no right, title, or claim, it could not be an act done by virtue of his trust." Here, again, the appellant's theory is that the money belonged to the state, and not to the association. This contention cannot be sustained. The act of congress imposed no restriction upon the state as to the channel or agency through which the money should be applied to the purposes designated in the act. It required no appropriation by the state legislature before the money could be used in support of the home. The money was appropriated by congress, and could not be diverted by the state. The veterans in the home were the beneficiaries of the fund from the moment it left the United States treasury, and the state itself could not divert it; and, as the inmates of the home could only receive it through the agency of the association, the association was entitled to its custody and use for the purpose for which it was appropriated, and such custody and use required and constituted ownership. The language of the act of the legislature of March, 1889, is: "The state treasurer is hereby authorized and empowered to receive any and all moneys to which said home may be entitled under the act of congress, the state thereby treating it as the property of the home, and recognizing the fact that the state is the mere conduit through which it is transmitted to the association."

We find no error which would justify a reversal, and the judgment and order appealed from are affirmed.

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103 Cal. 597

LACEY v. PORTER. (No. 19,325.)

(Supreme Court of California. Aug. 24, 1894.)

MALICIOUS PROSECUTION—SUFFICIENCY OF EVIDENCE—PROVINCE OF JURY.

1. Plaintiff was, at defendant's instance, arrested for threatening to enter on land in which defendant was interested, and detain the same by force. Plaintiff was a member of a society formed to take possession of the land, and a surveyor had been employed by the society to survey the land, and had surveyed a portion of it. *Held*, that the testimony of the surveyor as to acts and declarations of members of the society, in plaintiff's absence, regarding the intention of the society to take possession of the land, was admissible.

2. In an action for malicious prosecution, the credibility of witnesses, and the questions of malice, motives, and intention should be left to the jury only where the evidence for plaintiff is sufficient to support a verdict in his favor.

3. The question of malice is one of fact, and that of probable cause one of law.

4. In an action for causing plaintiff's arrest for threatening to enter on land and detain the same by force and violence, evidence that, when arrested, plaintiff was a member of a society the purpose of which was to take possession of the land; that plaintiff, with 14 other men and a team loaded with lumber, was going on the land when stopped by defendant; and that one of the party told defendant he might as well yield, as they had 300 or 400 men, and would go on the land,—showed probable cause for plaintiff's arrest.

5. Taking the advice of counsel before causing a person's arrest on a criminal charge tends to show good faith; and where the facts are fully stated to counsel, and his advice is acted on in good faith, there can be no recovery for malicious prosecution.

6. Where, in an action for malicious prosecution, probable cause is shown, no amount of malice will entitle plaintiff to recover.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by James Lacey against George K. Porter for malicious prosecution. Judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

Adams & Mitchell, for appellant. Graves, O'Melveny & Shankland (S. M. White, of counsel), for respondent.

HAYNES, C. On October 13, 1891, defendant, Porter, made complaint against the plaintiff, Lacey, charging him with threatening to enter upon and detain by force and violence the lands of the Porter Land & Water Company, a corporation, in which Porter was a large stockholder. Upon this complaint, the justice of the peace issued a warrant, and Lacey was arrested the same day; but, being unable to give bail that evening, was committed to jail, where he remained 17 hours. He was afterwards examined before the justice, and discharged, and thereupon brought this action against Porter for malicious prosecution. A jury trial was had, and, at the conclusion of the evidence, the defendant moved the court to instruct the jury to render a verdict for the defendant. The instruction was given, and a verdict returned in compliance with the instruction, upon which judgment was entered. Plaintiff moved for a new trial, and this appeal is from the judgment and the order denying said motion. No complaint was made by plaintiff other than that the prosecution was malicious and without probable cause; and these questions, he contends, should have been submitted to the jury. Some questions arising upon the admission of evidence are also made.

The lands of the Porter Land & Water Company, above mentioned, are part of the Mexican grant known as the "Rancho Ex-Mission de San Fernando." This grant was confirmed by the United States, and a patent therefor was issued in 1873, and was duly recorded in the recorder's office in Los Angeles county in 1876. The south half of the grant (generally known as the "Van Nuys Tract") is owned by the Los Angeles Farming & Milling Company. The lands of the Porter Land & Water Company are in the north half of the grant, and adjoin the Van Nuys tract. Other portions of the north half are held by individuals, among whom are Hubbard and Wright, who also own a tract the south boundary of which is the Van Nuys tract, and all held under titles derived by mesne conveyances from the patentee. At and prior to the time of the arrest, the plaintiff was a member of an organization called the "San Fernando Protective Association," which then had a membership variously stated at from 200 to 400 men. This organization had a written constitution, and all the officers usually had by voluntary associations, including a treasurer, to whom all moneys were to be paid over by the secretary, and who disbursed the same on orders drawn by the association. The membership fee was $15, upon the payment of which a person was entitled to a membership certificate. The dues were $5 per quarter. The object of the association, as stated in the preamble to the constitution, was "to have the title to certain portions of the lands of the San Fernando valley declared invalid, and open to settlement and entry as public lands;" or, as stated by the plaintiff in his testimony: "I think the association was for the purpose of jumping the land." Each member was restricted to 160 acres; but, if he desired more, he was required to pay to the secretary $25 for each additional 160 acres he might select. The land referred to in the preamble above quoted, and in the testimony of the plaintiff, was the said Mexican grant so confirmed and patented by the United States. Prior to the arrest of the plaintiff, the association had employed a surveyor, named Grove, who surveyed and subdivided the south half of the grant; and it, or a large portion of it, was allotted to members of the association, in individual parcels of 160 acres each; and, on and prior to October 8th, 50 or 60 houses or shanties had been erected and occupied by members of the association on that part of the grant.

The character of the entry upon and occupation of these lands is not doubtful. It was the unlawful and forcible entry by large numbers of persons, organized and banded together for that purpose, upon the peaceable and actual possession of another, whose title was evidenced by the patent of the United States, as was well known to the association. Nor were these lands wild and unimproved, but for many years, certainly for 15 or 20 years, had been regularly cultivated, and at the time of entry the stubble of the preceding harvest was upon the ground. The purposes of the association, however, were not confined to the south half of the grant. Whether the occupation of the south half before any open attempt to enter upon the north half was because of that part having been first surveyed, or whether it was for the better protection of the invaders by the proximity of their locations, it is not essential to inquire. On October 7, 1891, Shaffer, a member of the association, having made a selection of land on the north side from a map, went with two other members to find it, and on that occasion met Mr. Wright, one of the owners of the Hubbard & Wright tract, with whom they had some words. On the next day, Grove, the surveyor, with about 15 men (among whom were Shaffer, with a load of lumber, and the plaintiff), came to the south line of section 26, part of which section belonged to Hubbard & Wright and part to the Porter Land & Water Company, where they were met by Mr. Wilson, the superintendent of the Porter Land & Water Company, and Mr. Wright, who stopped them. Grove, who did the talking for the crowd, said they had come to settle on section 26; that they might as well let them go on there peaceably; that they were going on there anyhow; that he had 300 or 400 men belonging to the league, and had plenty of money back of them. The talk continued until between sundown and dark, when the crowd turned back. The next morning, Grove and the plaintiff, with several others, came again to the line. Plaintiff was head chainman. They had surveyed up to the line, and had gone about a half chain over, when Wilson, for the Porter Land & Water Company, forbade them going over the line, and pulled up a pin that had been stuck north of the line, and threw it back across the line. Plaintiff then went back across the line and said: "I ain't a bit afraid of you. I'll give you a pointer on that." Grove said (but not in the presence of plaintiff) that, if he had given the word the day before, his men would have gone on the land too quick, and that they (Wright and Wilson) would not have been anywhere; that his men were all armed; that they were coming again on Monday, and they might just as well let them go there and settle; that they considered it government land, and they calculated to go on it. The defendant, Porter, consulted the district attorney, and for that purpose visited his office two or three times, and was advised by him that he had a legal remedy, and directed the assistant district attorney to prepare a form of complaint to be used by defendant to procure warrants for the arrest of plaintiff and others, and such form was prepared, and was used to procure plaintiff's arrest. Grove, the surveyor, and several others, were included in the same complaint. Other facts, so far as material to be noticed, will be referred to in the examination of the points made by appellant.

The errors relied upon by appellant are (as stated in his brief):

1. "The admission of testimony showing the acts and declarations (made without the hearing of appellant), by members of the protective association and others, of the intention of the association to take possession

of respondent's land, no conspiracy having been shown." The constitution of the association was put in evidence by the plaintiff, and he admitted that he was a member, and that the object of the association was to "jump the land." Grove, it is true, was not a member of the association, but was its employé, aiding and assisting it, and having full knowledge of its existence and purposes; and all the statements and acts, whether of Grove or of the members of the association, were made and done while they were engaged in the accomplishment of the common design. Appellant was not only a member of the association, but was actively participating in what was being done, and it was not necessary to the admissibility of the declarations of the others that he should have been present and within hearing, even if he had been on trial upon the charge made against him.

2. It is further insisted that the court erred in "taking from the jury the questions of the credibility of witnesses, malice, motives, intention, and belief of respondent, and what facts the evidence established." The general rule undoubtedly is that these questions should be submitted to the jury where evidence is conflicting; but it is equally well settled that the court may within certain limits control the verdict, either by such an instruction as was here given, or by setting it aside, and granting a new trial, either upon motion of the defeated party or upon its own motion. To justify the court in directing a verdict, it is not necessary that there should be no conflict in the evidence; but, where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts. "In an action for malicious prosecution, the burden is on the plaintiff to show affirmatively that there was a want of probable cause." Grant v. Moore, 29 Cal. 656; Emerson v. Skaggs, 52 Cal. 247. "Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution." Ball v. Rawles, 93 Cal. 228, 28 Pac. 937. Malice is a question of fact; but what facts and circumstances amount to probable cause is a pure question of law, though whether such facts and circumstances exist is a question of fact. Id., 93 Cal. 227, 28 Pac. 937; Stone v. Crocker, 24 Pick. 84. The facts of the organization and purposes of the San Fernando Protective Association, that the Van Nuys tract had largely been occupied by members of the association acting in concert, that the purpose was also to occupy that part of the original grant then belonging to the Porter Land & Water Company, that Shaffer, accompanied by about 15 men, among whom were plaintiff and the surveyor, Grove, with a four-horse team loaded with lumber, were proceeding to go upon the land, when taken with the statements of Grove that the owners might as well yield peaceably, that he had 300 or 400 men, and would go on the land, all of which was shown without substantial contradiction, and all, except the statements of Grove last above referred to, by the testimony of the plaintiff, render it too plain for argument that defendant had probable cause for the arrest of plaintiff. It does not matter that no threat to occupy defendant's land was made by plaintiff personally, nor that he had already selected a quarter section on the other part of the tract. The occupation of the Van Nuys tract, in the manner described, with any movement towards the occupation of the other part of the grant with large numbers of men, was a threat to occupy it forcibly. Why should 15 men accompany one wagon load of lumber if the entry was intended to be lawful and peaceable? If the facts, as they existed, were such as to constitute probable cause, and the defendant acted thereon in good faith, it is not necessary to show that he consulted counsel. Taking the advice of counsel, however, tends to show good faith and honest motives and the absence of malice; and where the facts upon which a criminal complaint is based are fully stated to counsel, and his advice is acted upon in good faith, the plaintiff cannot recover. Ball v. Rawles, 93 Cal. 235, 28 Pac. 937. But, if probable cause is found to exist, no amount of malice will entitle plaintiff to recover; for, though malice is inferred from want of probable cause, still where probable cause does exist, malice, even affirmatively shown, will not entitle the plaintiff to a verdict. Thompson v. Rubber Co., 56 Conn. 493, 16 Atl. 554. The circumstances relied upon by appellant to show malice on the part of defendant are insufficient for that purpose; but, as it is clear that probable cause for the arrest was shown, it is not necessary to discuss them. We think the instruction to find for defendant was right, and that the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 624

JEFFERSON et al. v. HEWITT et ux. (No. 19,406.)

(Supreme Court of California. Aug. 31, 1894.)

Review on Appeal — Evidence of Agency — Promissory Notes — Conditions — Failure of Consideration—Void Issue of Stock.

1. Findings of fact by the trial court upon conflicting evidence will not be reviewed on appeal.

2. The secretary of a corporation is acting as its agent where he solicits a stock subscription, turns over to the company a note given therefor, whereupon the president delivers the stock certificate to the purchaser, and such actions are thereafter ratified by the board.

3. Under Civ. Code, § 359, prohibiting the issue of stock except for money paid, labor done, or property actually received, a stock certificate issued in exchange for a note conditioned upon the completion of the road in a given time is void, and such note is without consideration.

4. The condition upon which a note is payable need not be incorporated therein.

Commissioners' decision. Department 1. Appeal from superior court of Orange county; J. W. Towner, Judge.

Action by Amos E. Jefferson and others against R. E. Hewitt and wife. There was a judgment for defendants, from which, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Houghton, Silent & Campbell, for appellants. James Scarborough and Ray Billingsly, for respondents.

BELCHER, C. This action was brought by the assignees of a nonnegotiable note to recover from the makers the amount alleged to be due thereon. The note was for $5,000, dated July 14, 1888, and payable four months after date, and was given to the Santa Ana, Fairview & Pacific Railroad Company in payment for 50 shares of stock in that company. On the first trial, judgment was given for the defendants, and the plaintiffs appealed. The judgment was reversed, and the cause remanded for a new trial (95 Cal. 535, 30 Pac. 772), the court, among other things, saying: "The construction of the road to the ocean was no part of the consideration of the note. The findings negative the averment of the answer that the note was given 'upon the express condition' that the railroad should be completed within ninety days. The matters relied upon, to be available as a defense, must be shown to have been a condition agreed upon by the parties." When the case went back to the court below the defendants filed an amended answer, in which, after making certain denials, they set up two affirmative defenses. In the first of these defenses, it is alleged that on July 14, 1888, defendants agreed with the Santa Ana, Fairview & Pacific Railroad Company to take 50 shares of its capital stock, and to deliver to said company their promise in writing to pay therefor the sum of $5,000, and in pursuance thereof did on the same day deliver the note set out in the complaint, but that said agreement to take said stock, and the performance of said written promise, were by the agreement of the parties thereto at the same time made conditional upon the construction and completion of the railroad of said company from Fairview, its terminus at that time, to the Pacific ocean, before the maturity of said note, to wit, within 60 or 90 days, and that it was expressly agreed by and between said parties, at the time of the delivery of said note, that if said railroad should not be so constructed and completed within said period the defendants would not have to pay said note, or any part thereof; that said condition was not performed, and the road was not constructed in whole or in part from Fairview to the Pacific ocean, within said period, or at all, and no part thereof has yet been built; that about September 10, 1888, defendants notified said company that said condition had not been performed, and no steps had been taken to comply with it, and thereafter, about November 15, 1888, and again about January 15, 1890, the said condition being still unperformed, they tendered to the officials of said company the said stock, and demanded the return of said note, which return was refused; "and defendants hereby renew the tender of said stock, and deposit the certificate for the same herewith in court, and demand the return of their promise in writing." In the second defense it is alleged that the same agreement was made as that set up in the first defense, but that said agreement and note were made upon the sole consideration of the promise and agreement of the company that it would complete its road from Fairview to the Pacific ocean before the maturity of said note, to wit, within 60 or 90 days from its date; that the company failed to so complete its road, or any part thereof, and by reason of such failure the consideration for said agreement to take stock and for said note had wholly failed; and the tendering back of the stock is then alleged in the same terms as before. The case was again tried, and the court found the facts as to the said agreement and note to be as alleged in the answer, and gave judgment for defendants, from which, and from an order denying a new trial, the plaintiffs appeal.

In support of the appeal the principal contention is that the findings were not justified by the evidence. This contention cannot, in our opinion, be sustained. The negotiations for the sale and purchase of the stock were all between Dr. J. G. Bailey, who was then the secretary and a director and stockholder of the company, and the defendants, and they were the only witnesses as to the terms of the agreement. The testimony of the defendants was clearly sufficient to justify and sustain the findings, and the most that can be said is that some conflict was raised by the testimony of Dr. Bailey. That, however, was a matter for solution by the trial court, and its determination cannot be reviewed on appeal.

It is also contended that, whatever the agreement between Dr. Bailey and the defendants may have been, the company was not bound by it, for the reason that he was not acting as its agent, and had no power to sell the stock, either conditionally or unconditionally. And counsel say: "The company would have been bound if it were true that Bailey was its agent in the transaction, having authority to bind it; but he is neither shown to have been its agent, nor to have had any authority whatever to act for it in the matter." Whether this is so or not must be determined from the evidence. The material facts shown by the evidence are, in substance, as follows: As already stated, Dr. Bailey was the acting secretary and a director of the company, and all the negotiations for the sale of the stock to defendants were had between him and them. There was some unsold stock of the company, and Bailey and the other members of the board had talked a good many times about disposing of it, and he and they had tried to sell stock to others. Bailey went to the defendants, and solicited and urged them to take the stock, and during the negotiations told them that he had the privilege or power to dispose of a part of the stock to his friends. He took the note to the company on the day he received it, and a few days later the president of the company, Mr. Buck, took the certificate of stock to Hewitt's house, and offered it to him. Hewitt then asked Buck if it was true that the company was going to continue the road on from Fairview to the beach within 60 or 90 days, as agreed and stated to him by Dr. Bailey, and Buck said, "The road is going right on, notwithstanding any reports to the contrary." Hewitt then took the certificate, and he says, "I thought I might just as well have the certificate of stock, although I was negotiating for stock as completed from Fairview to the beach." In September following, Hewitt wrote a letter to the board of directors of the company, and delivered it to Mr. Catts, its then secretary, stating: "I hereby beg leave to tender to you my stock in your company, issued to me on or about the 17th day of July last, and to the amount of five thousand dollars ($5,000). And I further ask you to cancel my note, given for the sum of five thousand dollars ($5,000) for the said stock. My reason for this step is that the conditions and representations upon which the said stock was issued to me have not in any manner been fulfilled or carried into effect by your company." On the 8th of October following the directors of the company passed a resolution reading as follows: "Resolved, that the issue of certificate number 20, for fifty shares of the capital stock of this corporation, to R. E. Hewitt, on the 14th day of July, 1888, by the officers of this corporation, and the acceptance by them on behalf of this corporation of a certain promissory note made by R. E. Hewitt and Allie A. Hewitt, his wife, dated 14th day of July, 1888, for the sum of five thousand dollars, and given in payment in full for said shares of stock, be now by this board approved and ratified." These facts very clearly show, as we think, that Bailey, in making the agreement with the defendants in regard to the stock and the note, was acting as the agent of the company, with actual or ostensible authority to do so, and not as the agent of defendants; and it must be assumed that when he delivered the note to the company he notified its officers of the conditions agreed upon as to its payment. At any rate it was his duty to do so, and there is no evidence tending to show that he did not perform that duty. But, whether he did perform it or not, the company was bound by his action, since notice to an agent is constructive notice to the principal, and the rule applies to corporations as well as individuals. Civ. Code, § 2332; Bierce v. Hotel Co., 31 Cal. 165; 1 Mor. Priv. Corp. (2d Ed.) §§ 540b, 540c.

The point is made that when the defendants received the certificate of stock they became liable to pay for it, and the condition agreed upon as to payment, if made, was rendered void, leaving the obligation to pay in full force. In support of this position, counsel cite section 359 of the Civil Code, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received." But if that section has any bearing on the case, it seems to us, it must be construed to render void the certificate, and not the condition as to payment, and hence that the note was made without any consideration.

The objection that the condition, to be valid, should have been incorporated in the note, cannot be sustained. The facts of the case in this regard are very similar to those in Billings v. Everett, 52 Cal. 661. There it appeared that defendant gave plaintiff's assignor a note due August 1, 1875, with the oral agreement that the note should not be paid unless a certain water ditch, from which a certain number of acres of defendant's land could be irrigated, should be completed at the time fixed for the payment of the note; and, the ditch not being completed at the time fixed, it was held that there was a failure of consideration for the note, in whole or in part.

Looking at the whole case, we see no valid ground for reversal, and therefore advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 646

ADAMS v. BURBANK. (No. 19,324.)

(Supreme Court of California. Sept. 1, 1894.)

RESCISSION OF CONTRACT—QUANTUM MERUIT—SET-OFF.

1. Where one who has contracted with another to build a house wrongfully ousts the contractor, and prevents him from completing the work, the latter may treat the contract as rescinded, and can recover on quantum meruit.

2. In such an action the contract is admissible in evidence as proof of the value of the work, but is not conclusive on that point.

3. Where a contractor for the erection of a building gives to a material man an order on the owner, who owes him enough to pay the same, but refuses to do so, the owner, in an action by the contractor for the work done, cannot set off the cost of a mechanic's lien filed by the material man.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by J. F. Adams against David Burbank for work done and material furnished. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Brousseau & Thomas, for appellant. J. L. Murphey, for respondent.

SEARLS, C. This action was brought by J. F. Adams, the respondent, to recover from appellant the sum of $4,744.64, with interest and costs, for work, labor, and services performed and materials furnished in the construction of a brick building in the city of Los Angeles. It is conceded by the pleadings that on the 1st day of June, 1891, plaintiff and defendant entered into a written agreement by the terms of which the former was to furnish the material, labor, and work, as specified in certain specifications and shown by the plans, for a brick building to be erected for defendant on Broadway and First streets, in the city of Los Angeles, for which plaintiff was to receive $9.75 per 1,000 as per wall measure of 21 bricks to the foot, etc., to be paid by defendant at the rate of 75 per cent. as the work progressed; the estimates of the superintendent to be taken for the value of the work done, and his certificate to be given therefor; the residue to be paid upon the completion and acceptance of the work, and upon the plaintiff furnishing releases from all material men, or receipts for all material used and for all labor performed to the satisfaction of defendant. The specifications are made a part of the contract, which was filed with the recorder of the county. Plaintiff entered upon the construction of the building, furnished the materials, laid the foundation, built the first story and a small portion of the second story of said building, when, some time in July, 1891, he ceased work upon the same, leaving certain materials, such as brick, mortar, tools, and appliances for the work, and defendant finished the construction, using the material on hand, etc. At the time plaintiff ceased work there was due from him, for materials furnished by sundry parties, as follows: To the Inglewood Brick Company, for brick, $401.50; to H. S. Hudspeth, for sand, $37. Plaintiff, a few days after ceasing work on the building, gave orders for these claims upon the defendant, which he refused to pay; and they thereafter filed liens on the property for the several amounts due them, and prior to the trial of this action suits had been brought to foreclose said liens. Prior to the trial the action to foreclose the Hudspeth lien was dismissed. There was also a further lien filed upon the property to secure the sum of $30.45 due James L. Tucker for hauling brick for the Inglewood Brick Company to the building, but for which plaintiff was not personally liable, said brick company having contracted with him to deliver the brick; and the amount of Tucker's bill was included in the $401.50 due said company, and in the order given them on defendant. The foregoing facts are either admitted, or proven without material conflict.

As to the disputed facts, concerning which there was a substantial conflict in the testimony, it may be said that, in support of the verdict in favor of plaintiff, we are authorized to assume as proven the facts which there is substantial evidence to uphold. Upon this theory it must be said: (1) Plaintiff was proceeding to construct the building of the material and in the manner substantially as provided for in the contract, save as changed by orders of defendant's superintendent. (2) That without cause, and in violation of the contract, defendant took possession of the building, ousted the plaintiff therefrom, and refused to permit him to complete the same in consonance with the contract, and appropriated to his own use the material on hand and provided to be used therein, or in the construction thereof. (3) The labor performed by plaintiff and the material furnished by him, estimated at a fair valuation, are in excess of the verdict found in his favor. (4) Defendant agreed to pay the orders drawn upon him by plaintiff in favor of the brick company and of Hudspeth; and there was at that time in his hands, and due plaintiff, a sum of money greatly in excess of the sum of $438.50 called for by said orders, and that he refused to pay the same, or any part thereof.

The complaint contained three counts: The first, upon the contract; the second, upon a quantum meruit for services and for the materials furnished; and the third, for the value of materials left upon the premises, and converted by the defendant. The court, at the trial, ruled the plaintiff to an election as between the first and second counts, and he elected to go to trial upon the second and third counts. The theory of plaintiff was that defendant having violated the contract, and prevented his completion of the work, he was entitled to treat such contract as rescinded, and to recover, as for work performed and materials furnished at the request of defendant, the reasonable value thereof. This theory is correct; and while the contract was offered in evidence, and was admissible as proof of the value of material furnished and services rendered, it was by no means conclusive on that point, and was to be taken with the other evidence in arriving at such values.

The instructions asked by defendant and refused by the court, numbered from 1 to 12, both inclusive, were properly refused. They one and all involved, in different forms, the theory that plaintiff was bound by the contract price agreed upon for the work, or that the payments therefor were only due and payable in the manner and upon the terms provided by such contract, or that plaintiff could not recover if he had permitted liens to be filed upon the property on account of materials purchased by him, and for which he was liable, and had not paid the same as provided in the contract. Had the contract been adhered to, and the work completed under it, the result sought by these instructions would have followed; but if defendant violated it, and refused to allow plaintiff to consummate the work, he could not hold plaintiff to its terms, and at the same time refuse to perform his own obligations under the same agreement.

The court properly instructed the jury, at the request of defendant, that he, the said defendant, was not personally liable for the debts of the plaintiff, as contractor, to persons furnishing materials to him, and was not under obligation to the plaintiff to pay his debts to the material men, etc.

The court further instructed the jury, in substance, that they should offset the liens to the amount of $438, but not the costs and expenses thereof, provided plaintiff had given orders therefor, and that the defendant was indebted to plaintiff at the time in a sum in excess thereof. This was correct. If the money was due to the plaintiff from defendant, the orders given to the parties who later became lien holders operated as an assignment by plaintiff of his demand, pro tanto, and if defendant refused to pay the orders he should not be permitted to recover from plaintiff the costs and expenses incurred by reason of his refusal.

It is not perceived that Tucker was entitled to a lien. He did not perform labor upon the building, or furnish materials therefor, but was employed by the brick men to haul brick for them, and had no connection with the contractor, who owed him no liability. His position is not different from that of laborers who made the brick. If it, however, be conceded that he was entitled to a lien, as we must presume that, under the instructions of the court, defendant received a credit of $438 on account of the liens, and as the Hudspeth claim for $37 had been dismissed before trial, and defendant was not therefore bound to pay it, he is still a gainer if he pays the Tucker claim of $30.

The instructions given on behalf of plaintiff, taken together, contain a fair exposition of the law applicable to the case. To take up and answer in detail the objections made to them would take much space, and elucidate no principle of importance. The objections to evidence, so far as they involve any doubt as to the propriety of the action of the court, are not of sufficient importance to warrant a reversal, even if well founded. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 670

SEFTON v. PRENTICE et al. (No. 19,399.)

(Supreme Court of California. Sept. 1, 1894.)

CONSTRUCTION OF CONTRACT—TRESPASS.

1. An agreement to deliver at a certain place a quantity of water, "through and from a pipe, flume, or conduit," does not authorize the person to whom the delivery is to be made to cut at such place a hole in the pipe through which the water flows, and permanently attach thereto a pipe leading to his own premises.

2. It is no excuse for a trespass that no property was injured thereby.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by J. W. Sefton against W. B. Prentice and Julia V. Stewart for an injunction and damages. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

V. E. Shaw and Gibson & Titus, for appellants. E. W. Britt, for respondent.

McFARLAND, J. This action is somewhat difficult to classify. Its purpose is to obtain an injunction to prevent defendants from preventing plaintiff from attaching a water pipe to a certain water pipe of defendants. Judgment went for plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial. The decision of the case rests upon the respective rights of the parties under a certain written contract made by appellants on March 24, 1891, with one Fred. T. Hill. At that time appellants contemplated building some kind of a conduit to carry water from the large ditch of the San Diego Flume Company to Spring Valley, where they owned lands. This contemplated conduit was to run near to and past a point called "Patterson's Corner," which was about 2½ miles distant from the flume of the said San Diego Flume Company. Hill (as trustee) owned a part of lot 9, Ex-Mission rancho, consisting of about 300 acres of land, lying south of and most of it lower in elevation than said Patterson's corner. Appellants at that time had not determined what kind of a conduit they would construct for the purpose of carrying said water. Under these circumstances they and Hill entered into said contract, which provided, generally, that appellants would deliver to Hill, his executors, etc., and "assigns," at said Patterson's corner, for 25 years, such amount of water as Hill would purchase and furnish from the said San Diego Company's flume, not exceeding 10 miner's inches, in consideration of $1,000, which, it is admitted, was paid. Appellants were to begin to deliver the water within six months of the date of the contract. Within that time the said conduit was completed, and, when completed, it consisted of an open flume for about two-thirds of its length, beginning at the flume of the San Diego Company, and the remaining one-third consisted of an iron pipe, about 500 feet thereof next to the flume being 6 inches in diameter, and the rest, to and past said Patterson's corner, being 4 inches in diameter. The point at which the pipe commences is about 170 feet in elevation above said Patterson's corner; and it is continued over a hill to lands of appellants, and by force of the pressure water is carried to appellants' said lands, and also to lands of other persons to whom appellants furnish water. When it was completed, Hill was not prepared to use the water on the land on said lot 9, Ex-Mission rancho, and no request was made for the water mentioned in said contract until the month of April, 1893. At this last-named date the respondent herein, Sefton, was the owner of land lying easterly and about 3,000 feet distant from said Patterson's corner, and about 75 feet higher in elevation; and he also owned two miner's inches of water flowing in the said San Diego Company's flume, with the right to take the same from said flume. He laid an iron pipe from his land to or near Patterson's corner; and claiming that, by certain assignments, he had acquired all of Hill's interest in said contract, he demanded of appellants that they allow him to attach his pipe to theirs, so that by the pressure in appellants' pipe the two inches of water would be carried over the elevation to respondent's said land. This appellants refused to do, but they offered to furnish and turn out to him the two inches of water at Patterson's corner. Respondent then commenced the present action, and by the judgment of the court appellants were enjoined, or rather commanded, to allow respondent to attach his pipe to theirs, and furnish him the said pressure.

We pass over the preliminary points made by appellants; that is, whether the word "assigns" in the contract was not intended in the limited sense of meaning only the successors of Hill in the land in said lot 9; whether the attempted assignment of a certain alleged "receiver" was valid; and whether, under any view, injunction was the proper remedy. Assuming none of these points to be well taken, we are satisfied that, under the contract, neither Hill nor any of his successors or assigns had the right to cut a hole in appellants' pipe, attach another pipe to it hermetically, or use the pressure which it afforded. None of these things were covenanted for in the contract upon which respondent bases his right of action. The contract simply provides that appellants "will deliver to the party of the second part [Hill], his executors," etc., the amount of water before mentioned "near F. E. Patterson's northwest corner, in section 29," etc. The words of the contract upon which respondent mostly relies are these: "Said water to be delivered through and from a pipe, flume, or conduit, to be constructed" by appellants; and great stress is laid upon the word "from" by respondent and the court below. "Every word of the contract," it is argued, "must be given some force and meaning." Of course, in construing a writing, every word which, taken in connection with the other language used, has a distinctive meaning, and in any way qualifies the context, must be considered. But the makers of conveyances and contracts, as well as the makers of laws, are sometimes tautological, and needlessly repeat an idea in different words and phrases. The contract under consideration would be the same if the word "from" were not in it. No water running in appellants' pipe could possibly be delivered at Patterson's corner, in any manner whatever, without being taken from said pipe; otherwise it would inevitably run past said point. The word "from" simply expresses the general idea of separation. Some of its definitions given by Webster are: "Out of the neighborhood of;" "leaving behind;" "out of;" "the antithesis and correlative of to." By the contract, appellants were to construct some kind of a conduit,—any kind that they might choose,—and, through it, to carry and deliver to Hill at Patterson's corner a certain amount of water; but they did not contract to deliver to Hill any part of the conduit itself. "Conduit" is a general word, which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe, or any kind of aqueduct. Appellants chose to use a pipe as part of their conduit; but they did not agree to give Hill possession of any part of the pipe, for the purpose of cutting a hole in it and permanently occupying it by his attached pipe, or for any other purpose; and there is not a word in the contract about the furnishing of any "pressure." The contract to deliver the water, no doubt, included such delivery as would give Hill a reasonable opportunity of taking possession of the water delivered; but to sanction the claims of respondent in the premises would be for the court to make a contract for the parties different from that which they made for themselves.

It is contended that the attachment of respondent's pipe to that of appellants would not injure the latter. There is considerable evidence that it would be an injury to appellants; but a man has no right to commit a trespass upon the property of another because, in the opinion of the trespasser or of a court, it would do the owner of the property no harm. Neither is it of any consequence that, after the pipe of appellants had been constructed, they furnished water through connecting pipes to a few persons other than respondent. They had the right, of course, to make such a contract with another person if they chose to do so; but they made no such contract with Hill or his assigns.

The foregoing views are determinative of the appeal adversely to respondent; and, as they cover the merits of the whole case, it is not necessary to notice in detail the various specific points made by appellants. The case was decided in the court below upon the theory that, under the written contract between Hill and the appellants, the latter are compelled to allow the assigns of Hill to permanently attach a pipe to the pipe of appellants; and this, in our opinion, is not a correct construction of said contract. Judgment and order reversed.

We concur: FITZGERALD, J.; DE HAVEN, J.

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103 Cal. 652

SKELLY v. WESTMINSTER SCHOOL DIST. OF ORANGE COUNTY (MORRISON, Intervener). (No. 19,342.)

(Supreme Court of California. Sept. 1, 1894.)

SCHOOL DISTRICTS—LIABILITY TO GARNISHMENT—VOLUNTARY PAYMENT TO SHERIFF.

1. A school district is not subject to garnishment under Code Civ. Proc. § 542, authorizing the garnishment of any person indebted to a judgment debtor.

2. Though not subject to garnishment, payment by a school district to the sheriff of an amount garnished is a discharge, under Code Civ. Proc. § 716, authorizing any person indebted to a judgment debtor to pay the amount to the sheriff.

3. Payment of the amount due to the sheriff, after issuance of execution, but before delivery to the sheriff, is a discharge, under Code Civ. Proc. § 716, providing that a person indebted to a judgment debtor may pay the debt to the sheriff after issuance of execution, and before its return.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by F. F. Skelly against Westminster school district of Orange county (J. W. Morrison, intervener). There was a judgment for defendant, from which, and an order denying a new trial, plaintiff and intervener appeal. Affirmed.

Victor Montgomery, for appellant. F. O. Daniel, for intervener. James G. Scarborough, for respondent.

TEMPLE, C. This action was brought to recover $394 alleged to be due for work and materials performed and furnished in the building of a schoolhouse. It is alleged that the claim has been allowed to the extent of $350. The defendant, in its answer, denies that the value of the services and materials exceeded $350, and, as to that sum, pleads payment as follows: That on the 6th day of April, 1892, the Newport Wharf & Lumber Company, a corporation, commenced an action against the plaintiff to recover $545.05, and had summons and a writ of attachment issued on the same day, which said writ of attachment was on that day duly served on the defendant. That thereafter such proceedings were had that on the 11th day of May, 1892, a judgment by default was duly given and made by the clerk of said court in favor of said corporation, against said Skelly, for $549.39 and costs; that on the 6th day of July, 1892, an execution was issued in said action against the property of said Skelly, and July 11, 1892, the sheriff served upon the defendant a copy of the execution, with a notice that by virtue of said writ he levied upon all the moneys, goods, credits, effects, debts due and owing, or any personal property in its possession or under its control, belonging to said defendant therein, and at the same time demanded payment of such debt, or delivery of such personal property. Thereupon, in pursuance of said notice and demand, and before the return of said writ, the defendant paid to said sheriff the amount of said debt due from said defendant to the plaintiff, and took his receipt for the same. The court found for the defendant, and the findings of fact follow closely the language of the answer.

The intervener avers in his complaint of intervention that he is a creditor of this plaintiff, and on the 6th day of April, 1891, commenced an action against this plaintiff to recover the sum of $218.85; that on the same day a summons and writ of attachment were duly issued in said action and served on this plaintiff (defendant in that action). That on the same day the writ of attachment was served on this defendant by delivering to it a copy, with the notice required by the statute; that April 12th judgment was duly entered against said Skelly in favor of the intervener, and April 15, 1892, execution was issued upon the judgment, by virtue of which the constable having the writ levied upon the debt due from defendant to Skelly May 13, 1892; that after the claim of the defendant had been allowed, to the extent of $350, the constable made due demand for the amount of the execution, but defendant refused to pay the same, or any part thereof. The execution was thereafter returned wholly unsatisfied.

The defendant and the intervener, it will be seen, both claim that the admitted debt to the plaintiff has been levied upon under attachment and execution. The plaintiff contends that a school district is not subject to such process. Subdivision 5, § 542, Code Civ. Proc., reads as follows: "(5) Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ." The question is whether a school district is a "person," within the meaning of this section. Mayrhofer v. Board of Ed., 89 Cal. 110, 26 Pac. 646, was a case in which it was sought to foreclose a mechanic's lien upon a public schoolhouse. The constitution provides that laborers of every class, and material men, should have a lien upon the property upon which they have bestowed labor or furnished materials, and the legislature was required to provide by law for the speedy enforcement of the liens. The legislature, by law, provided that such persons should have liens for the labor or material used in the construction of any building or other structure. The language is general, and, in its usual sense, would include a schoolhouse, for that is a building and a structure. But it was held that the statute did not apply to public buildings. The rule is that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions, or establish a right against it. In Savings Bank v. U. S., 19 Wall. 239, it is said: "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the king) in the least, if they tend to restrain or diminish any of his rights or interests. * * * The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts." In People v. Herkimer, 15 Am. Dec. 382, some illustrations of the application of the rule are given. The state is not bound by a statute of limitations, unless it is expressly so provided, nor by a statute limiting a time during which a judgment shall be a lien (Com. v. Baldwin, 1 Watts, 54); an act abolishing imprisonment for debt (People v. Rossiter, 4 Cow. 143); insolvent law (U. S. v. Wilson, 8 Wheat. 253), etc. Rules of procedure generally do apply. But this principle does not go to the extent of holding that, where a right of action is given, it authorizes a suit against the state.

The special phase of this question, as applicable to garnishment, is discussed in Divine v. Harvie, 7 T. B. Mon. 439, and in a note to that case (18 Am. Dec. 194) the authorities upon the subject are collected and discussed. That was a creditor's bill founded upon a statute of Kentucky authorizing the court of chancery, upon return of an execution nulla bona, to subject to the satisfaction of the judgment any chose in action, etc., belonging to the judgment debtor. It was said that this act did not include a claim of the debtor against the state. It was pointed out that such a proceeding might cause great detriment to the state, and then the auditor and treasurer were not authorized to determine for the state the right of the attaching creditor to apply the debt to the satisfaction of the judgment. That receives illustration in this case. Plaintiff claims that the officers of the school district have paid the claim of one of his alleged creditors without right, and when there was no valid levy or judgment. The law has not given these officers the authority to determine these questions at the peril of the district. Merwin v. City of Chicago, 45 Ill. 133, was a case in which, an attachment having been sued out against one Nicolson, the city of Chicago was summoned as garnishee. On motion the city was discharged without having answered, and an appeal was taken. The court said: "The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been held the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Ill. [595, City of Chicago v. Hasley]. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers, to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings who are more dependent on the municipal for the security of life and property than they are on either the state or the federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation. * * * We understand, however, the counsel for the appellant to concede that money due municipal officers, agents, or contractors is not liable to garnishment; but it is insisted, if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes. But in our opinion the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation." The annotator above cited reaches the same conclusion, after citing numerous cases. If such be the rule as to municipal corporations, a fortiori such must be the rule as to school districts. A distinction exists between municipal corporations, which are generally called into existence with the consent of the inhabitants, for local and private advantage, and counties, school districts, and other political divisions, which are created for state purposes. Dill. Mun. Corp. § 23. "The school district or road district is invested by general enactments, operating throughout the state, with a corporate character, the better to perform, within and for the locality, its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty. So with counties. They are involuntary civil or political divisions of the state, created by general laws to aid in the administration of the government." Id. § 25. They are quasi corporations, of the most limited powers known to the laws. The trustees have special powers, and cannot exceed the limits. They are special agents, without general power to represent the district. In this state, for many purposes, the supervisors represent the district; and, in others, the county superintendent. They may be sued, it is true, but this does not enlarge the scope of their powers. On the other hand, some of the powers of a city may be considered private, as they are for the special advantage of the municipality, as distinct from the general public. School districts, being, like counties, political subdivisions of the state, can be sued only by permission of the state. Their funds are all devoted by statute to specific purposes. A garnishment may be regarded as a suit brought in the name of, and on behalf of, one who claims to be a creditor. One question to be determined may be whether the defendant in the process is a creditor. If subject to the writ, the corporation will be required to respond, and submit to a determination of the question. The determination will not bind the alleged creditor.

In accordance with the current of authority, and with principle, I think it must be held that a school district cannot be garnished. But the same reasoning does not tend to show that when the school district has paid the amount of the debt to the sheriff, while the sheriff had in his hands an execution issued upon a valid judgment against the creditor of the district, such payment may not be valid. Section 716, Code Civ. Proc., in no way trenches upon the sovereignty of the state, nor does it impose upon any officer of the state any duties which can embarrass his performance of official duties. The fact that the word "person" occurs in this section, and also in the provisions in regard to garnishment, does not show that unless one applies the other cannot. No doubt the school district is a person, within the Code definition. The decision is not placed upon the ground that the language is not sufficiently broad to include the political divisions of the state, but because laws made primarily to provide for individual rights will not be presumed to include the state when the effect might be to authorize a suit against the state, or embarrass it in the discharge of its functions. Nothing of this kind would result if the officers should voluntarily, acting under section 716, pay the debt. The officers, of course, still take some risks. If no such debt existed against the corporation, or if, for any reason, the execution were invalid, loss might fall upon the officers making the payment. Their only authority in the premises is the section under discussion, and they must be sure that all the necessary conditions exist to justify their action.

It is contended that the demurrer to the second defense should have been sustained. The point is that the judgment upon which the execution was issued is not well pleaded. It is averred that judgment by default was "duly given and made by the clerk of said court." It is not a case in which the pleader was taking advantage of the statutory mode of pleading in lieu of setting out the procedure in detail. There is a sufficient detail of the procedure in the answer, and the averment substantially sets out that default was entered by the clerk, and thereupon judgment entered by him. This the statute authorizes. At all events, as the functions of the clerk are well known, and he is a mere ministerial officer of the court, the inaccuracy could have misled no one.

I do not think the affidavits in regard to newly-discovered testimony entitle appellant to a new trial. It seems that an execution was issued on the 6th, but was retained by the attorney of the Newport Wharf & Lumber Company. The attorney had evidently informed the sheriff of the fact, and he commenced his efforts to find property as though he actually had it in his hands. An order was procured from the school trustees, and a requisition from the school superintendent. Then, before the money was paid, the sheriff took the execution, and received the money from the treasurer. This was a literal compliance with the statute. No doubt both the sheriff and the attorney representing the creditor considered the execution as already delivered to the sheriff. The statute does not require that, however.

If the views herein expressed are correct, it is unnecessary to discuss the case of the intervener. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(4 Cal. Unrep. 749)

GOETZ v. GOLDBAUM. (No. 19,331.)

(Supreme Court of California. Sept. 1, 1894.)

AGENCY—PLEADING—ESTOPPEL TO DENY.

1. A complaint on a contract executed by an agent may, without more, aver its execution by defendant, the principal; and, the agency appearing from the copy of the note set out, authority to execute it is implied, and need not be expressly alleged.

2. Ratification need not be expressly pleaded.

3. W., a merchant, and partner with plaintiff in a livery, failed, and transferred his property to his brother S., through whom he settled with most of his creditors, as he swore, with his own money. Business was done in S.'s name, but W. borrowed money from plaintiff for the business, bought out his interest in the stable, and gave him a note for the whole, signed, "S., per W." Plaintiff asked S. about the note, and S. said he would go and see about it, and went and talked to W., but said nothing to plaintiff. Later he proposed to plaintiff to go into partnership with him and W., putting in the note as capital; and then he took over the business and property from W., paying him some cash, and assuming the debts, among which, at the time, he mentioned this. *Held*, that he was estopped to say that W. did not sign the note as his agent, and that he had not ratified it.

4. A promissory note, such as, under Civ. Code, § 2309, must be in writing, is a commercial note, not a mere nonnegotiable promise to pay, and the latter may be ratified orally.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by J. E. Goetz against Simon Goldbaum on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

Aitken & Smith, for appellant. Daney & Wright, for respondent.

TEMPLE, C. Defendant appeals from the judgment and an order refusing a new trial. The action is based upon a nonnegotiable promissory note, and in the complaint it is alleged that on the 5th day of October, 1891, defendant executed and delivered a promissory note in writing, in the words and figures following. The note is then set out at length, and is signed, "Simon Goldbaum, per Wm. G." There is no averment showing who Wm. G. was, or that he had authority to execute the note as the agent of defendant. The complaint was demurred to for insufficiency of facts, and as ambiguous, in that it appears that the note was executed by some person other than defendant, but does not show who such person was, or that he had authority to execute the note as agent. The same objection is also made on the ground of uncertainty. It is now contended that the complaint should set out the facts, and not conclusions, and that, if the fact be that the note was made through an agent, it should be so averred. St. John v. Griffith, 1 Abb. Pr., 39, is quoted, in which it is said: "The Code requires facts to be stated, not fiction; the facts of the case, and not the mere legal conclusion. Such a statement as that adopted by the plaintiff is not only admissible, but necessary." In that case it was averred that the act was done by the agent. That decision was by a subordinate court, and is not in accordance with better considered cases. The plaintiff is required to state the facts which constitute his cause of action. The constitutive fact here is plainly that defendant executed the note. Whether by an agent or in person is immaterial. If by an agent, such fact is not one which constitutes his cause of action.

But it is argued, inasmuch as it appears that the note was executed through an agent, the authority should appear. This point is answered by the case of Sherman v. Comstock, 2 McLean, 19, Fed. Cas. No. 12,764. In the declaration in that case it was averred that defendant made his note or check in the words and figures following: "Detroit, December 14, 1838. Cashier of the Michigan State Bank: Pay to Morgan and Clark, or bearer, $674.96 thirty days from date. [Signed] Horace H. Comstock. By Joel Clemens." There was no further allegation as to agency. The declaration was demurred to on the ground that it did not appear that Clemens was authorized to act as agent for defendant. The court said: "As it regards the execution of the note by the defendant, it is sufficiently averred in the declaration. He signed it by Joel Clemens; and that Clemens was authorized to act in the premises appears, for that his act is alleged to be the act of his principal. The declaration might have contained an averment that Clemens was duly authorized to act as the attorney in fact of the defendant, but such averment is unnecessary."

Appellant next complains of the findings. He says that it is nowhere found that defendant executed the note; that, on the other hand, it is found that the note was executed by William Goldbaum, without authority to act as the agent of Simon; and that, in another finding, it is found that William Goldbaum did have implied authority to execute the note as the agent of Simon. In the first finding, it is found that William Goldbaum executed the note which is set out in the finding, pretending to act as the agent of Simon. The use of the word "pretending" is unfortunate, but the context plainly shows that the idea intended to be conveyed is that, in executing the note, William claimed to be acting as the agent of Simon. The court then proceeds to state that William had no express authority; sets out facts from which it draws the conclusion that the act was ratified and adopted by Simon as his act. The court did not find in direct terms that the defendant executed the note, but it found that it was executed by William, claiming to act as the agent of Simon, and that Simon ratified the act; in other words, adopted the instrument as his own. Ratification is in law the equivalent of a previous command. It is proof of due execution. This suggestion is also a sufficient answer to the objection that ratification should be pleaded. It is true the general rule is that estoppel should be pleaded when under the practice there has been an opportunity to plead it; but ratification is not estoppel, although there is often an element of estoppel in it. But the point is also made that the evidence does not justify the finding that there had been a ratification. It appears that prior to October, 1890, William Goldbaum had been carrying on a mercantile business at Oceanside, and had also been engaged in the livery business in partnership with plaintiff. In October, 1890, he failed, and was forced to transfer his property to his brother Simon, the defendant. He made a settlement with most of his creditors, and his brother Simon took a transfer of all the property, including William's interest in the stable, and paid or appeared to pay such debts of William as were then paid. I state the matter in this form because William testified that the money advanced by Simon really belonged to him (William). It was then arranged between William and Simon that William should continue the business in the name of Simon. Goods were to be purchased in the name of Simon, and all transactions were to be in his name. This was necessary, because William had not been able to settle with all of his creditors. The business was carried on in pursuance of this agreement for about one year before the note was given. During that time plaintiff had loaned to William $300 to be used in his business. He then arranged to sell his half of the livery stable to William. The arrangement was made, and the note in question was given, for the $300 which had been previously loaned, and for plaintiff's interest in the stable. Of course, plaintiff knew that the business was being carried on in the name of Simon Goldbaum, and, when he took the note, he asked William if he had authority from Simon to act for him, and was told by William that he had. Plaintiff testified that he knew the business was being conducted by William in the name of Simon, because William told him so. Some two weeks after getting the note, plaintiff went to San Luis Rey to ask Simon Goldbaum about the note. He showed Simon the note, and asked if it was all right. Mr. Goldbaum said: "I don't know what they are doing in town. I will go in this afternoon and see." Plaintiff replied, "Monday will do." Monday, Simon Goldbaum went to the store, and had a private talk with William. Plaintiff was there, but Simon said nothing to him about the note. The testimony of William Goldbaum shows that at that time Simon had a full explanation in regard to the note. Simon Goldbaum said nothing more about the note to plaintiff until November, 1892, when he proposed to plaintiff to go into partnership with himself and William, and said he could put the note in as a part of his capital. In January, 1893, a difference arose between William and Simon Goldbaum. The latter claimed the goods in the possession of William, and which constituted the stock in trade with which William was doing business in the name of Simon Goldbaum. The controversy was settled, Simon Goldbaum taking the business and property, and paying William some $1,700, besides assuming the indebtedness. While negotiations were progressing, a list of debts was produced, which did not contain the debt to plaintiff. Defendant called attention to the fact, and said: "The indebtedness must be more. It is best that we foot up the indebtedness, and make a settlement on that basis." And, again: "There is that Goetz note, too. Don't forget to put that in,—six hundred dollars. * * * I will have to pay that." For various reasons, appellant contends that this does not amount to ratification:

1. Because, he says, William did not, in the purchase of the interest of plaintiff in the livery stable, claim to act as agent, but in his own right. An act not done as agent cannot be ratified. The evidence shows very plainly that the parties to the transaction each understood that William Goldbaum, in making the trade, professed to be acting as the agent of his brother. The note is itself some evidence of that fact; and then plaintiff asked if he had authority to sign the note. Plaintiff knew that William Goldbaum was conducting business in his brother's name, but testified that he knew no more of it than others. Of course, he knew that the interest in the stable which had formerly belonged to William had been conveyed to Simon. The real question is, inasmuch as William really owned the business, although it was conducted in the name of his brother, is not the obligation his, although in the name of his brother? If Jones were to buy out Smith & Co., and were to continue the business on his own account, but in the name of Smith & Co., as to those who knew the facts Smith & Co. would be but an alias of Jones. It does not appear that plaintiff knew that all the property belonged to William, and it does appear that Simon Goldbaum claimed that it belonged to him. The reason why the business stood in the name of Simon was to avoid the creditors of William. It was a hiding of the goods, or they really belonged to Simon, with the understanding that William should somehow get the benefit of the business. Under the circumstances, I think Simon Goldbaum cannot be heard to say that William was not conducting the business as his agent, even as to those who did know the facts.

2. It is contended that the act of William in executing the note could only be ratified by a writing, because it is said a promissory note must be in writing. Civ. Code, § 2309. But waiving the point that the instrument set out in the complaint is conceded not to be a "promissory note," within the meaning

of the Code, the contract is not one required by law to be in writing. Only when in writing, it is recognized by commercial law as a promissory note; but the contract is simply an agreement to pay money, which need not be in writing.

3. The facts do not show ratification. I think the facts are quite sufficient, and, furthermore, that, when Simon took the business subject to the payment of the debts, he was under obligation to pay the note. It was not required to be in the memorandum, because Simon Goldbaum recognized his liability on the note, and in effect so said at the time. There is evidence contradicting the testimony to which I have alluded. As the case is presented here, that is of no consequence.

Several objections were made to the introduction of evidence. After examination, I am satisfied that none of them were well taken. A discussion of them would serve no useful purpose. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 641

MERCED SECURITY SAV. BANK v. CASACCIA et al. (No. 18,304.)

(Supreme Court of California. Sept. 1, 1894.)

MORTGAGES—COLLATERAL SECURITY—SEPARATE ACTIONS.

Code Civ. Proc. § 726, providing that there can be but one action for the recovery of a debt secured by mortgage on real estate, does not prevent separate actions on mortgages given as collateral security only of a debt, or of an action on a mortgage given as security for a debt after action on one given as collateral security.

Commissioners' decision. Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by the Merced Security Savings Bank against A. R. Casaccia and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Frank H. Farrar, for appellants. T. C. Law, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The action was brought to foreclose a mortgage. The answer is a plea in bar. The court found, among other things, that on the 29th day of July, 1889, one Flanagan was indebted to plaintiff in the sum of $1,032.07, and to defendant Casaccia in the sum of $600. Casaccia then assumed the debt of Flanagan to plaintiff, and gave his note for the same, which was accepted by the bank. Casaccia at the same time took from Flanagan his note, secured by mortgage for $1,632.07, which was then assigned to plaintiff as collateral security for Casaccia's note of $1,032.07. At the same time, Casaccia executed another note to the bank for $400, secured by a mortgage upon land of his own. This was also intended as collateral security for the note for $1,032.07 from Casaccia to the bank, and is the note and mortgage upon which this suit is brought. The condition then was this: The bank held Casaccia's note for $1,032.07; as collateral to secure it, a note and mortgage for $1,632.07, executed by Flanagan to Casaccia, and by him assigned to the bank; and a note of $400, secured by mortgage executed by Casaccia to the bank. In May, 1893, the bank, as assignee of Casaccia, commenced an action to foreclose the Flanagan mortgage, but did not make Casaccia a party to that action. A decree of foreclosure was obtained, and the property sold; and, after paying costs, the sum of $575 was left to be credited upon the debt of Casaccia to the bank, leaving $808.78 still due.

Appellant claims that plaintiff should have brought suit upon the note for $1,032.07 against Casaccia, and in the same action sought to foreclose the mortgage against Flanagan for $1,632.07 and the mortgage involved in this suit for $400, and that, not having done so, he has waived the security on the mortgage sued on in this action, and perhaps the right to sue on the note for $1,032.07. This contention is based solely upon section 726, Code Civ. Proc., which provides that there can be but one action for the recovery of any debt secured by mortgage upon real estate. This statute is a limitation upon the rights which usually pertain to property, and the restriction will not be carried beyond the obvious import of the language used. Accordingly, it has been held that a judgment of foreclosure of a mortgage given to secure a promissory note does not bar the right, after sale and judgment for a deficiency, to a suit against an indorser of the note to recover such deficiency (Vandewater v. McRae, 27 Cal. 596); also, that after judgment of foreclosure and sale under a mortgage given by a nonresident of the state, upon whom personal service has not been obtained, a personal action may be brought to recover any deficiency remaining after sale of the mortgaged premises, although it was held that in such case the court had no jurisdiction in the foreclosure suit to enter a judgment for such deficiency. Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102. It was said: "It is true that the personal judgment docketed against the defendant was void, and also that, under the section of the Code cited, there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property. It does not follow, however, that after the mortgage security is exhausted, leaving a deficiency which is no longer secured, no new action on the note can ever be maintained." The Code itself recognizes this view in section 533, where an attachment is authorized when the security has been lost. In these cases, when the personal action was instituted, the debt was not secured by mortgage. If the mortgagee had voluntarily released his mortgage, his debt would then be unsecured. Such a mortgagee, however, would not be entitled to his personal action. It would be an attempt on his part to evade the operation of the statute, while the other cases supposed would not be within the policy of the law, although two actions have been allowed upon a debt which was originally secured by a mortgage. The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action.

The statute was complied with in the suit against Flanagan. The mortgage was not given to secure the principal debt of defendant to plaintiff. It was a collateral matter. The suit to foreclose it was not an action for the recovery of the principal debt. It was an act for the preservation of the security. To do this was a duty imposed upon plaintiff by the contract of hypothecation. That the plaintiff thereby received part payment of the note was an incidental matter. The suit to foreclose was not an action to recover that debt, but to preserve the security. A construction should not be given to a statute, if it can be avoided, which will lead to absurd results or to a conclusion plainly not contemplated by the legislature. In this case there were two mortgages, both taken as collateral security. Suppose the mortgages had been upon land situated in different counties, and that the debt secured by one would be barred by the statute of limitations before the debt secured by the other fell due. Plaintiff could not have included both in one suit to foreclose, because such suits must be brought in the county in which the land or some part of it is situated; and one debt would either not be due when suit was brought, or would be barred by the statute of limitations. Certainly, it was not intended to prohibit the ordinary transaction of putting up collaterals to secure an indebtedness, nor to limit such collaterals to mortgages which can be foreclosed in the same action. The plea in bar, therefore, is not good. There is some greater plausibility in claiming that the mortgage in suit was given to secure the principal debt than that such was the case with the Flanagan mortgage. The present note and mortgage were executed solely as security for the principal debt. There is no other consideration for the note, and it represents no other indebtedness. But, conceding that this mortgage is one given to secure the principal debt, no other action has been brought to recover the debt secured by it, and—if the concession be made—no other could be brought on that note until this security has been exhausted. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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4 Cal. Unrep. 754

ORR v. KERN COUNTY. (No. 19,382.)

(Supreme Court of California. Sept. 1, 1894.)

CONSTABLES—FEES.

St. 1893, p. 310, § 7, providing that, in counties of the class to which K. county belongs, constables shall receive "such fees as are now or may hereafter be allowed by law," does not make any change in the existing law relating to fees of constables in that county.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by T. B. Orr against the county of Kern to recover constable's fees. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Patten & Graham and R. J. Ashe, for appellant. J. W. Ahern and A. T. McCreery, for respondent.

DE HAVEN, J. The superior court drew the correct conclusion of law from the facts found, and the judgment must therefore be affirmed. Section 7 of the act of March 23, 1893 (St. 1893, p. 310), amending the act of March 31, 1891, establishing a uniform system of county governments, provides that, in counties of the class to which the county of Kern belongs, constables shall receive "such fees as are now or may hereafter be allowed by law." It is too plain to admit of argument that by this language the legislature meant to say that constables should, until otherwise enacted, continue to receive the same fees in the county of Kern as they were then allowed by law. In other words, it was not the intention of the amendatory act of March 23, 1893, to make any change whatever in the existing law relating to the fees of constables in that county. Judgment affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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103 Cal. 678

JONES v. SANDERS. (No. 15,306.)

(Supreme Court of California. Sept. 1, 1894.)

NEW TRIAL—DEATH OF TRIAL JUDGE—AUTHORITY OF SUCCESSOR—REVIEW ON APPEAL.

1. Where, after findings and judgment, a trial judge dies, his successor may review the findings and grant a new trial.

2. An order granting a new trial for insufficiency of evidence will not be reversed on appeal unless the trial court clearly abused its discretion.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by M. P. Jones against C. T. Sanders. There was a judgment for defendant, and, from an order granting a new trial, defendant appeals. Affirmed.

Atty. Gen. Hart, for appellant. W. S. Goodfellow, for respondent.

PER CURIAM. This action was brought in the superior court of the city and county of San Francisco, and the question involved was whether the plaintiff had a right to maintain a certain sewer across a lot owned by the defendant in that city. The case was tried before the late Judge Hoge, and the findings and judgment were in favor of the defendant. The plaintiff moved for a new trial upon the ground that the findings were not justified by the evidence, but, before the motion was heard, Judge Hoge died. Afterwards the motion was heard by another judge of the court, and granted, and from that order this appeal is prosecuted by the defendant.

It is claimed for appellant that, as Judge Hoge presided at the trial, his findings upon all the questions of fact should be treated as conclusive. We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings when there is a substantial conflict in the evidence, but it has been repeatedly held that, upon motion for a new trial, it is the duty of the trial court to examine the evidence, even though it be conflicting, and, if dissatisfied with the conclusions reached, to grant a new trial; and the rule is the same whether the motion is heard by the judge who tried the case, or by some other judge, whose only knowledge of the facts is obtained from the record. Macy v. Davila, 48 Cal. 646; Bauder v. Tyrrel, 59 Cal. 99; Blum v. Sunol, 63 Cal. 341; Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861.

It is also claimed that the evidence without any substantial conflict was sufficient to justify and sustain the findings made by Judge Hoge, and that the order granting the new trial was therefore erroneous. But it is well settled that a motion for a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and that an order granting a new trial on that ground will not be reversed on appeal unless it appears that there was a clear abuse of discretion. Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Breckinridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Bjorman v. Redwood Co., 92 Cal. 500, 28 Pac. 591. Here we do not think any such abuse of discretion appears as would justify a reversal of the order. This being so, no good would be accomplished by a rehearsal of the facts; and any discussion of them for the purpose of indicating the results which should be reached on the new trial would be obiter dictum, and out of place. The order appealed from is affirmed.

PEOPLE ex rel. SANDERS v. JONES. (No. 15,388.)

(Supreme Court of California. Sept. 1, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the people, etc., on the relation of C. T. Sanders, against M. P. Jones. There was a judgment for plaintiff, and from an order granting a new trial he appeals. Affirmed.

Atty. Gen. Hart, for appellant. W. S. Goodfellow, for respondent.

PER CURIAM. The questions arising on the appeal in this case are substantially the same as those considered in Jones v. Sanders (No. 15,306, just decided) 37 Pac. 649. The action was brought to compel the removal of obstructions from an alleged public street, commonly known as "Touchard Street," in the city of San Francisco. The trial was before Judge Hoge, and the findings and judgment were against the defendant. A motion for new trial was made upon the grounds of the insufficiency of the evidence to justify the decision and of errors of law occurring at the trial, and, after the death of Judge Hoge, was heard and granted by another judge of the court. The appeal is by the people, from the order granting the defendant's motion. In support of the appeal the same points are made as in Jones v. Sanders, and what was said in deciding that case is applicable here. Upon the authority of the decision in that case, we think the order appealed from should be affirmed, and it is so ordered.

103 Cal. 661

MARQUIS v. CITY OF SANTA ANA. (No. 19,380.)

(Supreme Court of California. Sept. 1, 1894.)

MUNICIPAL OFFICES—ABOLISHMENT — CHANGE OF SALARY—REMEDY OF OFFICER.

1. An officer may sue a city for salary, even though he may be entitled to relief by writ of mandate.

2. Under the municipal government act (St. 1883, p. 251, § 755), providing that the assessor shall receive a compensation, to be fixed by ordinance, which shall not be increased or diminished during term of office, it cannot be changed during term of office by an ordinance accepting the provision of an act previously passed that the assessment by the county might be made the basis of municipal taxation, the act stipulating, however, that its provisions should not be in effect in any city till accepted by ordinance.

3. Right of an officer to salary is not affected by diminution or cessation of the duties of the office, the office itself remaining.

4. A city office created by the legislature cannot be abolished by the city.

5. The office of city assessor, created by the municipal government act (St. 1883, p. 251, § 752), is not abolished by the act of March 2, 1891, providing that the assessment by the county may be made the basis of municipal taxation, provided that it shall not be in force in any city till it, by ordinance, elects to avail itself thereof by a certain day "of each year."

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by W. H. Marquis against the city of Santa Ana for salary as assessor. Judgment for plaintiff. Defendant appeals. Affirmed.

West & Heathman, for appellant. Jas. G. Scarborough, for respondent.

HARRISON, J. The plaintiff was elected to the office of city assessor of the defendant on the 13th of April, 1891, and entered upon the duties of his office April 20, 1891. Previous to his election, viz. March 16, 1891, the salary of that office had been fixed by an ordinance of the city at $375 per year, payable one-half thereof on the first Monday of July, and one-half thereof on the first Monday of September. March 2, 1891, the legislature passed an act (St. 1891, p. 22) providing that in cities in this state, excepting municipal corporations of the first, second, third, and fourth classes, and cities operating under a freeholders' charter, the assessment of property made by the county assessor might be made the basis of municipal taxation. The act, however, contained the following proviso: "Provided, however, that the provisions of this act shall not apply to or be in force in any city or municipal corporation until its board of trustees, common council, or other legislative body, shall have passed an ordinance electing to avail itself of the provisions of this act, and filed a certified copy of the same with the auditor of the county in which such municipal corporation or city is situated on or before the first Monday in March of each year." The defendant is a municipal corporation of the fifth class, and on February 15, 1892, through its board of trustees passed an ordinance electing to avail itself of the provisions of the above act, and by the same ordinance repealed its former ordinance fixing the compensation of the city assessor. A copy of this ordinance was filed with the county auditor of Orange county, in which the city of Santa Ana is situated, on February 23, 1892. March 21, 1892, the defendant passed an ordinance repealing a prior ordinance providing for a street poll tax; so that all of the duties imposed upon the assessor by virtue of any city ordinance were taken away. After the passage of these ordinances, the plaintiff performed no duty as city assessor, except to make out the list of male persons over the age of 21 years residing within the limits of the city, required by section 787 of the municipal government act. The defendant refused to allow or pay to the plaintiff any salary for the second year of his incumbency of the office, and he thereupon brought this action. Judgment was rendered in his favor, and the defendant has appealed directly upon the judgment roll, including a bill of exceptions.

1. The objection that the court had no jurisdiction in the matter, for the reason that the writ of mandate was the proper remedy, was properly disregarded. Even though it should be conceded that the plaintiff might have sought relief through a writ of mandate, he was also entitled to bring an action for the amount claimed by him.

2. Section 755 of the municipal government act (St. 1883, p. 251) provides: "The clerk, treasurer, assessor, marshal, city attorney and recorder shall severally receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." The power of the legislature to abolish the office of city treasurer, or to change the compensation of the officer, or its power to authorize the city to change his compensation during his term of office, is not presented in the present case, as the legislature has neither abolished the office, nor changed the compensation, nor given to the city the authority to make such change. As the power of the defendant to fix or change the salary of its officers rests entirely upon statute, the exercise of this power is subject to all the limitations contained in the statute. The plaintiff was elected to the office of city assessor after the adoption of the ordinance fixing the amount of his salary, and the limitation in the above section that his compensation shall not be increased or diminished during his term of office renders the act of the defendant repealing the ordinance fixing his salary nugatory. As the defendant could not directly, by express ordinance for that purpose, diminish the amount of his salary, the same result could not be accomplished by it indirectly, either by accepting the provisions of the act of March 2, 1891, or by doing away with the necessity for his services through its adoption of the ordinance abolishing the street poll tax. The right of an officer to the salary fixed by law for that office is not impaired by any change that may be made in the duties of the office, or even by an entire cessation of those duties, so long as the office itself remains in existence.

3. It is urged by the appellant that its election to avail itself of the provisions of the act of March 2, 1891, had the effect to abolish the office of city assessor. As the office is, however, created by the legislature, it could not be directly abolished by the city; much less could its abolition be implied from any act that did not in terms purport to abolish it. The office is provided for in section 752 of the municipal government act, which has never been repealed; and the act of March 2, 1891, instead of sustaining the suggestion of an implied repeal of that section, expressly declares that its provisions shall not be given force in any city until it shall have passed an ordinance electing to avail itself thereof, on or before

the first Monday in March of each year, thus implying that the office continues to exist. The duties of the city assessor are fixed by section 787 of the municipal government act; and while it may be conceded that the election by the defendant to avail itself of the provisions of the act of March 2, 1891, did away with the necessity for the performance by the assessor of any acts connected with the assessment of property, theretofore imposed upon him, so long as such election remained in force, it does not follow that the office of assessor was thereby abolished. Section 787 prescribes as one of the duties of this office that "the assessor shall during said term also make a list of all male persons residing within the limits of such city over the age of twenty-one years, and shall verify said list by his oath, and shall on or before the first Monday of August in each year deposit the same with the city clerk." It is urged by the defendant that, inasmuch as the only apparent object for which this list is to be made is to form the basis for collecting an annual street poll tax, the repeal of the ordinance providing for the street poll tax relieved the plaintiff from the duty of preparing this list. The statute, however, under which he holds his office, makes the preparation of this list one of his official duties; and we are not at liberty to assume that the only object of this requirement was to enable the city to collect a street poll tax, or that he would be justified in omitting this official duty prescribed by the statute, even though the city, by its ordinance, rendered his act in preparing it of no avail to it. The city had still the power to pass an ordinance imposing this tax, and might then avail itself of the list thus prepared; but, whether the duties have been increased or diminished, or entirely dispensed with, so long as the office remains, the salary affixed thereto is an incident of the office, and must be paid to the incumbent. We have, however, seen that the office has not been abolished; and the defendant does not contend that, if the office is still in existence, the respondent is not its incumbent. It follows that he is entitled to the salary attached to the office at the time of his election, and that the action of the court in holding this defense to be unavailing was correct. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(104 Cal. xvii; 4 Cal. Unrep. 758)

HORTON v. JACK et al. (No. 19,328.)

(Supreme Court of California. Sept. 4, 1894.)

EXECUTORS — CONVEYANCE FOR INDIVIDUAL DEBT —CONVERSION—LIMITATIONS.

1. An action for conversion is within Code Civ. Proc. § 338, subd. 3, prescribing the limitation of an action for taking, detaining, or injuring goods or chattels.

2. One to whom an executrix conveys property of the estate, in payment of her individual debt, before distribution, and without authority of the probate court, is, on refusal to return, liable to the estate for conversion, though the executrix was the sole legatee, and the property was the community property, and executrix was testator's widow.

3. In order to maintain such action, it is not necessary to prove an indebtedness against the estate, and necessity of obtaining the property to satisfy it.

4. Though the person to whom an executrix conveys property belonging to the estate does, as he agrees, have it applied on the claim of a bank against her individually, the bank is not jointly liable with him to the estate for the conversion of the property, it not being shown that he was acting for the bank in such manner as to bind it.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph Horton, administrator with the will annexed of James A. Brown, deceased, against R. E. Jack and the First National Bank of San Luis Obispo. Judgment for defendants. Plaintiff appeals. Reversed as to defendant Jack.

M. C. Hester and Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

TEMPLE, C. This appeal is from the judgment, and from an order refusing a new trial. The complaint shows that James A. Brown died testate October 26, 1889, in the county of Santa Barbara, leaving his widow, Catherine J. Brown, his executrix; that said will was duly admitted to probate, the said Catherine J. appointed executrix, and that she duly qualified as such, and took possession of the property of the estate, consisting in part of certain personal property, which is specifically described in the complaint; that on the 15th day of April, 1890, while the said executrix was lawfully possessed of said property, as the property of the estate, defendants "wrongfully and without right took and carried away said personal property, and the whole thereof, and converted and disposed of the same to their own use." Said property was at the time of the value of $6,000. Catherine J. Brown died April 17, 1892, not having closed the administration. Proper allegations follow, showing due appointment and qualification of plaintiff as administrator with the will annexed. The complaint was demurred to for insufficiency of facts, and because it appeared from the complaint that the cause of action was barred by section 339, Code Civ. Proc. The demurrer was overruled, and defendants answered separately. The answer of the bank consists of denials. The answer of defendant Jack denies the conversion, the alleged value of the property, the official character of plaintiff; avers that Catherine J. Brown was paid the full value of the property, and that the cause of action is barred by section 339, Code Civ. Proc. The answer then proceeds with an averment that James A. Brown, by his will, bequeathed all his property to Catherine

J. Brown, and appointed her executrix, with power to sell personal property without leave of court; that she qualified, and afterwards procured an order authorizing her to sell the personal property, including the property described in the complaint, at private sale; that she did, subsequently to the order, execute to Jack a bill of sale of the property, but did not deliver the same to him, but afterwards agreed with Jack that the property should be delivered to one Sandercock, to be by him sold, the proceeds, less expenses, to be paid to Jack for the bank, and to be applied to an indebtedness of said Catherine J. to it; that thereupon said Catherine J. appointed said Sandercock her agent, and delivered the property to him; that Sandercock sold the property as her agent, and, at her request, paid the money to the bank. The answer then proceeds with a plea in bar of plaintiff's claim.

Respondent raises a preliminary point, to the effect that plaintiff is entitled to no relief, because his complaint shows that his cause of action is barred by the statute of limitations, and the demurrer on this ground should have been sustained. If the demurrer were well taken, it would not follow that respondent could avail himself of the point on this appeal; but, waiving that, the point is not well taken. The question suggested is whether an action for the conversion of goods is barred by subdivision 3 of section 338, Code Civ. Proc. Respondent claims that such an action is not covered by that section, and is therefore included in section 339, and is barred in two years. The complaint shows that the suit was not commenced within two years after the alleged conversion. Subdivision 3, § 338, reads: "An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property." Cooley defines "conversion" as follows: "Any distinct act of dominion wrongfully exerted over one's property, in denial of his right or inconsistent with it, is conversion." The author also quotes with approval from Liptrot v. Holmes, 1 Kelly, 381: "The action of trover being founded on a conjunct right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion." While there may be cases, under this definition of "conversion," where there is no manual taking or corporal detention of the property, still I apprehend there is no case in which the plaintiff has not been actually deprived of his property, or is not entitled under the rules of law to consider himself deprived of it for the sake of the remedy, and when a judgment for damages for the conversion has been paid the wrongdoer becomes the owner of the property. It has been wrongfully taken from the owner, although it is not necessary that the original taking be wrongful. The words in the statute are not used to indicate any particular form of action, but I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certainly, one whose property has been wrongfully taken or detained may sue for conversion, if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred.

The cause was tried by the court without a jury, and the court found for the defendant Jack, a nonsuit having been entered as to the bank. Several findings of fact are excepted to as not sustained by the evidence. Among such findings are the following: (1) That the personal property was never delivered to Jack, although it is admitted that a bill of sale of the property was made and delivered to him; (2) that Sandercock, who took the property and sold it, was the agent of the executrix, and not the agent of Jack; and (3) that the proceeds of the property were paid to the executrix.

1. It seems that Mrs. Brown was indebted to the bank, of which Jack was president; that it was agreed between Jack and Mrs. Brown that the property should be conveyed to Jack as security, and immediately sold, and the proceeds paid on Mrs. Brown's personal indebtedness to the bank. In pursuance of this agreement an absolute bill of sale was executed, and Sandercock was selected to sell the property, with the consent of Mrs. Brown. Having delivered the bill of sale to Jack, and agreed upon Sandercock as a proper person to conduct the sale, Mrs. Brown prepared a letter to be handed by Sandercock to Bailey, her agent, and which was so delivered. It was as follows: "Mr. S. P. Bailey—Dear Sir: I have made a bill of sale to Mr. Jack of the whole outfit. Mr. Sandercock, the bearer of the note, will consult you about the disposition of the outfit. If Mr. Sandercock cannot manage the disposition of the same without your help, then you will please go with him. Mr. Sandercock acts as Mr. Jack's agent and the entire disposition must be under Mr. Sandercock's control. C. J. Brown." Mr. Sandercock, also, at the same time, handed Bailey a letter from Mr. Jack, as follows: "Mr. Bailey—Dear Sir: This will introduce to you my friend, Mr. John G. Sandercock. I have bought of Mrs. J. A. Brown the whole grading outfit which belonged to the late J. A. Brown, and I send him down to represent me in the premises, and to sell according to the general plan that you have arranged. You will therefore please deliver the whole business to my representative, Mr. Sandercock. I should be

pleased to have you accompany Mr. Sandercock, and assist him all in your power. Mrs. Brown's desire also is that you shall accompany Mr. S., and aid with your counsel and co-operation. Yours, truly, R. E. Jack." Bailey, acting for Mrs. Brown, had already arranged to ship the goods to Modesto for sale. They were then turned over to Sandercock, who shipped them to Modesto. Bailey accompanied him, but acted in entire subordination to Sandercock. The property was sold, and the proceeds sent by Sandercock to Jack, who applied them to the payment of Mrs. Brown's individual debt to the bank. At the trial Mr. Jack testified as follows: "The understanding, as between Mrs. Brown and Mr. Unangst and myself, was that he would put this property into my hands to be sold for her, and the amount applied on this bank indebtedness. We were then making advances after the property was sold, and the money paid into my hands. I placed it to the account of Mrs. Brown in the First National Bank, i. e. account to her during her lifetime for the moneys so received. I always accounted for them. They were applied to her account at her request." On cross-examination he testified: "Q. Did you ever have any account with Mrs. Brown as executrix of the estate of J. A. Brown? A. I told you yesterday I hadn't. * * * Q. Did you ever file a claim with her in a formal way, and have her approve it as administratrix or executrix of the estate? A. No. * * * Q. She never borrowed any money from your bank, did she? A. Yes; borrowed a great deal. Q. What was the amount of it? A. I don't know what amount it was. Q. Did she borrow herself? did she get the money? A. Yes." Mr. J. A. Brown had been engaged in certain work at Port Harford. After his death, Mrs. Brown continued the work on her own account, at a loss. A small part of the indebtedness was that of Mr. Brown, which was never presented to the estate for allowance. Most of it was incurred by Mrs. Brown herself. From these extracts, I think it is evident that the findings, in the respects mentioned, are not sustained by the evidence. In the nature of things, there could not well be a substantial conflict upon these points.

The court also found that Jack had not converted the property to his own use. That he took the property, by the consent of Mrs. Brown, to sell, and to apply the proceeds to the payment of her individual debt to the bank, cannot be denied. Did it amount, under the circumstances, to a conversion? Of course, when Mrs. Brown conveyed the property to Jack in payment of her individual debt, she misappropriated it. She put it out of her power to hold the property as executrix for the estate, and subject to the orders of the court. It was a clear violation of her duty. It was a wasting of the estate which would constitute a devastavit. Ordinarily, no doubt, one who receives property under such circumstances in payment of an individual debt of the executrix to him may be treated by the successor of such executrix, after a demand and a refusal to deliver the property, as a wrongdoer. Respondent contends that such consequence cannot follow here, because the executrix was also sole legatee, and therefore had the power to sell and apply the property to her own use. The will does not in terms authorize the executrix to sell property without leave of the court. Nor, if it be conceded that all the property is by the will bequeathed to the widow, would that consequence follow. As legatee she could sell her interest subject to the administration. In the will the testator declared all his property community property. He then gave one dollar each to two brothers and three sisters. He then declares that he has executed deeds to his wife for his real estate, and deposited them in escrow, to be delivered to his wife upon his death. He then bequeaths his personal property to his wife, but directs that his wife "shall, by will or otherwise, cause any and all residue or remainder of my real estate and personal property remaining after her death to be distributed [to his brothers and sisters], but I wish her, my said wife, to be untrammeled in the use of said estate during the term of her natural life." Subsequently to the sale to Jack and by him, and the application of the proceeds, Mrs. Brown died. The sale to Jack was never confirmed by the probate court. There had, however, been made an order of sale which authorized the executrix to sell the personal property at private sale. No report was ever made to the probate court of any sales made through Sandercock, but the executrix reported to the court that she had, through mistake, sold the property in question to Jack to pay her individual debt. Thereupon, the probate court refused to confirm the sale. It does not appear whether or not there are debts outstanding against the estate, or whether the administrator with the will annexed has in his hands money or property with which to pay the expenses of administration. Nor does it appear when notice to creditors was published, or, indeed, whether such notice has been published at all. The construction of the will is a matter for the probate court, but I will assume that the will gave the property to Mrs. Brown absolutely, except that she was denied the power of testamentary disposition. One-half she did not take under the will, but it all was subject to the right of the personal representative to have the custody during administration, and to the payment of the debts of the testator and the costs of administration. The executor undoubtedly has such title and right of possession as will authorize him to maintain an action for the conversion of the assets of the estate. Nor do I see how title derived from an heir or legatee can constitute a defense, or put the executor to the necessity of proving an indebtedness to satisfy which the property is necessary. The vendee in such case may have rights which should be protected when the estate is finally distributed to the beneficiaries under the will. Pending the administration, however, the legatees have not the right of possession, and may be held for conversion if they wrongfully deprive the executor of the property. A contrary rule might lead to great trouble and loss. It may not be known whether there are creditors or not until nearly 10 months have elapsed. Yet the administrator is responsible to creditors for the preservation of the property. If the vendee of an heir had made way with property, and had become insolvent, the administrator could not defend himself on the ground that he had delivered the property to an heir; and, besides, it cannot always be known who are heirs or legatees until distribution. Power to declare the succession, to determine heirship, and to construe wills, is in the probate court. Courts in which suits of this character may be brought cannot determine such questions; and, if such defense may be made, it would lead to delay and expense. The policy of the law certainly is that estates should be quickly settled, and administrators should not be exposed to such litigation. Until distribution, the right of the representative should be absolute, in the interest of all concerned. A fair illustration of the possible evils of such a rule would be in the well-known Blythe estate. Suppose a "claimant" in that estate had property, and would not deliver it because there were sufficient assets without it? Would any court where such suit was brought against the claimant be compelled to determine the question of heirship? The right of a legatee differs a little from that of an heir. But there is no difference under the statute as to the right of a legatee to possession prior to distribution. Nor do I see that the fact that the property was community property can make a difference. The widow does not take her share of the common property as heir, but her title is subject to administration and payment of debts. Her title is no more absolute than that of an heir at law, and the administrator has the same right of possession. Respondent has not been able to cite an authority which will sustain the conclusion reached by the court. He cites, however, Hunt v. Hunt, 11 Nev. 442; Presby v. Powers, 81 Ill. 125; and Rutherford v. Thompson, 14 Or. 236, 12 Pac. 382. In Hunt v. Hunt, it was held that the widow was the devisee of the property, and that her deed conveyed title subject to administration, and that the title of the purchaser was good,—not as against the executor, but as against an heir at law. Presby v. Powers is a mis-citation. I have found no such case.[1] In Rutherford v. Thompson no such question was involved. A person, not the legal representative, and not an heir or legatee, had disposed of some of the property, and the question was how far the common-law doctrine applicable to executors de son tort obtained in Oregon. It is enough, however, in my opinion, to say that the legislature has given to the personal representative the custody of the property, and has made him responsible for it, and has also provided the mode in which he may be discharged of his responsibility. The power of the legislature over the subject is plenary, and the law recognizes no such exception as it is sought to establish in this case. As we have seen, the will contains no grant to the executrix of power to sell. The fact that the property was bequeathed to the same person who was named as executrix is not the equivalent of such power, nor does it make a case which comes within the decision in Re Delaney, 49 Cal. 85. I think, therefore, the court erred in holding that Jack did not convert the property to his own use.

The cause of action was not barred by the judgment rendered in the suit of R. E. Jack v. Catherine J. Brown. Mrs. Brown was not sued in her representative character, nor was any question raised in the case as to the right of Mrs. Brown to dispose of the property to Jack. The validity of the sale was not questioned. The action was brought to foreclose a mortgage given by Mrs. Brown upon real estate. No mention of this property was made in the complaint. In the answer it is averred that a portion of the debt was paid by the sale to him by Mrs. Brown of certain personal property. It is not shown in any way that it is the property involved in this action, but, conceding that it was, it is not claimed that it belonged to the estate. Having bought it as the property of Mrs. Brown, and sold it, and applied the proceeds to the payment of his debt, Jack could not then have refused to give her credit for it. Both parties, then, repudiated the title of the estate.

There was no error in granting the nonsuit as to the bank. Quite possibly, plaintiff could have shown that Jack was acting for the bank in such manner as to bind the bank, and render it jointly liable. I do not find such testimony in the record. I think the judgment of nonsuit in favor of the corporate defendant should be affirmed, but that the judgment and order in favor of defendant Jack should be reversed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit in favor of the corporate defendant is affirmed, and the judgment and order in favor of defendant Jack are reversed.

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[1] Probably Presley v. Powers, 82 Ill. 125.

DOW v. NASON et al. (No. 19,329.)

(Supreme Court of California. Sept. 3, 1894.)

REVIEW ON APPEAL.

The issue being whether a note was paid, a finding that it was paid will not be disturbed because the evidence leaves the matter somewhat in doubt.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by H. G. Dow against Arthur G. Nason and others on a promissory note. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Trippet, Boone & Neale, for appellant. Cassius Carter and A. C. Younkin, for respondents.

PER CURIAM. The pleadings, findings, and briefs herein do not present the facts of this case with remarkable clearness. It appears, however, that the $5,000 note made by Arthur G. Nason to H. W. Nason, which is the subject of this action, was pledged as security for the payment of certain other promissory notes, and the pivotal point in the case is whether or not these last notes were paid. The court found that they were not paid, and, while the evidence on the point leaves the matter somewhat in doubt, we do not think it so weak as to warrant us in saying that it does not support the finding; and, this being so, there is no ground for disturbing the judgment. Judgment affirmed.

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4 Cal. Unrep. 755

JONES et al. v. LOS ANGELES & P. RY. CO. (No. 19,315.)

(Supreme Court of California. Sept. 3, 1894.)

ACTION TO FORFEIT GRANT—BREACH OF CONDITIONS—COMPLAINT—APPEAL.

1. Though a general demurrer to a complaint was overruled by consent, defendant may, on appeal from a default judgment after answer, question its sufficiency.

2. A complaint for forfeiture of a right of way granted on condition of the construction of the road on the line designated, continuous operation of the road when constructed, establishment of stations at points to be designated by plaintiff, and maintenance of the road in good condition, which alleges that the stations were not established, that the road on its completion was not operated continuously or at all, and that it has long since ceased to be operated, and has not been kept in good condition, but has been allowed to become wholly out of repair, and that there has been a total failure to comply with the conditions, sufficiently states, as against a general demurrer, the completion of the road and breaches of the conditions.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by John P. Jones and others against the Los Angeles & Pacific Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wells, Monroe & Lee, for appellant. Anderson & Anderson, for respondents.

PER CURIAM. This action was brought by plaintiffs to declare forfeited a certain right of way granted by them to the Los Angeles County Railroad Company, the predecessor in interest of the defendant, upon the ground that certain conditions subsequent attached to the grant had not been complied with. Defendant interposed a general demurrer to the complaint, which was overruled by consent, and an answer filed. The defendant did not appear at the trial, and plaintiffs had judgment, from which defendant appeals. The only question presented is as to the sufficiency of the complaint. The demurrer being general, the fact that it was overruled by consent is immaterial. One of the conditions of the grant of the easement was the erection and construction of the road on the line designated, and the operation of the road when constructed. The second condition was that the company should establish two stations on the line granted, the particular points of each of said stations to be selected by the parties of the first part (the plaintiffs herein). It is further provided in the agreement that, upon the completion of the road, it should be operated continuously and without interruption; and again, if the corporation should "at any time hereafter cease to operate said railroad, or fail or refuse to keep the same in good order and condition, * * * then the grant hereby made and all rights thereunder shall cease and determine." The complaint alleges breaches of the foregoing conditions, to the effect that said stations were not established nor the station houses built at the places mentioned, or at any place selected by the plaintiffs herein, or at any place at all; and as to the other conditions it is alleged "that neither the defendant nor the Los Angeles County Railroad Company, upon the completion of said railroad, operated the same continuously or without interruption, so as to accommodate the transportation of freight and passengers between the city of Los Angeles and the town of Santa Monica; but, on the contrary, said railroad has not been operated at all, * * * and has never left or received passengers or freight in the usual manner of first-class railroad lines, or at all, at any such stations, and that the defendant has long ceased to operate said railroad, and has failed and refused to keep the same in good order and condition, but has allowed the same to become completely out of repair, and has altogether failed to comply with any of the conditions of said agreement." The complaint is not well drawn, but, in the absence of a special demurrer, we think it sufficient to state a cause of action. Taking its allegations together, it may be fairly construed as alleging the completion of the road; and, assuming that fact to be sufficiently stated, its remaining allegations are entirely sufficient in charging breaches of various conditions of the agreement heretofore quoted. For the foregoing reasons, it is ordered that the judgment be affirmed.

104 Cal. 103

GUTIERREZ v. HEBBARD, Judge. (No. 15,694.)

(Supreme Court of California. Sept. 13, 1894.)

APPEAL BOND—FIXING AMOUNT—DUTY OF JUDGE.

Under Code Civ. Proc. § 945, providing for a stay of proceedings under a judgment directing the delivery of possession of lands, upon the execution of a proper undertaking on appeal, in an amount fixed by the judge, the judge must fix such amount, though the judgment has already been executed.

In bank.

Application by Gutierrez for writ of mandate to compel J. C. B. Hebbard, judge, to fix the amount of an undertaking on appeal. Application granted.

T. J. Crowley, for petitioner. E. J. Pringle, for respondent.

HARRISON, J. Application for a writ of mandate. In the action of Emeric v. Alvarado, for the partition of the Rancho San Pablo, the above-named petitioner was one of the defendants claiming a portion of the land, and by the final decree was awarded one portion of the land claimed by her; another portion, designated as "Lot No. 198," being allotted to H. F. Emeric. This decree was entered March 3, 1894, and notice thereof served upon the petitioner upon the same day. By the terms of the decree, it was ordered and adjudged "that the several parties to this action do forthwith surrender and deliver up the possession of such parcels of said rancho as they now respectively occupy, which have not been allotted to them in severalty by said decree, and that, in default thereof, writs of possession shall, on the application of any of the parties thereto, be issued by the clerk of said court, and under the seal thereof, directed to the sheriff of the county of Contra Costa, commanding him to place said parties in the quiet and peaceable possession of the said parcels allotted to them as aforesaid, and to remove all other persons therefrom." At the date of the decree, and for several years prior thereto, lot 198 was in the possession of W. B. Hellings and his tenants, claiming to hold the same under and as the successor in interest of Mrs. Gutierrez. After the entry of the decree an appeal therefrom was taken to this court on behalf of, and in the name of, Mrs. Gutierrez; and an application was made to the respondent to fix the amount of the undertaking against waste, and for use and occupation, required by section 945, Code Civ. Proc., for the purpose of staying proceedings on the judgment. This application was heard by the respondent March 23d, after notice thereof had been given to Emeric, and was by him denied. Thereupon, the present application was made to this court for a writ of mandate directing the respondent to fix the amount of such undertaking. In his answer to the application the respondent alleges that on the 5th day of March an affidavit was filed in the superior court showing that, after entry of the decree, demand had been made by Emeric upon Hellings and his tenants for the possession of lot 198, and that they had refused to give possession; that upon an ex parte application on said affidavit a writ of possession was issued by the clerk, under the order of the court, directed to the sheriff, to place Emeric in the quiet and peaceable possession of lot 198, and to remove all other persons therefrom; that before any application had been made to fix the amount of the undertaking the said writ had been served and executed by the sheriff, and return thereafter made, to the effect that he had placed said Emeric in actual possession of the premises, and removed all other persons therefrom. It is now claimed on behalf of the respondent that because of these facts he was not required to fix any amount for said undertaking.

We are of the opinion, however, that it was the duty of the respondent to fix an amount for which the appellant might give an undertaking to stay proceedings upon the judgment, if she so desired. Section 945, Code Civ. Proc., provides that all proceedings in the court below upon a judgment which directs the delivery of possession of real property may be stayed if the appellant executes a written undertaking to the effect that during the possession of such property by him he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof. This is a right conferred upon an appellant by the statute, and the same statute makes it the official duty of the judge to fix the amount of the undertaking that is to be given. If the judge refuse to fix the amount for such undertaking, he thereby deprives an appellant of a substantial right which the statute has conferred. The decree in the present case directs the delivery of possession of real property, and was rendered by the respondent; and when he was informed of the desire of the petitioner to appeal therefrom, and to have proceedings thereon stayed pending the appeal, his official duty to fix the amount of the undertaking was clear. If, after the entry of the decree, matters had supervened which might deprive the appellant of an effective stay of proceedings, even though she should give the undertaking, the respondent should determine the sufficiency of those matters when presented upon a direct issue in which her right to the stay of proceedings was involved, rather than adjudicate upon their sufficiency before there was an opportunity for her to ask for such stay. Whether, after she had given such an undertaking, she could avail herself of the privileges which the statute confers, would be a matter then to be considered and determined. If, in fact, the execution of the decree had become so complete that there were no proceedings thereon to be stayed, no harm could be done to any of the parties to the action by the giving of such an undertaking; and if there should be any reason by which the appellant might show herself entitled to a stay, notwithstanding the execution of the decree, she ought to be allowed that privilege. The respondent should not deprive her of the opportunity which the statute affords in this respect, by refusing to fix the amount of the undertaking. The application for the writ is granted.

We concur: BEATTY, C. J.; VAN FLEET, J.; FITZGERALD, J.; DE HAVEN, J.; GAROUTTE, J.

103 Cal. 614

EACHUS et al. v. LOS ANGELES CONSOLIDATED ELECTRIC RY. CO.

(No. 19,205.)

(Supreme Court of California. Aug. 30, 1894.)

CHANGE OF STREET GRADE — INJURIES TO ABUTTING PROPERTY—LIABILITY OF CITY — MEASURE OF DAMAGES.

1. Under Const. 1879, art. 1, § 14, which provides that private property shall not be taken or "damaged" for public use without compensation, the owner of a lot on a street which was dedicated to the city may recover for damages thereto caused by the grading of the street to the established grade. Beatty, C. J., and McFarland, J., dissenting.

2. In an action by a lot owner for damage to his lot caused by grading the street, evidence of the diminution in the value of the lot by the adoption of the ordinance establishing such grade is inadmissible, as there can be a recovery only for the actual physical change of grade.

3. Benefits to the lot from the operation of a street railway on the street after it was graded cannot be considered to diminish the damages.

4. Where the only objection to evidence was that it was "incompetent, irrelevant, and immaterial," it cannot be argued on appeal that such evidence should have been excluded on account of the manner in which the question was asked.

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by B. D. Eachus and another against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

John D. Pope, for appellant. Galbreth & Morrison, for respondents.

HARRISON, J. The plaintiffs are the owners of a lot of land in the city of Los Angeles, situate at the corner of First and Figueroa streets, having a frontage of 142 feet on First street and 50 feet on Figueroa street. The lot is a portion of a larger tract of land which originally belonged to the municipality, and was laid out by it into blocks and streets in 1872. The plaintiffs became the owners of their lot in 1887, and built a house thereon in which they lived for several years. In 1891 the defendant received a franchise from the city of Los Angeles to construct a railroad along First street in said city in front of the plaintiffs' property, and, in preparing the street for the construction of its railroad, made an excavation in the middle of the street to its official grade. The street is 82½ feet in width, and, for the purpose of laying its tracks upon the official grade of the street, the excavation made by the defendant in front of the plaintiff's property was 28 feet in depth at the corner, gradually diminishing to a depth of 20 feet at its rear and extended to within ten feet of the boundary line of their lot fronting on the street. The ordinance conferring the franchise upon the defendant is not set forth in the record, and it does not appear whether there was any requirement that the track should be laid upon the official grade of the street; and, although it was admitted that until the excavation made by the defendant the street had never been changed from its natural grade, it does not appear from the record when the official grade was established. The plaintiffs brought this action to recover the damages caused to their lot by reason of the acts of the defendant in cutting off their access thereto. The cause was tried by a jury, and a verdict rendered in their favor for $823. The defendant has appealed.

The constitution of 1879 (article 1, § 14) provides that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Prior to the adoption of this constitution, it was held that an abutting owner was not entitled to compensation for any injury to his property resulting from a lawful change in the grade of the street fronting thereon; but in Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, it was held that this provision of the constitution gave to him a remedy that he did not previously have, and authorized a recovery for such indirect or consequential damage to his property as he might sustain over and above that sustained by him in common with other abutters, or the public in general. This provision does not exist in the constitution of many of the states, and it is only within a few years that it has been incorporated into the constitution of any state. Hence, the opinions of courts in other states, which were rendered at a time when no such rule of law existed, are inapplicable, and apt to be misleading in their reasoning. The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation.

The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is, to that extent, a damage to his property. When a city subdivides a tract of land, of which it is the owner, into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner, in its destruction or impairment, is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has the fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief. City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Rude v. City of St. Louis, 93 Mo. 413, 6 S. W. 257; Hobson v. Philadelphia, 150 Pa. St. 595, 24 Atl. 1048; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834. Rigney v. City of Chicago, 102 Ill. 64, is a leading case on this subject. In that case the fee of the streets was in the city; and the city had constructed a bridge or viaduct on a public street intersecting the street on which the plaintiff's lot fronted, and about 220 feet distant from his lot, thus interfering with his access to that street, except by means of a flight of stairs, and his premises were thereby damaged and depreciated in value. The court held that the injury sustained by him in the prevention and impairment of free access to his lot was a damage for which the constitution gave him a right of recovery, and that, in order to recover for the damage which private property had sustained for public use, "it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a right of action." The supreme court of the United States gave the same construction to that provision in the constitution of Illinois in Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820. Similar principles have been enunciated in other states whose constitution contains this provision. City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Sheehy v. Railway Co., 94 Mo. 574, 7 S. W. 579; Hatch v. Railroad Co., 6 Wash. 1, 32 Pac. 1063; City of Atlanta v. Green, 67 Ga. 386; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Johnson v. Parkersburg, 16 W. Va. 402; Railroad Co. v. Williamson, 45 Ark. 429; Railroad Co. v. Eddins, 60 Tex. 656; Railway Co. v. Fuller, 63 Tex. 467.

Whether the grading of the street in front of a lot will increase or diminish the value of the lot will depend upon the relative condition of the street and lot before and after the grading, and must be determined from the circumstances of each case. The elements which enter into this consideration are varied, and no rule can be prescribed which will be applicable to all cases. It is not every change of grade that will constitute a damage to the adjacent property. An excavation of one or two feet might not appreciably impair the value of the lot, while one of twenty feet would naturally have that effect; and the increased facility for communication with other parts of the city, or the opening up of the land to access by the public, may fully equal if not exceed the cost of grading the lot to correspond with the changed grade of the street. The mere fact that the property is worth as much after the grading as before is not an absolute test, since this may be the result of a general advance in values throughout the entire vicinity, irrespective of the grading, or dependent upon some municipal improvement of which the grading in front of the lot is only a part. Railway Co. v. McCloskey, 110 Pa. St. 442, 1 Atl. 555. Nor is its diminution in value for some particular use necessarily a damage to the property. The grading of a street may impair the desirability or salability of a lot for use as a residence, while at the same time it may render it so desirable as a site for a warehouse or a manufactory as to increase its market value. The market value of a lot is not determined by its value for any particular use, but results from a consideration of all the uses for which it is adapted and to which it may be applied. Town Co. v. Neale, 88 Cal. 50, 25 Pac. 977. And it is only when the market value of property is diminished by the public use that the property can be said to have sustained such damage as will entitle its owner to receive compensation.

The same rule is applicable when a street is for the first time reduced to an established grade as when a change in the grade has been made after the street has once been brought to such grade. The suggestion that, when the owner dedicates his land for a street, it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation imposed by the constitution to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the grading of the street would have the effect to increase rather than to diminish the value of the lots adjacent thereto by making them accessible to the public; but, if the municipality deems it desirable to establish such a grade as will cause a damage rather than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged "for public use." In City of Elgin v. Eaton, 83 Ill. 535, the street fronting the plaintiff's property was graded for the first time to a line about six feet below the ground on which his house stood, and the court held that the city was liable for any damage sustained thereby, saying: "It is urged that a municipal corporation is not liable for damages growing out of grading their streets. That was no doubt true before the adoption of our present constitution. Article 2, § 13, declares that private property shall not be taken or damaged for public use without just compensation. Now, this was private property, and the improvement was being made for public use; and, if the property was damaged thereby, appellee is entitled to just compensation for such damage. If injury was sustained, it was for public use." And in City of Bloomington v. Pollock, 141 Ill. 351, 31 N. E. 146; the same court said: "We are unable to see any sound legal ground for a distinction between cases where the damage is done under an ordinance which changes the grade of a street, and cases where the damage is done under an ordinance which for the first time establishes the grade." See, also, Borough of New Brighton v. United Presbyterian Church, 96 Pa. St. 331; Hendricks' Appeal, 103 Pa. St. 358; Jones v. Borough of Bangor, 144 Pa. St. 638, 23 Atl. 252.

The damage sustained by the plaintiffs was caused by the actual grading of the street, and not by the ordinance fixing the grade. Jones v. Borough of Bangor, 144 Pa. St. 638, 23 Atl. 252; O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. 1047. Until the physical condition of the street was changed, their lot had received no actual damage for public use. The enactment of the ordinance rendered it possible that the street would at some time be reduced to that grade, but a mere paper change of grade did not affect the condition of the lot, or impair its use or enjoyment. Any diminution in value that it might sustain from the mere passing of the ordinance was purely speculative, and contingent upon the time when grading should be done, and would no more constitute the damage contemplated by the constitution than would a diminution in its value resulting from excessive taxation, or the contraction of a municipal debt. Hence, the court did not err in refusing to permit testimony as to the damage caused by the adoption of the ordinance. Nor was the benefit that might be derived from the construction or operation of the defendant's railroad material to the issue. The use to which the street might be put by the defendant after the excavation had been made did not affect the damage caused to the lot by the excavation.

The plaintiffs were entitled to recover in this action the entire damage which their lot had sustained by the act of the defendant in making the excavation in the street. Railroad Co. v. Scott, 132 Ill. 429, 24 N. E. 78; City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6. The action was not for any personal damage that the plaintiffs had sustained prior to the action by reason of the interruption that they had sustained in their access to the lot, nor for damages resulting from an unlawful or unauthorized use of the street by the defendant, but it was for the damages which had been done to the lot itself by the permanent change in the street. These damages do not depend upon any subsequent use of the lot, but were complete when the grade was changed, and could be recovered in this action.

For the purpose of ascertaining the amount of damage that the plaintiffs had sustained, witnesses were asked, "What effect did the cut have upon the value of the property?" And, upon replying that its effect was to depreciate the value, they were then asked, "To what extent?" and in reply stated the amount. These questions were objected to by the defendant upon the ground that they were incompetent, irrelevant, and immaterial; and it is now urged that the opinions of the witnesses should have been limited to the market value of the property before and after the grading was done, and that the jury should have drawn its conclusion of the amount of damage from such evidence, rather than from the opinions of the witnesses. If this special objection had been made at the trial, the plaintiffs could have asked the questions in such a way as to obviate the objection; but it is well settled that, unless the evidence is inadmissible for any purpose, a party is not at liberty, under this general objection, afterwards to urge a special objection which goes merely to the form in which the evidence is sought. Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271. The extent to which the property was damaged by the grading was the precise issue in controversy, and evidence tending to establish the amount of that damage was neither incompetent nor irrelevant nor immaterial. The inquiry of the witnesses respecting the value of the property would of itself, in the absence of any qualifying term, imply the "market value;" and it was open for the defendant, upon cross-examination, to show that their opinion referred to some associate value. The subsequent question respecting the "extent" to which its value had been depreciated was but another mode of inquiring what was its market value after the grading; and the defendant had the same opportunity of testing by cross-examination the weight and accuracy of the replies to this question, or to show by other testimony that the value of the property had been increased by the grading, or that its depreciation was attributable to other causes than the grading. The judgment and order are affirmed.

We concur: GAROUTTE, J.; FITZGERALD, J.; DE HAVEN, J.

I dissent: McFARLAND, J.

BEATTY, C. J. I dissent. When the tract of land embracing these lots was by the owners laid off into streets and squares, the plat recorded, and the lots sold by reference to such recorded plat, the streets were thereby dedicated to the public; and this dedication carried with it an implied consent, binding upon the owner and its successors, that the streets might be properly graded to fit them for the purpose for which they were dedicated. Such consent was a waiver of any claim for damages to abutting lots by reason of a proper grade. Here the city has established a grade which, so far as appears, is, with reference to the whole tract, entirely reasonable and proper, although it is an injury to these particular lots; and the defendant, in laying its track, has been required to conform to the grade so established. The owners, in my opinion, have no claim for damages for bringing the street to the established grade. Corcoran v.

City of Benicia, 96 Cal. 1, 30 Pac. 798, seems to me to be in direct conflict with the decision here.

103 Cal. 675

PEOPLE v. BRYON. (No. 21,108.)

(Supreme Court of California. Sept. 1, 1894.)

COMPOUNDING FELONY — SUFFICIENCY OF INDICTMENT — DEFECTIVE PLEADING—AIDER BY VERDICT.

1. An information stating that the crime of grand larceny was committed by one H., and that defendant, knowing of the commission of said crime by said H., did receive from said H. $20 upon the agreement that the said defendant would compound and conceal the crime, sufficiently charges an offense under Pen. Code, § 153, which provides for the punishment of "every person who, having knowledge of the actual commission of a crime, takes money or property of another" upon any agreement to compound or conceal such crime.

2. Pen. Code, § 1004, provides that, if an indictment or information does not substantially conform to statute made and provided therefor, the defect is a ground for demurrer. Penal Code, § 1012, provides that the objections mentioned in section 1004, if apparent on the face of the information, can be taken advantage of by demurrer only, except objections to the jurisdiction, and that the indictment does not charge a public offense.

3. Pen. Code, § 1185, provides that a motion in arrest of judgment may be founded on any defects mentioned in section 1004, unless the objection has been "waived by a failure to demur." *Held*, that an objection "that the information does not substantially conform to the law in such case made and provided" is waived if not taken by demurrer.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

William Bryon was convicted of compounding a felony. Order granting an arrest of judgment reversed.

Atty. Gen. Hart, for the People. C. H. Marks and B. F. Fowler, for respondent.

BELCHER, C. The respondent was charged by information with the crime of compounding a felony, and convicted. At the time set for pronouncing judgment he moved for an order in arrest of judgment, upon the grounds: "That the information in this action did not and does not state facts sufficient to constitute a public offense,—that is, the facts stated do not constitute a public offense;" and "that said information does not substantially conform to the law in such cases made and provided." The court granted the motion, and the people appeal from the order.

No brief has been filed on behalf of respondent, and we are left to solve the questions presented without any assistance from him. Section 153 of the Penal Code provides: "Every person who, having knowledge of the actual commission of a crime, takes money or property of another * * * upon any agreement or understanding to compound or conceal such crime * * * is punishable," etc. The information charges that on or about the 11th day of December, 1893, in the county of Merced, "one Maurice Hardy did commit the crime of grand larceny, a felony,—that is to say, that at said time and place the said Maurice Hardy did willfully, unlawfully, and feloniously steal and take from the person of E. O. Mickle the sum of forty dollars, lawful money of the United States, said money being the property of and belonging to the said E. O. Mickle; that said William Bryon, at said time and place, and prior to the filing of this information, having knowledge of the commission of said crime by said Maurice Hardy, as aforesaid, did take and receive from the said Maurice Hardy the sum of twenty dollars, lawful money of the United States, upon the agreement and understanding, willfully, unlawfully, and feloniously made and entered into with the said Maurice Hardy, that he, the said William Bryon, would compound and conceal the crime which had been committed as aforesaid by said Hardy, contrary," etc.

The Penal Code contains the following provisions in regard to indictments and informations:

"Sec. 950. The indictment or information must contain * * * 2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

"Sec. 959. The indictment or information is sufficient, if it can be understood therefrom * * * 6. That the act or omission charged as an offense is clearly and distinctly set forth in ordinary and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the rights of the case.

"Sec. 960. No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

No demurrer to the information was interposed, and all objections thereto mentioned in section 1004, except that the facts stated did not constitute a public offense, were waived. Pen. Code, §§ 1012, 1185. The only question, then, is, did the information state facts sufficient to constitute a public offense? The facts necessary to constitute an offense under section 153 of the Penal Code are: Knowledge of the actual commission of a crime, and the taking of money or property of another upon an agreement or understanding to compound or conceal such crime. The information charges that the crime of grand larceny was committed by Hardy, and states when, where, and how it was committed. It then charges that the respondent, "having knowledge of the commission of said crime," took money from Hardy upon the agreement and understanding that he would compound and conceal the same. It is true the information does not say, "having knowledge of the actual commission of said crime;" but, if the crime was committed, it was actually committed, and, if respondent had knowledge of its commission, he had knowledge of its actual commission. The omission of the word "actual" was therefore immaterial. In our opinion the information was sufficient to meet all the requirements of the Code, and there was no valid ground for an order arresting the judgment. We advise that the order appealed from be reversed, and the cause remanded for further proceedings.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for further proceedings.

(102 Cal. 493)

QUACKENBUSH v. REED et al. (No. 15,302.)[1]

(Supreme Court of California. May 22, 1894.)

DECLARATION OF HOMESTEAD — SUFFICIENCY—RECORDING—DESCRIPTION OF LAND.

1. Under the homestead act of 1860 (section 1), which requires that the declaration of claim of homestead shall be acknowledged and recorded as conveyances affecting land, and provides that from "the filing for record of such declaration" the husband and wife shall be deemed to hold the homestead as joint tenants, the omission by the clerk to copy into the record the acknowledgment of the wife in such a declaration does not affect the validity of the homestead.

2. Homestead laws should be liberally construed in favor of the exemption.

3. The description of the land in a declaration of homestead by reference to a recorded deed is sufficient.

4. Under the homestead act of 1860 (section 1), providing that the selection of a homestead may be made by the husband and wife, or either of them, or other head of a family, declaring "their" intention in writing to claim the same as a homestead, a declaration by a wife need only declare it is "her" intention.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Thomas M. Quackenbush against John J. Reed, administrator, and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Pringle, Hayne & Boyd, for appellant. Lindley & Eickhoff and Hepburn Wilkins, for respondents.

TEMPLE, C. This is an action to foreclose a mortgage dated December 8, 1887, executed by Hugh Boyle, now deceased. Defendant Carmelita Natividad Boyle is the widow of Hugh Boyle, and was the wife of the decedent at the time of the execution of the mortgage, April 29, 1872. She, being then the wife of Hugh Boyle, made a declaration of homestead, which was in due form and properly acknowledged and duly filed for record in the recorder's office of Marin county, where the property is situated, in which the mortgaged premises were claimed as a homestead. The mortgage was executed by the husband alone, and defendants now claim that it is void. Plaintiff contends that the premises were not impressed with the character of a homestead, because (1) the declaration, though duly filed for record, was not recorded; (2) it does not particularly describe the premises; (3) the declaration does not state that it was the intention of both husband and wife to claim the premises as a homestead, but only that it was the intention of the declarant (the wife) to claim such exemption. Appellant also claims (1) that he was a purchaser for value without notice; (2) that the court erred in not permitting him to amend his complaint, and avers that when the declaration was filed the premises were of the value of $30,000; also in not permitting him to show the present value of the premises that he might recover the excess. The appeal is from the judgment, and from an order refusing a new trial.

The declaration was filed under the homestead law of 1860 (Hitt. Laws, § 3541 et seq.). The declaration was copied by the recorder into the proper book, but he omitted from the acknowledgment the words, "and who is personally known to me to be the person whose name is subscribed to the said annexed instrument as a party thereto." Section 1 of the act of 1860 reads as follows: "The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale in execution or any final process from any court, for any debt or liability contracted or incurred after the passage of the act to which this is amendatory. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing, to claim the same as a homestead. Said declaration shall state that they or either of them are married, or if not married, that he or she is the head of a family; that they or either of them, as the case may be, are at the time of making such declaration residing with their family or with the person under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead; which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded, and from and after the filing for record of such declaration the husband and wife shall be deemed to hold said homestead as joint tenants; and all homesteads heretofore appropriated and acquired by husband and wife under the act to which this act is amendatory shall be deemed to be held by such husband and wife in joint tenancy." The declaration and the acknowledgment being in all respects perfect, does this omission render the claim of homestead void? Appellant contends that, as the section above quoted provides that the declaration shall be recorded as conveyances are required to be recorded, and as such conveyances, as the law stood before the Code, must have been copied into the record, with the proper certificate of acknowledgment, in order to impart notice, it must follow that the same rule applies to homesteads, under the act of 1860. There was, then, no such provision of law as section 1170, Civ. Code, to the effect that an instrument shall be deemed to be recorded when duly filed for record. Appellant claims that the record, when made, is retroactive, and then makes the record notice from the time of filing. I find some difficulty in understanding a retroacting notice. Those who purchase intermediate the filing and the record are purchasers with notice, if the instrument be correctly copied into the proper book; but they will be purchasers without notice if the recorder inadvertently or corruptly omits a word from the acknowledgment. This opens a wide field for fraud, and seems to me unreasonable. Of course, as the constructive notice is a creature of statute, the legislature could make it what they please. But absurd or unfortunate results should be avoided if possible. But I do not find any provision making the record of a declaration of a homestead notice to any one. Certainly the language quoted, requiring that it shall be recorded as conveyances are required to be recorded, is entirely insufficient for that purpose. It is not included in section 24 of the act of 1850 (Hitt. Laws, § 649), nor in sections 25 and 26 of the same act. Nor was it necessary. The question as to homestead under that act was always domicilium vel non. Has the law authorizing the homestead been complied with, or not? If the law has been followed, the premises constitute a homestead; if not, not. True, the legislature has wisely provided for a record, but the provision with reference to it is important only as one thing to be done as a condition precedent to the creation of the homestead. What, then, does the statute require to be done in order to create the homestead? It will not be denied that defendant Boyle did all that was incumbent upon her to do when she filed for record a proper declaration, properly acknowledged. But the legislature had the power to declare that the homestead character shall not attach until and unless the officer has performed his duty, and correctly copied the declaration into the proper book. Has it so provided? I think not. Appellant contends that the rule of construction applicable to cases where parties are deprived of their rights by legal proceedings, as in suits to condemn land, shall prevail. But this court has decided otherwise; that the law is remedial, and is to be liberally construed in favor of the exemption. Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436; Southwick v. Davis, 78 Cal 508, 21 Pac. 121. The statute says that the declaration shall be acknowledged and recorded as conveyances of real estate are required to be acknowledged and recorded, "and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants." There could hardly be a plainer declaration that the premises constitute a homestead from the time of filing.

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[1] Rehearing denied.

2. The premises are described in the declaration by reference to a map made by H. Austin, civil engineer and surveyor, as a part of the Reed Rancho, and as particularly described in a deed, which is referred to, giving the names of the parties to it, the date and the page of the record in the recorder's office of the same county in which the declaration of homestead was filed. It is not contended that the record referred to does not give a full and ample description, but it is contended that the premises cannot be described by such reference in a declaration of homestead. If the record referred to does not particularly describe the premises, the point might be well taken. As it is, even with the aid of the earnest and able argument of counsel, I fail to see why the case is not completely covered by the case of Ornbaum v. His Creditors, 61 Cal. 455.

3. A mere reading of the statute above set out is a sufficient answer to the objection that the declarant did not state that it was the joint intention of both herself and husband to claim the premises as a homestead. The statute explicitly and carefully provides that either husband or wife may make and file the declaration. This right cannot be taken from either by the refusal of the other to join in the claim. This policy, so plainly manifested, is not defeated by the use of the plural pronoun "their." The context plainly shows that it was not meant to require a joint intention.

The claim that plaintiff is an incumbrancer in good faith need not be further discussed.

If plaintiff could have shown that the homestead claim was void because the premises were at the time of the declaration worth more than $5,000, he required no amendment to his complaint for that purpose. So, too, if the homestead did not include the entire premises, because the homestead right only extended to land worth $5,000, that could have been shown without further averment. But the position is not sound. The homestead was the land or premises described (Sanders

v. Russell, 86 Cal. 119, 24 Pac. 852), and every attempt to convey or mortgage it is unavailing. I see no real difference, so far as this point is concerned, between the statute of 1860 and the present homestead law. In each the homestead consists of the premises described in the declaration. I think the judgment and order must be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 15

PERRY v. ROSS. (No. 18,312.)

(Supreme Court of California. Sept 6, 1894.)

HOMESTEAD—CONTRACT FOR PURCHASE — ASSIGNMENT—LIEN.

Where a married man, who was in possession of railroad land, and who had filed a declaration of homestead thereon, makes a contract of purchase with the railroad company and assigns the contract to one who advances part of the purchase money, the assignee has no lien on the land.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Clara B. Perry against W. G. Ross. There was a judgment for defendant, and plaintiff appeals. Reversed.

John C. Deuel, for appellant. George A. Nourse, for respondent.

TEMPLE, C. This is an action to quiet title. Plaintiff avers: That she is the widow of Jesse L. Perry, deceased. That decedent died January, 1891, leaving him surviving plaintiff, his widow, and eight children. That letters of administration were duly issued to plaintiff, who qualified and administered the estate. Said Perry, in his lifetime, to wit, June 23, 1890, purchased from the Southern Pacific Railroad Company the tract of land in controversy, and said company, for a valuable consideration paid to it, agreed to make to said Perry, his heirs or assigns, when the deferred payments should be made, a good and sufficient deed for the land. That the land was purchased with community funds. That said Perry was then residing upon the land with his family, and on the 11th day of December made and filed for record his declaration of homestead in due form. That thereafter, in the estate of said Perry, the same was duly set apart to plaintiff for a homestead. That the court did also find that the total value of said estate was less than $1,500, and thereupon set over to plaintiff all of the estate of said Perry for the support of herself and her minor children. That defendant claims title to the property, but without right. Defendant answered, denying the allegations of the complaint, and for a separate defense averred that Jesse L. Perry, on the 9th day of December, 1890, being indebted to defendant, made, executed, and delivered to him his promissory note for $211.21, with interest, and, in case suit was instituted to collect the same, for attorney's fees; that the said sum of $211.21 was part of the purchase money paid by said Perry for the said land, and that at the time of its execution said Perry assigned, transferred, and delivered to defendant all his interest in said land and the contract of purchase, to have and to hold as security for the payment of the note; that no part of principal or interest of said note has been paid. The case was tried without a jury, and the court found that the probate proceedings were in accordance with the allegations of the complaint. The purchase was not made with community funds, but at the time of the purchase said Perry was married, and was residing on the premises with his family, and had filed a declaration of homestead thereon. The court in the probate proceedings did set over to plaintiff all the right, title, and interest, claim, and demand to said homestead which said Jesse L. Perry had at the time of his death, and had acquired by said purchase; and also found that the whole value of the estate of said Jesse L. Perry did not exceed $1,500. But the plaintiff did not by any decree become entitled to the premises in suit, or acquire any muniment of title thereto or to said contract of purchase. That Jesse L. Perry executed the note described in the answer in consideration of a loan to said Perry of $211.21, which was a part of the purchase money paid for said land and contract of purchase; and that at that time said Perry assigned said contract to defendant as security for said note. Defendant is still the owner of the note, no part of which has been paid. Plaintiff, in her motion for a new trial, attacks several of these findings, as not justified by the evidence; among them: (1) That the purchase was not made with community funds; (2) that the money due on the note was a part of the purchase money; and (3) that the contract was assigned.

The first is entirely immaterial. If the money was community property, the husband had the control and management of it. The point aimed at was not whether the money was or was not community property, but whether it was money advanced by defendant for the purchase of the land. Even though it had been so advanced, it was still community property in the hands of Perry.

But the second is also of no consequence. If one having a homestead borrows money to buy an outstanding title or claim of title against it, the lender does not thereby acquire a lien on the homestead. Nor can I see how there can be a resulting trust. No trust results in favor of one who lends money to another with which to buy land.

The real question in the case is raised under the third point. There was no conflict in the evidence. It is a question as to the effect of the evidence. Does the statement in the note, "This note is secured by R. R. contract 10,353 for deed, given to Jesse L. Perry," together with the fact that the contract was then delivered by Perry to Ross, create a lien upon the land, or convey to Ross the contract right? Perry entered into the contract after he had filed his declaration of homestead. That which is covered by the exemption is the land, and not any particular claim of title to it. Sanders v. Russell, 86 Cal. 119, 24 Pac. 852; Quackenbush v. Reed (No. 15,302) 37 Pac. 755; Alexander v. Jackson, 92 Cal. 514, 28 Pac. 593. When Perry entered into that contract he added to his claim of title by mere possession his right under the contract, which—if the vendor was the legal owner of the land—was an equitable title. He could not convey this equitable title apart from the land, and he could not convey that except as provided in the homestead law. The assignment of the contract would amount to nothing, unless it carried the equitable title. It could not do that under the circumstances. It is true, ordinarily, one having a contract for the purchase of land may transfer his rights by merely assigning the contract. But here is a statutory inhibition. It cannot be doubted but that Perry, after he had become the purchaser with the right of possession, could have acquired a homestead right in the premises. If he had done so, he could not convey the land, except in the statutory mode. He could not evade the statute, and convey the land by assigning the contract of purchase. I cannot see that it makes any difference that he filed his declaration before he made the purchase. Even then he had some evidence of title. Having possession, he was owner as to all the world except the holder of the legal title, and he was entitled to the benefit of the homestead act. I have assumed, for the purpose of this opinion, that the words quoted from the note, with the delivery of the contract, would amount to an assignment of the contract, if the land had not been a homestead. I doubt if this would constitute an assignment, but, under the view I have taken, it is not necessary to determine that. I think the judgment and order should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

103 Cal. 668

MARTIN v. BOARD OF SUP'RS OF YOLO COUNTY. (No. 18,288.)

(Supreme Court of California. Sept. 1, 1894.)

ESTABLISHMENT OF COUNTY HIGH SCHOOL — ACTION BY SUPERVISORS—ACQUIREMENT OF LAND.

Under Acts 1891, p. 58, § 3, requiring the board of supervisors, after the people have elected to establish a county high school, "to estimate the cost of purchasing a lot, erecting a building, and furnishing the same, together with the cost of conducting the same for the next 12 months," etc., and section 5, requiring the board to convey the building, when completed, to the board of education, who are to hold it in trust for the people, mandamus will not be granted to compel the supervisors to estimate the cost of erecting a building, etc., where the only step towards purchasing a lot has been the acceptance of an offer of a person to vouch that another shall convey to them a certain lot, as title to the lot must first be acquired.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Application for writ of mandamus by J. T. Martin against the board of supervisors of Yolo county. From a judgment granting the writ, defendant appeals. Reversed.

C. M. Mead, Dist. Atty., and Armstrong, Bruner & Platnauer, for appellant. R. L. Simpson, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court in a proceeding of mandamus, requiring the appellant to estimate the cost of erecting a county high-school building, of furnishing the same, and of conducting the school for 12 months. Waiving all other questions arising out of the somewhat complicated legislation on the subject of high schools, we do not think that the acts which the judgment compels appellant to perform are acts which the law specially enjoins, because no lot of land had been acquired upon which to erect the building. The promise of Ross and Bush to vouch that the city of Woodland would furnish a lot for such school purposes provided the appellant would erect thereon a first-class high school, the "property to revert to the owners when it ceases to be used for high-school purposes," is entirely too vague to be considered as furnishing any sort of title to the lot mentioned. It is quite clear from the statute[1] that the board of supervisors must own the lot upon which the building is erected, and must convey it, after the completion of the building, to the board of education, who must hold it in trust for the county, and the acquisition of the lot is the first thing to be done. It is needless to inquire whether the title must be in absolute fee simple, for here the board has no title at all. The fact that the board at one time inadvertently accepted the offer of Ross and Bush was not of such force as to necessarily drive it onward to the commission of other unwarranted acts. Moreover, what did it accept? A mere promise made by two persons, without consideration, that another person would, upon the happening of certain contingencies, furnish to the board a conditional estate in a certain piece of land. The judgment is reversed.

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[1] Act 1891, p. 58, § 3, requires the board of supervisors, after the people have elected to establish a county high school, "to estimate the cost of purchasing a suitable lot, erecting a building and furnishing the same, together with the cost of conducting the same for the next 12 months." Section 5 requires it, after the building is completed, to convey it to the board of education, "who shall hold the same in trust for the people."

We concur: FITZGERALD, J.; DE HAVEN, J.

4 Cal. Unrep. 767

PADEN v. GOLDBAUM et al. (No. 19,400.)

(Supreme Court of California. Sept. 4, 1894.)

EXECUTION AGAINST HUSBAND — LEVY ON WIFE'S PROPERTY — EVIDENCE OF TITLE — PLEADINGS — FINDINGS.

1. In an action by a wife to recover for cattle alleged to be her separate property, but sold on execution by a judgment creditor of her husband, although the evidence shows that her husband returned the stock for taxation in his name, and had the use thereof for dairy purposes, and represented to the judgment creditor that he was owner thereof, if it appears that the stock was bought by the wife with money earned before marriage, and its increase was reserved as her property, a finding that the stock was in fact hers will not be disturbed.

2. Where the sole issue is the truth of the allegations of the answer, a finding "that the allegations of the separate defense contained in the answer of the defendant G. are untrue" is sufficient.

3. A finding that the allegations in the answer are untrue is justified when the only allegations therein are that the plaintiff, by her conduct, held out her husband as the owner of her separate stock seized on execution against him, and that, on faith thereof, credit was given the husband, and such allegations are contradicted by evidence showing that the creditor ordered the sheriff to seize the property in question, and gave a bond indemnifying such sheriff against the claim of the wife, and had constructive notice of such claim by a previously recorded statement of her separate property, including the stock seized.

4. Where an answer contains two separate defenses, viz. a denial of the allegations of the complaint, and a justification of the acts complained of, a finding for the plaintiff on the first defense renders a failure to find on the second immaterial.

5. Code Civ. Proc. § 689, as amended by Laws 1891, p. 20, provides that, if one claiming property seized on execution serves on the sheriff a sworn claim setting out his title and his right to possession, the sheriff need not keep the property, unless the execution plaintiff gives a bond of indemnity to him against such claim. *Held,* that proof of the service on the sheriff of such claim is admissible against the sheriff in an action by a claimant for the wrongful seizure of property, though it is not pleaded in the complaint, since the statute is for the benefit of the sheriff, and is matter of defense.

6. Where a husband pastures his wife's cattle in return for their use for dairy purposes, she reserving the increase, such use by the husband, accompanied by a representation on his part that they were his, cannot, in the absence of any such representation on her part, or any act tending to mislead one holding a judgment against her husband as to the ownership of the stock, estop the wife from setting up ownership to defeat an execution levied on the stock under such judgment.

7. An inventory of a wife's separate property, filed with the recorder, is admissible in evidence, against a judgment creditor of her husband, in an action to recover her separate property seized by him on execution, though the husband's debt to him was contracted before such filing, if the levy of execution was made subsequent thereto.

8. The account books of a judgment creditor are original evidence to establish claims against the debtor, and should be introduced as part of the case, and it is proper to exclude them when offered in rebuttal.

9. Evidence as to indorsements on a sheriff's writ of execution, whereby part of the property seized thereunder was surrendered as exempt, was properly excluded on the ground that its ownership was not in issue.

10. The testimony of a witness in regard to a conversation with the judgment creditor prior to the execution, wherein he offered to take a new note from the husband if the wife would sign it, was admissible to show that the creditor had knowledge that the property levied on was the property of the wife.

11. Where a witness testifies that he has been in the dairy business for seven years, and is familiar with the value of cattle for that business, his testimony as to the value of the cattle in suit is admissible, although he has not seen them for a year previous to the execution.

12. Code Civ. Proc. § 437, provides that "where the complaint is not verified a general denial is sufficient." *Held,* that where an unverified complaint alleges the value of property converted, and the answer is a general denial, the value is put in issue.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Flora J. Paden against Simon Goldbaum and B. F. Hubbert for the conversion of live stock. Judgment for plaintiff, and defendants appeal. Affirmed.

Aitken & Smith and Hunsaker, Goodrich & McCutcheon, for appellants. Withington & Pearson and J. P. Pearson, for respondent.

HAYNES, C. In this action the plaintiff had judgment, and defendants appeal therefrom, and from an order denying a new trial. The complaint alleged that on January 13, 1893, the plaintiff, the wife of Alfred Paden, was the owner of certain milch cows and other cattle, and of certain horses and other personal property; that defendants, knowing that it was her separate property, took possession, and converted it to their own use, under the false pretenses that it was the property of her husband, to her damage in the sum of $3,000. Hubbert justified, alleging that he was a constable, and took the property under a writ of execution issued upon a judgment in favor of his codefendant against Alfred Paden, whom he alleged was the owner. Goldbaum denied all the allegations of the complaint, and alleged the recovering of the judgment; that he was a merchant; that Alfred Paden conducted a dairy, milk, and stock ranch, and used said stock as the owner; that during said time he extended credit to Alfred Paden, and that the plaintiff, by her acts and conduct, represented the fact to be that her husband was the owner, and permitted him to represent himself to be the owner, of the property in question; that the conduct of both was such as to imply and cause defendant to believe that Alfred Paden was the owner; that he gave credit because thereof; that he had no knowledge of any claim of ownership by plaintiff, and in giving credit relied upon said acts, conduct, representations, and declarations of the plaintiff; and that he would be injured by allowing the truth thereof to be disproved by plaintiff. Findings were for the plaintiff, upon which judgment was entered against both defendants for the sum of $1,160.

The finding that plaintiff was the owner of the property is attacked. The evidence tends to show that the husband was the owner of about 200 acres of land; that his wife was the owner of the stock; that under an arrangement between them the husband had the use of the stock for conducting the milk business, the wife to have the increase of the stock. There seems to be no doubt that the husband used and spoke of the property as his own, and sold and bought and traded portions of it with the consent of his wife, and returned the property for taxation in his own name. It does not appear, however, that she ever spoke of the property as his, while it does appear that there were rumors in the neighborhood that the stock belonged to her. That her money earned by her before her marriage was invested in stock, and that she was in fact the owner of the stock in question, is, I think, justified by the weight of the evidence; but, if it were doubtful, the conflict is such as to prevent the appellate court from disturbing the finding.

The plaintiff offered in evidence an inventory of property claimed therein to be her separate property, dated April 20, 1891, and filed with the recorder May 7, 1891, which included part of the property in question; the remainder, as plaintiff claimed, being the increase of the stock therein mentioned, or other stock replacing that which had been sold or exchanged. This inventory was received in evidence over defendants' objection. Defendants contend that the statute makes such inventory notice and prima facie evidence of the title of the wife, but only from the date of filing, while the indebtedness of the husband to Goldbaum was contracted in 1888, and that it was therefore inadmissible to prove notice and title at the time the debt was created. Very true; but it was admissible to prove notice of her claim at the time of the levy of the execution, to the extent, at least, that the stock therein described was seized under the execution. If defendant Goldbaum's plea of estoppel had been sustained, it might be that the evidence would not benefit the plaintiff, but that did not affect its admissibility.

As to defendant Goldbaum's answer, the court found "that the allegations of the separate defense contained in the answer of defendant Simon Goldbaum are untrue." This finding is said to be insufficient, and that it is not supported by the evidence. As to the sufficiency of this finding, counsel cite Goodnow v. Griswold, 68 Cal. 603, 9 Pac. 837. In that case the court found specifically several facts, and then made the following finding: "The court finds that the several allegations of said complaint not in conflict with the foregoing findings are true." But what allegations were or were not in conflict with the findings made were not specified by the trial court, and that question the appellate court held it was not called upon to determine. The sufficiency of the finding here made is sustained by Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Moore v. Waterworks, 68 Cal. 146, 8 Pac. 816; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. The new matter in the answer was deemed denied, and, as no new matter was or could be pleaded thereto, the sole issue was as to the truth of the averments of the answer, and that was determined by the finding. Whether that finding is justified by the evidence will be considered hereafter.

It is also assigned for error that the court failed to find upon defendant Hubbert's answer. This answer contained two defenses; the first consisting wholly of denials of the allegations of plaintiff's complaint, and the second a justification under the writ of execution. The findings cover the issues raised by the first defense, and, those issues having been found for the plaintiff, a finding that defendant Hubbert had a writ, and took the property under it, would not have affected the conclusion of law that plaintiff was entitled to judgment. A finding thereon was therefore immaterial, unless counsel are correct in the construction given by them to section 689, Code Civ. Proc., as amended in 1891 (Laws 1891, p. 20), a question we shall now consider. Section 689, Code Civ. Proc., prior to the amendment, provided for a sheriff's jury to try the claim of a third person to property levied upon by the officer. That section, as amended, is as follows: "689. If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made as above provided." Upon the trial, plaintiff was permitted, over the objection of defendants, to prove the service of a written claim—in all respects conforming to the above provision—upon the constable prior to the sale of the property, the objection being made upon the specific ground that the complaint did not allege service of such claim. The argument is that under this statute there can be no recovery against the officer unless such claim is served; that it cannot be given in evidence unless it is pleaded; and that, therefore, the justification set up in the answer is a good defense, notwithstanding plaintiff's ownership, and therefore a finding of the facts constituting a justification would sustain a judgment in favor of the officer, and was material, and should have been made.

The first question here presented is one of pleading. In statutory actions a compliance with all the provisions conferring the right must be alleged. People v. Jackson, 24 Cal. 630. This, however, is not a statutory action, but one which existed at common law. The former statute, as well as the amendment, was intended for the protection of the officer, and is therefore matter of defense. It is an exception to a general right which need not be alleged in the complaint. 1 Chit. Pl. *p. 247. If the plaintiff had omitted to make the verified claim required by the amendment, the omission, if it could operate as a protection to the officer in this form of action, should in such case be alleged in the answer. The making or omitting to make the verified claim does not affect the ownership of the plaintiff, but, if not made, excepts the officer from liability in certain actions, and is matter of defense. "Wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a 'proviso' or a 'condition subsequent,' it must, in its nature, be a matter of defense, and ought to be shown in pleading by the opposite party." 1 Chit. Pl. *p. 246. The case of Himmelmann v. Danos, 35 Cal. 447, cited by appellants, is not applicable here. That was an action to enforce a lien upon a lot for macadamizing a street, and the complaint did not allege the proceeding required by the statute. The case of Barry v. McGrade, 14 Minn. 163 (Gil. 126), cited by appellants, sustains their contention, although the question of pleading is not discussed. The statute there considered was similar to ours, and it was held that the plaintiff must prove the service of the affidavit of claim in order to maintain the action. If it is necessary to be proved by the plaintiff in chief, so as to prevent a nonsuit, it must be alleged in the complaint. We cannot, however, assent to the reasoning or the conclusion of the court in that case. In the absence of the statute, the right of the plaintiff depends solely upon ownership; and it must be apparent that if the plaintiff, being in fact the owner, cannot recover, it must be because the statute exempts the defendant from liability, and not because it controverts the fact of ownership. It could no more be necessary for the plaintiff to anticipate a claim on the part of the officer that he was not liable because a verified claim was not served than to anticipate the plea of estoppel by Goldbaum by alleging facts inconsistent with that defense. It is entirely analogous to pleading the statute of frauds or the statute of limitations, which must be taken by answer, unless the defense appears on the face of the complaint when it may be reached by demurrer. If the verified claim had not been offered in evidence by the plaintiff, the omission would not have availed the defendant Hubbert, since he had not alleged that a verified claim was not served. The result was that the plaintiff disproved a defense not made,—a circumstance which could not prejudice the defendant. Whether the failure of a plaintiff to serve such verified claim would be a defense to an action for damages for the conversion of the property, or only to an action in claim and delivery to recover possession of the property from the officer (a question discussed by counsel), need not be considered here, in view of the conclusion reached upon the question of pleading.

It is also contended that the second finding is not justified by the evidence, in that there is no evidence that defendant Goldbaum took possession of the property, or directed or aided any one to take possession, or that he disposed of it. The officer took the property under a written direction from Goldbaum's attorney, of which the following is a copy: "You are instructed to levy upon all the horned and neat cattle, horses, and other personal property (excepting household furniture) of the defendant, whether said cattle and property be at defendant's place of business, at Oceanside, or at his farm, at San Luis Rey; and you are instructed to have all milch cows regularly and properly milked while in your possession, prior to sale." It does not appear that there was any other property of that description at either of the places mentioned than that levied upon, and all of it, Goldbaum testified, he believed to be owned by Mr. Paden, and the attorney who gave the instruction testified, in substance, that, before he gave the instruction, Mr. Paden told him it was his property; and hence there is no question that the instruction was intended to cover the property in controversy, and required the officer to levy upon it. Not only so, but the constable required from Goldbaum a bond of indemnity, and this was given. Independently of the rumor which Goldbaum says he heard, about the time he commenced his suit against Mr. Paden, that this property belonged to the wife, he had also at least constructive notice of her recorded claim, and following this came the demand from the officer for a bond of indemnity. Whether this demand was accompanied by notice of plaintiff's verified claim does not clearly appear. But it was after the seizure, and before the sale. An indemnity bond had been previously given, but whether before or after the seizure does not appear. The additional bond was given, and operated as a ratification of the taking, and was in effect a request, if not a direction, to sell notwithstanding the plaintiff's claim, since, under section 689, Code Civ. Proc., as amended in 1891, the officer "is not bound to keep the property unless the plaintiff * * * on demand, indemnify the sheriff against such claim by an undertaking," etc. Whether, upon receiving the bond, the officer is bound to keep possession and sell, it is not necessary to consider. The finding in question is justified by the evidence.

It is also urged by appellants that, if the finding against defendant Goldbaum's plea of estoppel is sufficient, such finding is not justified by the evidence. Mrs. Paden testified that the arrangement between herself and husband was that he pastured the stock for the use of the cattle, and she had the increase. This contract she had a right to make, and the use of the stock under it by the husband could not of itself create an estoppel against his wife. The objection here urged necessarily concedes that she is the owner; and no one else, the arrangement itself being lawful, reasonable, and proper, could, by word or act, create an estoppel against her. So far as the estoppel pleaded relates to the time when the indebtedness which was finally merged in the judgment was created, there was no evidence which tended to support the plea. Mr. Goldbaum testified that at the time credit was given "he (Paden) was running a dairy there, and had cattle and land, and I thought he was good. He was running it in his own name. Mrs. Paden was living with him at the time as his wife. She got some of those groceries from me. * * * Mrs. Paden never notified me that she owned any of the cows during the running of this bill, nor that she owned this business, or owned any of the stock." He did not testify to any act or statement done or made by Mrs. Paden which misled him, or that she was at any time called upon to assert her ownership, and was silent, or that she intentionally or deliberately led him to believe that her husband was the owner of the stock, or to act on such belief. Section 1962, subd. 3, Code Civ. Proc., provides: "Whenever a party has, by his own declaration, act or omission, intentionally or deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." We find no evidence upon which a finding in favor of the defendant upon his plea of estoppel could be sustained, whether it relates to the period when credit was given, or the time when the execution was levied. That the husband generally spoke of the property as his is doubtless true, but it does not appear that he ever spoke so of it when the question of ownership was discussed, or otherwise than casually in connection with the dairy business he was conducting. But if he had asserted his ownership when that was a material question, unless it was with the knowledge of the wife, and the defendant was misled by her silence when she was called upon to assert her ownership, her title to the property would not be affected. There would be little protection given the wife in respect to her separate property, if, upon the facts of this case, it could be taken to satisfy the husband's debt. There is nothing in Barnhart v. Fulkerth, 90 Cal. 159, 27 Pac. 71, inconsistent with our conclusion, nor is it necessary to comment upon the cases cited from other states, since if they laid down a different rule from that prescribed by the Code, they could not be authority here.

Defendants called a witness in rebuttal, and asked him whether he had any conversation with Mr. Paden since January 11th, about a visit paid to the Padens that day? The court, of its own motion, interposed, saying, "We cannot have this sort of testimony for the purpose of convicting Mr. Paden upon an immaterial point." Counsel thereupon offered to prove by the witness Hayes and by defendant Hubbert that, a few days after the 11th day of January, Mr. Paden said to the witnesses named that he (the counsel) "had been at their house, and as he expressed it, was doing some detective work, and he had acknowledged to me at the time the cattle were his." Counsel for plaintiff did not object to the offer, but the court ruled that it was not competent evidence, saying to counsel for the plaintiff, "If you are willing that it should go in, I do not know that I ought to say it should not, but it would take another day to finish the case, and I will not admit it." The conversation referred to was given in the testimony of counsel, during the examination of defendants' witnesses in chief, to the effect that Mr. Paden, in a conversation with the witness before the execution was issued,—the plaintiff being present,—said he was running the dairy; that witness asked him whose cattle they were, and "he said they were his cattle." In rebuttal, Mr. Paden gave a different account of the conversation. Counsel, at the time of this conversation, was at Paden's house on other business. Mrs. Paden was at work making butter, and took no part in the conversation. Nothing was said in regard to Goldbaum's claim, or of any effort to collect it. The inquiry was apparently without motive, and did not call for any remark by Mrs. Paden. That she should remain silent was natural. Under the circumstances, she was not affected by the statement of her husband, conceding it to have been as testified to by defendants' counsel; and, if so, the proposed evidence was immaterial, unless for the purpose of impeaching Mr. Paden's testimony in chief, so far as it tended to prove Mrs. Paden's ownership, by showing that he had made statements inconsistent with his testimony. The evidence being immaterial for any other purpose, all testimony tending to show such contradictory statements should have been given by the defendants in chief, and no part of it could be reserved to rebut plaintiff's rebuttal. The defendant can only rebut new matter brought out in plaintiff's rebuttal, unless the court, in its discretion, permits it.

Under these circumstances the exception will not avail appellants.

We think the court did not err in excluding Goldbaum's account books, offered by defendants in rebuttal. They were original evidence, and should have been introduced by defendants as part of their case. But, as defendants were allowed, without objection, to give oral evidence of the accounts, a liberal ruling would have permitted their introduction after plaintiff, in rebuttal, disputed the oral testimony. Defendants were not prejudiced, however, as the object of the evidence was to show that credit was given for merchandise because of Mr. Paden's supposed ownership,—a defense that was not sustained by the evidence.

The evidence offered to be shown by Edward J. Martin was properly excluded. What the attorney who drew up the declaration of separate property for Mrs. Paden said about it in her absence was clearly inadmissible, while the fact that it was necessary to go to Mrs. Paden before he could get title to the property would not have benefited defendants.

The indorsements on the constable's return, showing that certain of the property seized was claimed by Mr. Paden to be exempt from execution, and was surrendered to him, was properly excluded. That property was not in litigation, and it was immaterial to whom it belonged.

The testimony of Joseph Jones, a witness for plaintiff, to a conversation with defendant Goldbaum in October preceding the levy of the execution, was properly received. We have held that the instruction to the constable required him to levy upon the property here in question, so that the objection that Goldbaum had nothing to do with the levy is not tenable, while the answer of the witness shows that at that date Goldbaum knew that Mrs. Paden owned or claimed to own the property, and had offered to Paden to take a new note for half of the amount if Mrs. Paden would also sign it. This also disposes of the objection to a similar question put to William H. Libby.

The witness Olds testified that he had been in the dairy business for the last seven years, and was familiar with the values of cattle for dairy purposes; that he had seen these cattle two or three times, the last time being about one year before the trial. This was sufficient to qualify him to testify as to value. It is true he did not see the cattle at the time they were taken, and could not know their condition at that time, but if their condition had changed it was competent for defendants to have shown that fact. His testimony was not so satisfactory, for that reason, nor perhaps entitled to as much weight, as if he had seen them at the time of their conversion, but that was not sufficient to require its exclusion. But it was further objected that there was no issue as to the value. The complaint alleged the property converted to be of the value of $2,000. If no issue was taken upon this allegation, the defendants are not injured by the finding of damages at $1,186. But the complaint was not verified, and each of the defendants denied "each and every, and all and singular. the allegations of the complaint;" and this put in issue the value of the property converted, under section 437, Code Civ. Proc., which provides, "If the complaint be not verified a general denial is sufficient," and puts in issue every material allegation of the complaint.

Appellants, on their motion for new trial, specified 58 errors of law occurring on the trial. We have noticed only such of them as counsel have mentioned in their brief; but we have carefully read the entire record, and find no error justifying a reversal, and advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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102 Cal. 483

FOSTER v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,501.)

(Supreme Court of California. May 22, 1894.)

LIQUOR LICENSES—INSURANCE BY CITY—REGULATION BY ORDINANCE—CONSTITUTIONAL LAW.

1. Const. 1879, art. 11, § 11, authorizes any city to make and enforce all such local, police, sanitary, or other regulations as are not in conflict with the general law. Act March 23, 1878, § 4, provides for certain requisites before licenses to sell liquor shall be issued in the city of San Francisco. *Held*, that the city, by ordinance, could require additional requisites in the persons to whom such licenses were to be issued.

2. An ordinance providing that licenses to sell liquor shall not be granted to persons who have employed females as waitresses is not unconstitutional as being an ex post facto law, since it is not a criminal law.

3. San Francisco City Ordinance No. 1589, as amended by No. 2637, which prohibits the issuance of liquor licenses to any person who has carried on or is carrying on his business in a certain manner, applies to those who carried on their business in such manner before the adoption of the ordinance.

4. Such an ordinance is not invalid in that it discriminates between different persons.

5. An ordinance of the city of San Francisco regulating the issuance of liquor licenses, which applies to the entire city and county, is not special legislation.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition for writ of mandamus by Edgar M. Foster against the board of police commissioners of the city and county of San Francisco and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Carroll Cook, for appellant. H. T. Creswell, City and Co. Atty., for respondents.

HAYNES, C. Appellant petitioned the superior court for a writ of mandate to compel the board of police commissioners to consent to the issuance to him of a license as a retail liquor dealer. An alternative writ was granted, and upon the return thereof the defendants demurred to the petition, and this appeal is from the judgment entered thereon, dismissing the writ.

Appellant was the proprietor of the Bella Union Theater, and in connection therewith had a saloon, in which, prior to May 1, 1893, females were employed to wait upon those who patronized his place of business. His license for the theater was from April 15 to September 15, 1893. His license for the sale of liquor expired June 1, 1893. On May 1st he closed his place of business for repairs. On June 12, 1893, he applied to the license collector for a retail liquor dealer's license, and that officer refused to issue it, and gave as the ground of such refusal that the board of police commissioners had, in writing, directed him not to issue such license to appellant, for the reason that appellant, prior to that time, had employed and permitted females to wait upon customers therein. The petition further alleged that he applied to said board of police commissioners for such consent, assuring them that "he did not intend to, and would not, if such license was granted to him as requested, either procure or suffer any females to wait on or attend in any manner any person in his place of business," and also tendered a recommendation, in writing, of 12 citizens owning real property in the block in which his said business was to be carried on, that such license be granted. This application was denied upon the ground that appellant had prior thereto employed and permitted females to wait upon customers in his said place of business; and the sole question to be determined upon this appeal is the validity of an ordinance approved July 28, 1880, known as "Order No. 1589," as amended May 22, 1893, by Order No. 2637. The material part of the amended section, so far as this appeal is concerned, is as follows: "Provided, however, as a police measure for the suppression of public vice, immorality and crime, that no license shall be granted under this section, upon the recommendation of citizens or otherwise, to any person who has been convicted of felony, or to any person who has carried on, is carrying on, or is about to carry on the business of selling or furnishing spirituous, malt or fermented liquors or wines in any dance cellar or dance hall, or in any place where females are suffered or procured to wait or attend in any manner on any person, and wherein also any musical, theatrical or other public exhibition or performance is exhibited or performed, or in connection with any resort for lewd, immoral or unlawful purposes." Appellant contends that this ordinance is void, and bases this contention upon several grounds.

That the act of March 23, 1878, is a part of the consolidation act or charter of the city of San Francisco, that this act was not repealed by the constitution of 1879, and that the amended ordinance is in conflict therewith.

The second subdivision of section 4 of that act is as follows: "Those making sales of less than $15,000 per quarter shall pay a license of twenty dollars per quarter; provided, that on and after January 1, 1879, no license as a retail liquor dealer shall be issued by the collector of license unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer is to be carried on, or in the four blocks or squares bounding the same." St. 1877-78, p. 444. It may be conceded that the constitution of 1879 did not repeal the act of 1878, but the act in question was purely local, applicable only to the city and county of San Francisco, and was upon a subject included within section 11 of article 11 of the constitution, which provides as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary or other regulations as are not in conflict with general laws." The power to legislate upon such subjects, thus given to the city, necessarily includes the power to amend an existing regulation upon the same subject, and this authority expressly given in the constitution obviates all necessity of any authority being given upon the same subject in the charter. While this case presents some questions not heretofore considered by this court, the power of the board of supervisors to amend the former ordinance has been considered and decided. See Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13; Ex parte Hayes, 98 Cal. 556, 33 Pac. 337. And in the case last cited it was held that the ordinance here in question is a valid exercise of the power conferred by that provision of the constitution hereinbefore quoted.

It is further insisted by appellant that the amended ordinance in question, so far, at least, as it affects this case, is void (1) because it is ex post facto, and imposes a penalty and consequence for an act that was done prior to the passage of the order; (2) because the ordinance is not equal and uniform in its operation; and (3) that it is special legislation.

The ordinance in question is not an ex post facto law, within the meaning of the constitution of this state or of the United States. In Watson v. Mercer, 8 Pet. 110, it was said: "The phrase 'ex post facto laws,' is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed." In Ogden v. Saunders, 12 Wheat. 267, in speaking of bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, it was said: "The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil, character." And such is the uniform construction given by all the authorities. The ordinance in question punishes no past act committed, done, or suffered to be done by appellant. It simply furnishes a standard, applicable to all persons, by which their fitness to conduct a business in itself dangerous to the morals and good order of the city shall be measured. As was said by Field, J., in Crowley v. Christensen, 137 U. S. 91, 11 Sup. Ct. 13: "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. There is no inherent right in a citizen thus to sell intoxicating liquors by retail." See, also, Cooley, Const. Lim. (6th Ed.) p. 342. In that case, after discussing other questions, the court further said: "We, however, find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offense and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner." If the past offenses of Christensen's wife were sufficient to justify a refusal to grant a license to him, certainly the past conduct of appellant, in employing females, though not then prohibited by law, is quite as conclusive evidence of his unfitness to conduct a saloon. His protestation that he did not intend to and would not in the future procure or permit females to wait upon his customers, does not aid him. A man who has in the past shown himself willing to debauch the morals of the community to increase his business would not in the future refrain from any line of conduct, in the prosecution of his business, which would not bring upon himself, personally, the penalty of the law, whatever of evil it might bring to others. The ordinance was therefore not only constitutional, but wise, and should be scrupulously observed by those intrusted with its execution.

But appellant contends that the ordinance, properly construed, applies only to those who have, since its adoption, violated its provisions. But this construction cannot be sustained. The language is too explicit to admit it. Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons, as a class. Nor can we perceive why such evidence should be more conclusive of unfitness, were the act done after the passage of the ordinance than if done before.

It is also insisted that the ordinance under consideration is objectionable for want of uniformity, and that it discriminates between different persons. That it affects all persons of certain classes without discrimination, and as to them acts uniformly, cannot be questioned. The question, however, is as to the power to discriminate at all. The power thus to discriminate is well settled by the authorities hereinbefore cited, and by many others. This power is exercised in relation to many other occupations besides that of selling liquor, and, when promotive of the best interests of the people, is always sustained. The occupation of engineers and pilots on vessels, and of druggists, physicians, lawyers, and others, are confined by law to persons having certain qualifications, and who are licensed therefor, upon the ground that the protection of the life, health, and welfare of the people at large require those who pursue these avocations to have those qualifications which will prevent, as far as possible, the evils which would result from ignorance and incompetency. Counsel, quoting from Miller v. Kister, 68 Cal. 145, 8 Pac. 813, say: "The legislature cannot discriminate or grant an indulgence to one which is not accorded to another." But the legislature does discriminate, and in many cases properly, while in those cases where the public is affected only by depriving an individual of a right common to all others, the exercise of which is not attended with evil consequences, the above quotation applies.

Nor is it special legislation. If it had been enacted by the legislature, being applicable only to the city and county of San Francisco, it would have been special legislation, because restricted to a portion of the state; but being enacted by the city and county, under the authority of the constitution, and not restricted to a part of the city and county, it is, as to the city and county, a general law.

As to the supposed conflict with the laws of the state, that question is settled by Ex parte Christensen and Ex parte Hayes, supra.

Many other points are made by counsel for appellant, all of which have been considered, but, as the points decided are necessarily conclusive of the case, they need not be noticed here. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 35

BELL v. PECK et al. (No. 18,266.)

(Supreme Court of California. Sept. 8, 1894.)

ACTION ON CONSTABLE'S BOND—JOINDER OF PARTIES AND ACTIONS—OPENING DEFAULT—DISCRETION OF COURT—HARMLESS ERROR.

1. In an action on a constable's bond, on account of the illegal seizure of plaintiff's property by the principal in the bond, there is no misjoinder of parties on the ground that the sureties, whose obligation is one of contract, are joined with the principal, sued as a trespasser.

2. An action against a constable for injury to property, in which the sureties on his bond are joined, does not improperly join two causes of action.

3. On a showing that, pending suit, defendants' attorneys had moved from the county, and had no notice of a transfer of the case to another department of the superior court, though such notice and notice of trial were published in a newspaper of general circulation, and that they were not present at the trial, and did not know of the judgment until after its entry, an order refusing to open up the judgment was not an abuse of the discretion vested in the court in such cases by Code Civ. Proc. § 473.

4. A judgment rendered in the alternative, that defendant must pay for the property converted, or return the same, will not be disturbed at the instance of the defendant, for whose benefit the alternative was inserted.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by T. A. Bell against P. F. Peck, constable, as principal, and Victor and Noble, sureties, for breach of condition in the constable's bond. Judgment for plaintiff, and defendants appeal. Affirmed.

Stanton L. Carter and Newman Jones, for appellants. E. D. Edwards, for respondent.

FITZGERALD, J. This action is brought against the defendant Peck, as principal, and the defendants Victor and Noble, as sureties on Peck's official bond as constable, to recover damages for breach of the condition thereof "that he and said Peck would well, truly, and faithfully perform the duties of his said office during his said term." The breach of official duty complained of is that Peck, in his official capacity as constable, under and by virtue of an "attachment or execution" issued against the property of other parties, illegally seized and converted the property of plaintiff described in the complaint. The complaint was demurred to generally upon the ground that it did not state facts sufficient to constitute a cause of action, and specially upon the following, among other grounds not necessary to be stated: (1) That the defendants Victor and Noble, sued for breach of contract, were improperly joined with the defendant Peck, sued as a trespasser; (2) that several causes of action were improperly joined, to wit, a cause of action for injuries to property and a cause of action founded on contract. The demurrer was properly overruled upon these grounds, on the authority of Van Pelt v. Littler, 14 Cal. 194; Black v. Clasby, 97 Cal. 482, 32 Pac. 564; and Sam Yuen v. McMann, 99 Cal. 497, 34 Pac. 80. The case of Ghiradelli v. Bourland, 32 Cal. 585, cited by appellants as authority to the contrary, is not in point. As to the other grounds of demurrer, it is sufficient to say they are equally untenable. Upon the overruling of the demurrer the defendants answered, and thereupon, without notice to the defendants or their attorney, the case was assigned or transferred by the judges of the superior court of Fresno county from department 2, where it had laid without being set for trial for more than two years, to department 3 of that court, and by them ordered to be placed on the trial calendar of that department. Notice was thereafter published in two newspapers of general circulation in that county that on April 4, 1893, this calendar would be called, and the cases thereon set for trial; and on that day it was called, and this case set for trial in that department for June 22d following. Afterwards this calendar was published in the same newspapers, and on the day stated the case was called for trial, and, neither of the defendants or their attorney appearing, the court proceeded with the trial of the cause, and, after hearing the evidence offered by plaintiff, gave judgment in his favor for the return of the property described in the complaint, or the value thereof, with interest and costs in case delivery could not be had. Afterwards, on the 31st day of July, following, the defendants moved the court to vacate and set aside the judgment, on the ground that it was given against them through the "inadvertence, surprise, and excusable neglect" of themselves and their attorney. The application was made upon notice and affidavits, including one of merits, duly served, and the pleadings and record in the case, and was resisted by two opposing affidavits, the whole of one of them and the greater part of the other being in opposition to defendants' affidavit of merits, and to that extent are, upon well-settled authority, improper to be considered in a proceeding of this character. The affidavits upon which the motion was made show, in addition to what has been stated, that defendants' attorney moved from Fresno county some time in November, 1892, and that he "has resided without and been absent from said county during the whole of the time, except about two weeks in May, 1893;" that neither he nor the defendants, or either of them, were present on April 4th, when the trial calendar was called in department 3, and this case ordered to be set for trial on June 22d, nor did they, or either of them, have any notice whatever thereof, nor were they, or either of them, present on the day the case was called for trial and tried, nor did they, or either of them, have any notice thereof, or of the judgment rendered therein, until after the date of its entry. It further appears from the only material part of the counter affidavits filed in this proceeding that the defendant Peck, during all of the time referred to, commencing January, 1893, was an under or deputy sheriff of that county, and as such was in attendance and waiting upon the different departments of the superior court thereof.

The application for relief is based upon the provisions of section 473 of the Code of Civil Procedure, and is addressed to the discretion of the court. Hence it follows that, unless it manifestly appears from the showing made that the court below abused the sound legal discretion thus vested in it by the statute, its action in denying the defendants' motion to vacate and set aside the judgment is not the subject of review here.

It is claimed by appellants that the court below abused its discretion in making the order appealed from, because they had no notice of the assignment of the case to department 3, nor of the regular calling of the trial calendar, and the setting of the case for trial in that department. We have been referred to no rule of that court providing for any such notice, and certainly none is required to be given by the statute. Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Eltzroth v. Ryan, 91 Cal. 587, 27 Pac. 932. It may be, however, that where a party to an action makes application to a department of the superior court where the same is pending for an order transferring the case from that department to another department of the same court, the rule would be that notice of such application should be duly served on the opposite party. But such is not the rule where the judges of the superior court, for the more convenient dispatch of business, as was the case here, or for any other reason they may deem necessary, make an order assigning or transferring cases for trial to any one or more of the several departments of such court. The case of Cottrill v. Cottrill, 83 Cal. 457, 23 Pac. 531, cited by appellants, is not in conflict with these views. In that case it was held that "to transfer a case from one department to another, and try it on the same day, without any notice whatever to the opposite party, is a very abrupt proceeding, from which, in a divorce case at least, it is not improper to relieve the absent party." That was a divorce case, and in such cases the rule is well settled that courts should be very liberal in relieving a party from a judgment obtained against him under such circumstances, for the reason that the public, as well as the parties to the action, has an interest in the result thereof. The nature of that action, and the unseemly haste with which the case, after its transfer, was rushed to trial, in the absence and without the knowledge of the defendant or his attorneys, were the grounds upon which it was held by this court that the defendant was properly relieved from the judgment obtained against him.

Upon the facts disclosed by the affidavits in this proceeding we cannot say that the court below abused its discretion in denying appellants' motion to vacate and set aside the judgment.

It is further claimed by appellants that the judgment is erroneous because rendered in the alternative. Conceding, for the purpose of this case, that the claim is well founded, we do not think that appellants are in a position to complain, for they are not only not injured by the judgment as rendered, but it is decidedly to their advantage, for they are accorded by it the privilege of avoiding the payment of the judgment by returning the property.

The remaining errors complained of are not necessary to be considered, as they are either untenable or immaterial. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

104 Cal. 1

BAINES v. BABCOCK et al. (WEST COAST LUMBER CO. et al., Interveners).

(No. 19,352.)

(Supreme Court of California. Sept. 4, 1894.)

CORPORATION — ACTION AGAINST STOCKHOLDER—UNPAID SUBSCRIPTIONS — CREDITORS' BILL—INTERVENTION BY OTHER CREDITORS—JOINDER OF PARTIES.

1. In an action by a judgment creditor of a corporation for an unpaid subscription of stock, a statement in the complaint that the action is brought on behalf of plaintiff "and all other creditors who may come in and contribute to the costs and expenses" will not entitle a simple contract creditor to be made a party thereto, as he is not entitled to the relief asked for.

2. An order appended to a judgment in a suit by a judgment creditor of a corporation against a stockholder for an unpaid subscription of stock, that the "cause be retained, and that any other judgment creditor * * * who shall make a proper showing * * * be allowed to become a party," refers only to persons who were judgment creditors at the time the order was made.

3. Where a judgment creditor of a corporation improperly intervenes in an action by another judgment creditor against a stockholder of the corporation for an unpaid subscription of stock, and his complaint states a good cause of action against the stockholder, the allegations as to intervention will be regarded as redundant, and the complaint treated as an independent and original one.

4. Judgment creditors of a corporation, holding separate judgments, may join in a suit against a stockholder for an unpaid subscription to stock.

5. In an action by a judgment creditor of a corporation for an unpaid subscription to stock, a judgment in an action by another judgment creditor against the same stockholder, rendered two years before, is not evidence of the indebtedness of the stockholder to the corporation.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by W. E. Baines, a judgment creditor of the San Diego Street-Car Company, against Babcock and Story, stockholders, to recover an unpaid subscription to stock. Judgment was rendered for plaintiff, and afterwards the West Coast Lumber Company and C. J. Fox, other judgment creditors of the company, intervened and had judgment, from which defendants appeal. Reversed.

Luce & McDonald and Gibson & Titus, for appellants. Trippett, Boone & Neale, for respondent.

VANCLIEF, C. As indicated by the title, the controversy here is solely between the alleged interveners and two of the defendants in the action as originally commenced. The action, as originally commenced against Babcock, Story, San Diego Street-Car Company, et al., was of the nature of a creditors' bill in equity to subject equitable assets of the street-car company, a corporation, to the satisfaction of a judgment against it in favor of the plaintiff. It was averred in the complaint that Babcock and Story and certain other defendants were the owners and holders of a large number of shares of stock of the street-car corporation, on which shares they had paid only 50 per cent. of their par value, and that they were indebted to that corporation for the unpaid balance on their subscription for said stock. After the averment of other facts necessary to constitute a cause of action, the prayer was, in substance, that so much of said indebtedness of each of the defendants to the street-car company as might be necessary for that purpose be applied to the payment of plaintiff's said judgment against the street-car company, and that plaintiff have execution therefor against said stockholders. The introductory clause of that complaint is in the following language: "The plaintiff, for himself and all other creditors of the San Diego Street-Car Company who may come in and be made parties to this action, and contribute to the costs and expenses of the prosecution thereof, complains and alleges." On July 2, 1890, no other creditors having come in, or been made parties to the action, judgment was rendered in favor of plaintiff according to the prayer of his complaint; and in addition to the judgment prayed for, and without any finding that there was any other creditor of the street-car company than the plaintiff, the judgment contains the following paragraph: "It is further ordered, adjudged, and decreed that this cause be retained, and that any other judgment creditor of the defendant corporation, the San Diego Street-Car Company, who shall make a proper showing to the court of his right thereto, be allowed to become a party to this suit, to establish his claim, and have execution against said defendants for such sum found due such creditor, not exceeding the uncollected balance of the amount herein found due from said defendants, respectively, to said corporation: provided that in no case shall any of said defendants be required to pay, nor shall execution issue against them for, any greater sum than the amount found due from them to the said corporation as aforesaid." The defendants appealed from the judgment in the original action, and from an order denying their motion for new trial, and this court affirmed the judgment and order. Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776. But no question relating to said last paragraph of the judgment, or to the rights of other creditors of the street-car company, was involved in that appeal, or considered by the court. On September 12, 1892, being two years and two months after the rendition of the above-mentioned judgment, and more than a month after that judgment was finally affirmed by this court, the respondents herein, West Coast Lumber Company and C. J. Fox, applied to the superior court for leave to file in that case what they denominated their "Intervening and Supplemental Complaint," which was granted; and accordingly they filed it, and thereafter amended it. The introductory paragraph thereof is as follows: "Come now West Coast Lumber Company and C. J. Fox, for themselves and all other creditors of the defendant San Diego Street-Car Company who may come in and be made parties to this action, and contribute to the costs and expenses of the prosecution thereof; and they themselves, coming in and joining with the plaintiff in the prosecution of this action, and offering to contribute to the costs and expenses thereof, and by way of coming in under the previous order of this court and judgment herein, by leave of court, now file this, their amended complaint in intervention herein, and complain of the defendants and allege." Then follow allegations of facts constituting the interveners' cause of action against the defendants in the original action, founded on judgments in their favor against the street-car company obtained about 15 months after the rendition of the original judgment in favor of the plaintiff, Baines. In addition to the facts constituting a cause of action against the defendants, Babcock and Story, the intervening complaint set forth all the proceedings in the original action, including the judgment therein in favor of the plaintiff, Baines, and also alleged that the judgment in favor of Baines had been fully satisfied. The plaintiff, Baines, did not answer this so-called interveners' complaint, but the defendants, Babcock and Story (appellants), answered, denying, among other things, that either of them was indebted to the street-car corporation in any sum whatever, and specifically denying that any sum remained due or unpaid from either of them to said corporation upon the subscription price of any shares of the capital stock of said corporation, owned or held by either of them, as alleged in the intervention complaint. The court found for the alleged interveners, and thereupon rendered judgment as follows: "Now, therefore, by reason of said findings, and by reason of the law and the premises, it is ordered, adjudged and decreed as follows: That the West Coast Lumber Company is a judgment creditor of the San Diego Street-Car Company in the sum of $6,184.45, upon a judgment duly made and given by the superior court of the county of San Diego, state of California, on the 14th day of October, 1891, in an action therein pending, wherein the said West Coast Lumber Company was plaintiff, and the San Diego Street-Car Company was defendant. That C. J. Fox is a judgment creditor of said San Diego Street-Car Company in the sum of $2,136.35, upon a judgment duly given and made by the superior court of the county of San Diego, state of California, on the 20th day of November, 1891, in an action in said court pending, entitled C. J. Fox, Plaintiff, vs. The San Diego Street Car Company, Defendant. That each of said judgments remains wholly unpaid, together with interest thereon at the legal rate since the respective renditions thereof. That each of said parties has properly come in and become parties to this action, and established their claims as provided in the decree hitherto entered herein on the 2d day of July, 1890. That the defendant E. S. Babcock, Jr., has not paid the amount adjudged to be due from him to the said San Diego Street-Car Company, or any part thereof, and the said defendant is still indebted to said San Diego Street-Car Company in the sum of $48,600. That the defendant H. L. Story has not paid the amount adjudged to be due from him to said San Diego Street-Car Company, or any part thereof, and the said defendant is still indebted to said San Diego Street-Car Company in the sum of $21,275. That the claim of W. E. Baines has been fully paid and satisfied. That the said West Coast Lumber Company and C. J. Fox have and recover of and from the said defendants, Babcock and Story, the amount of their respective judgments, with interest, but not to exceed the amount decreed to be due from said Babcock and said Story, respectively, to said San Diego Street-Car Company. That said West Coast Lumber Company and C. J. Fox share pro rata, according to the amount of their respective claims, any sums recovered of either of said defendants. That said interveners have execution against said defendants for the amounts above decreed to be due them, respectively. Done in open court this 1st day of June, 1893. W. L. Pierce, Judge." The defendants appealed from this judgment within 60 days from the entry thereof, upon the judgment roll, including a bill of exceptions specifying alleged errors in law and fact.

1. Whether respondents had such "interest in the matter in litigation" as would have entitled them to intervene in the original action "before trial," pursuant to section 387 of the Code of Civil Procedure, it is clear that they did not so intervene, and it is quite as clear that under that section they had no right to intervene two years after the trial. Laugenour v. Shanklin, 57 Cal. 70; Carey v. Brown, 58 Cal. 180; Owens v. Colgan, 97 Cal. 454, 32 Pac. 519. Nor do respondents contend that they had. But they contend that the original action was commenced partly for their benefit, as authorized by section 382 of the Code of Civil Procedure, and that they properly came in and became parties to the action two years after final judgment therein. In the first place, the original complaint does not purport to have been made for the benefit of any class of persons who had any interest in any question involved in the action, though it does purport to be on behalf of all creditors of the street-car company who may come in and be made parties to the action, and contribute to the costs, etc. But mere creditors were not of the class to which the plaintiff belonged, nor within any exception which entitled them to the same or similar remedies. Only judgment creditors who had exhausted their remedies at law were of plaintiff's class. Upon the facts stated in the complaint, mere creditors were entitled to no relief whatever. Though the complaint was sufficient to warrant the relief sought by the original plaintiff, as held in Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, it was not sufficient to entitle others on whose behalf it purported to be made even to come in as parties to the action. Carey v. Brown, 58 Cal. 181; Pom. Code Rem. 390. So far as the respondents were concerned, the averment that plaintiff sued on behalf of other creditors was of no consequence, and in relation to plaintiff's cause of action it was merely redundant surplusage. If respondents were entitled to become parties to that action at all, the only mode by which they could have been made parties was by intervention before trial, under section 387, Code Civ. Proc., of which, as above shown, they did not avail themselves. Besides, the so-called "Amended Complaint in Intervention" shows that neither of the respondents became a judgment creditor of the street-car company until October, 1891, 15 months after the rendition of the judgment in the original action; and therefore, until that date, neither of them was entitled to become a party to the action, either under section 382 or section 387 of the Code of Civil Procedure.

2. Respondents contend, however, that they came in as parties under the order of the court appended to the original judgment, to the effect that the "cause be retained, and that any other judgment creditor * * * who shall make a proper showing * * * be allowed to become a party," etc. But there was nothing in the pleadings upon which to rest this order, except the aforesaid redundant surplusage in the complaint, upon which nothing in the judgment, other than surplusage, could have been founded. But, even if it be conceded that the order is valid, it refers only to persons who were judgment creditors at the time it was made, and not to those who may have become such 15 months or 15 years thereafter. For additional authorities under this head, see Pom. Code Rem. (3d Ed.) 388-400.

3. Although the respondents never became parties to the original action, I think their so-called "Complaint in Intervention" may be regarded and treated as an independent original complaint, and as such is sufficient, notwithstanding the redundant matter relating to the action of Baines v. Babcock, which does not vitiate the complaint, if otherwise good. Wickersham v. Crittenden, 93 Cal. 33, 28 Pac. 788; Carey v. Brown, 58 Cal. 180. Without this redundant matter the complaint states a cause of action similar to that stated in Baines v. Babcock, which was held sufficient by this court. 95 Cal. 582, 27 Pac. 674, and 30 Pac. 776. But the complaint was demurred to on the ground of misjoinder of parties plaintiff, and appellants contend that the demurrer should have been sustained on this ground. But I think there is no misjoinder. Owen v. Frink, 24 Cal. 171; People v. Morrill, 26 Cal. 360; Pom. Code Rem. (3d Ed.) 267, and notes.

4. Upon the issues as to whether the defendants were indebted to the San Diego Car Company, and as to whether that company had refused or neglected to levy an assessment, as alleged in respondents' complaint, the court found as follows: "That only fifty per cent. of the par value of the shares of the capital stock of the San Diego Street-Car Company, alleged in said complaint to be held and owned by said defendants, Babcock and Story, respectively, have been paid. That said defendants, respectively, agreed to pay the remaining fifty per cent. alleged to be due upon said shares. That there is due and unpaid from the defendant Story, upon his subscription to said capital stock, the sum of $21,275. That there is due and unpaid from the defendant Babcock, upon his subscription to said capital stock, the sum of $48,600. That the San Diego Street-Car Company has neglected and refused to make or levy any assessment upon any share or shares of its capital stock held by said defendants, or either of them." The appellants contend that neither of these findings is justified by the evidence, and I think this point should be sustained. The only evidence claimed to have any tendency to support either of these findings is the judgment roll in the case of Baines v. Babcock, to which, as we have seen, neither of the respondents here was a party. This judgment roll was admitted in evidence, against the objection of defendants on the grounds that it was incompetent, irrelevant, and immaterial. I think it was incompetent and immaterial, and surely it had no tendency to prove that either of the defendants was indebted to the street-car company when respondents' complaint was filed, two years after the entry of the judgment in favor of Baines. Even as between defendants and Baines, that judgment only proved that defendants were indebted to the street-car company, and that the street-car company had failed to levy an assessment up to the time of the rendition thereof in favor of Baines; and it cannot be presumed that defendants did not pay their overdue debts to the street-car company, nor that the street-car company did not levy an assessment within the next following two years.

Upon the facts of this case, it is not necessary to decide whether or not section 382 of the Code of Civil Procedure was intended to authorize the practice of courts of equity, to its full extent, in permitting one plaintiff to sue on behalf of others, since even that practice does not permit the coming in of additional parties plaintiff, after judgment in favor of the original plaintiff, who were not qualified to come in before such judgment.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded for a new trial.

104 Cal. 45

HOWELL v. HOWELL. (No. 18,251.)

(Supreme Court of California. Sept. 10, 1894.)

DIVORCE — GRANT OF ALIMONY AFTER FINAL DECREE.

After a final decree of divorce has been entered, in which alimony was not granted, the court has no jurisdiction to grant alimony, as Civ. Code, §§ 137, 139, only authorize the court to grant alimony "while an action for divorce is pending," and to "modify" its order.

Department 2. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action for divorce by Elizabeth Howell against T. N. Howell. From an order granting plaintiff alimony, defendant appeals. Reversed.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle (W. Henry Jones, of counsel), for respondent.

McFARLAND, J. This is an appeal by defendant from an order of the superior court requiring him to pay to plaintiff $100 per month from January 20, 1892, until the further order of the court. On May 14, 1890, the parties were husband and wife, and on that day plaintiff commenced an action for divorce from defendant. She averred in her complaint, as ground for the divorce, desertion by the defendant; and she also averred that there were certain named minor children of the parties, and that there was certain community property in the territory of Wyoming worth about $10,000, and also certain personal property in California worth $7,100, and certain described real property here belonging to the community. She prayed for a divorce, the custody of the children, and that the court award to her all the said community property, real and personal, in California. The defendant, who then lived in Wyoming territory, was served by publication, and made default. The court entered a decree on September 11, 1890, in accordance with the prayer of the complaint. There was nothing in either the complaint or the judgment about alimony. By the judgment the property prayed for in the complaint was awarded to plaintiff, but it contained nothing more about property, money, or property rights of any kind. The judgment has never been appealed from, or in any way disturbed. On January 20, 1892,—more than 14 months after the judgment,—plaintiff filed a petition entitled in said divorce suit, in which, after alleging certain property and income of defendant, she averred that she was in indigent circumstances, and unable to support herself and said minor children, and that "the sum of $250 is a reasonable sum per month to be allowed plaintiff to support herself, and support and educate her said minor children." She then prays that, in addition to counsel fees, defendant "pay to plaintiff such further sum as to this court may seem just for support of plaintiff and said minor children," and that "said alimony be made permanent." The defendant demurred to the petition upon the ground, among others, of want of jurisdiction. The demurrer was overruled, and defendant answered. His answer was stricken out for reasons not necessary to be here noticed. The court made findings reciting the history of the divorce, and declaring that defendant had certain property and income, that plaintiff had two minor children dependent upon her, and that she "has not separate property, nor any property, sufficient to maintain herself and said minor children." Whereupon, the court made an order "that defendant pay to plaintiff the sum of one hundred dollars per month on the 20th day of each and every month, commencing on the 20th day of January, 1892, and the defendant do continue to pay said sum to the plaintiff on the 20th day of each and every month thereafter until the further order of this court." From this order, defendant appeals.

We are satisfied that the court had not jurisdiction to make the order appealed from. A judgment in a divorce suit, settling the property rights of the parties, after the time for appealing therefrom has expired, is as final as any other kind of a judgment, except so far as the power to modify it is given by statutory provision. Of course, when we speak of a "final judgment," we mean one which does not upon its face reserve jurisdiction (when that can be done) to make a supplemental decree, in which case it is not final. In the case at bar there was no such reservation. It was final in form and substance. And there is no statutory provision giving jurisdiction to make the order appealed from. Section 137, Civ. Code, provides that "while an action for divorce is pending" the court may require the husband to pay, as alimony, money necessary to enable the wife to support herself and children, and prosecute or defend the action. Section 139 provides that, where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children, and make a suitable allowance for the support of the wife, and that "the court may from time to time modify its orders in these respects." But the latter section clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce, and established by the judgment; and the provision is that, where the right to alimony has been thus established, the amount may be changed by a modification of the order. But in the case at bar there was nothing to "modify." After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. In the case at bar the judgment became final without any award of alimony, and of course the court could not afterwards "modify" what never existed. In Stewart on Marriage and Divorce (section 366), the authorities are correctly summed up in this language: "When the court has allowed the suit to be dismissed, or has finally entered the decree, it has no further jurisdiction over the parties or the subject-matter, except so far as this is reserved by itself or by statute." And in section 376 the author further says: "But a decree of divorce a vinculo is final, and the jurisdiction of the court over the parties is, after the expiration of the term, at an end; and just as there can be no grant of alimony after such a divorce, so there can be no change in the award of alimony, unless the right to make such a change is reserved by the court in its decree, as it may be, or is given by statute, as it often is." See, also, Kamp v. Kamp, 59 N. Y. 212, and Egan v. Egan, 90 Cal. 15, 27 Pac. 22. In the cases cited by respondent the right to alimony had been established in the final decree, or the disposition of the question of alimony had been expressly reserved for further consideration. Our conclusion is that the court below had no jurisdiction to make the order appealed from, and that the demurrer to the petition should have been sustained. It is not necessary here to determine what order the court might make "after judgment," under section 138 of the Civil Code, with respect to the "custody, care and education of the children of the marriage." The order under review is for alimony for the wife, and for her support, and its character is not changed by the mention of the children. The order appealed from is reversed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(104 Cal. xvii)

HOWELL v. HOWELL. (No. 18,250.)

(Supreme Court of California. Sept. 10, 1894.)

Department 2. Appeal from superior court, Tehama county. E. A. Bridgford, Judge.

Action for divorce by Elizabeth Howell against T. N. Howell. From an order granting plaintiff alimony for the first time made after the entry of the final decree, defendant appeals. Reversed.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle (W. Henry Jones, of counsel), for respondent.

PER CURIAM. Upon the authority of Howell v. Howell (No. 18,251, this day decided) 37 Pac. 770, the orders appealed from are reversed.

(4 Cal. Unrep. 787)

GRUSS v. ROBERTSON et al. (No. 18,283.)

(Supreme Court of California. Sept. 5, 1894.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

The granting a new trial on the ground of newly-discovered evidence is discretionary with the trial court.

Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Joseph Gruss against Martha Robertson and others. From an order granting a new trial, defendants appeal. Affirmed.

Goodwin & Goodwin, for appellants. C. E. McLaughlin, for respondent.

PER CURIAM. This is an appeal from an order granting the plaintiff a new trial upon the ground of newly-discovered evidence, and the only question is, did the court abuse its discretion in making the order? It is true that "applications for new trials upon the ground of newly-discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great." Arnold v. Skaggs, 35 Cal. 684. But it is also true that "applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed, except for an abuse of discretion, the presumption being that the discretion was properly exercised." Hayne, New Trial & App. § 87; People v. Sutton, 73 Cal. 248, 15 Pac. 86; People v. Urquidas, 96 Cal. 240, 31 Pac. 52. At the hearing of the motion, affidavits were read by both sides, and it must be presumed that they were properly looked upon and considered by the court. They were conflicting as to some of the facts stated, but it was the province of that court to determine on which side was the truth. Assuming, therefore, as we must, that the facts stated in the plaintiff's affidavits were true, we think there was a sufficient showing to meet the requirements of the law in such cases, and to justify the order. At any rate, we cannot say that the action of the court was an abuse of its discretion. The order appealed from is affirmed.

(4 Cal. Unrep. 780)

RAYMOND v. GLOVER et al. (No. 19,335.)[1]

(Supreme Court of California. Sept. 4, 1894.)

MORTGAGE FOR PURCHASE MONEY—VALIDITY—DELIVERY TO UNAUTHORIZED PARTY—EFFECT—EXTINCTION OF VENDOR'S LIEN.

1. Where an agent for the sale of land, intrusted with a deed thereof, through the negligence of the vendee, who knew that he was authorized to deliver the deed only after a purchase-money note and mortgage were executed to the vendor, fraudulently took the note and mortgage in his own name, there was no valid delivery, and the vendor was entitled to a lien for the price, as against an innocent purchaser of the mortgage.

2. Where a vendee signs a purchase-money mortgage, payable to the vendor's agent, under the belief that it is payable to the vendor, after having ample opportunity to examine it, he cannot contest its validity as against an innocent purchaser.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ellen D. Raymond against George W. Glover, Sarah J. Glover, George Munroe, and the German-American Savings Bank to establish a vendor's lien. Plaintiff had judgment, and the defendant bank appeals, and, by a cross bill, seeks to foreclose a mortgage. Affirmed and remanded.

Walter Bordwell and Chapman & Hendricks, for appellant. Lee & Scott and Wilson & Lamme, for respondents.

TEMPLE, C. This appeal is from the judgment, with a bill of exceptions. The complaint, as amended, shows: That on the 1st day of July, 1891, plaintiff owned a certain tract of land in the county of Los Angeles, and on that day entered into an agreement with the defendant George W. Glover to sell to him said tract of land for $1,800, of which sum $500 was to be paid in cash, and $1,300 to be secured by mortgage on the place, payable in three years, with interest at 9 per cent. per annum. That plaintiff was absent from the state, and the sale was negotiated by her through defendant George Munroe. That afterwards, to wit, January 22, 1892, plaintiff executed and forwarded to said Munroe a deed duly signed and acknowledged, conveying said property to George W. Glover and Sarah J. Glover, his wife, with instructions to deliver the same to George W. Glover upon receiving the promissory note of said Glover and wife, secured by mortgage as provided in said agreement, and the payment of $500 cash. That said Munroe received the deed, and, in violation of the instructions to him, gave into the possession of defendant George W. Glover said deed without receiving the said promissory note or mortgage, and said Glover caused the deed to be recorded in the recorder's office of Los Angeles county. Though said Glovers paid the said sum of $500, they wholly failed to execute said note and mortgage, or pay the said sum of $1,300 or any part thereof, and the same is still unpaid. That said Munroe, at the time he gave said deed into the possession of said Glover, fraudulently prepared a note and mortgage for $1,300, running and payable to himself, and induced said Glovers to execute the same under the belief that plaintiff was named in said note and mortgage as payee. That the defendant the German-American Savings Bank afterwards caused said mortgage to be recorded, claiming to be the assignee thereof. That said note and mortgage were executed and delivered without the knowledge or consent of plaintiff. That she had no knowledge of such facts until after the pretended assignment to the defendant bank. That said note and mortgage were without consideration other than as herein set forth, and were taken by said Munroe in violation of his duty, and in fraud of plaintiff's rights. That at the time of the delivery to said George W. Glover of said deed, and the execution and delivery to him of said note and mortgage, said Glover had full notice of the agency of said Munroe, and that said Munroe had no right or authority to take such note and mortgage. That the sole consideration for the note and mortgage was the conveyance, and said Munroe had no authority to take them otherwise than in the name of plaintiff, of which facts the bank had full notice. She asks the court to decree that the note and mortgage were accepted, taken, and held by Munroe as her trustee, and are now held by the bank as her trustee, or that she has a vendor's lien upon the premises for $1,300 and interest, and such other relief as may be equitable. The appellant, the bank, answered, denying all the allegations in the complaint, and averring an assignment to itself for a valuable consideration and without notice. Appellant also filed a cross complaint, in which it seeks to foreclose the mortgage. To this cross complaint the Glovers answer, averring that the note and mortgage were wholly without consideration and were procured by fraud. They also filed a cross complaint, in which they set out the alleged fraud and want of consideration, and ask to have the note and mortgage declared void. To this cross complaint the appellant answered, denying the fraud, and pleading want of notice, and its purchase for a valuable consideration.

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[1] For separate opinion, see 37 Pac. 918.

The court found the sale of the land as averred by the plaintiff; that plaintiff was a nonresident; that she signed and acknowledged the deed, and sent the same to Munroe with the instructions averred; that Munroe handed the deed to Glover without taking his note or mortgage as he was instructed to do; that Munroe received the said $500 from Glover, but, instead of taking the note and mortgage payable to plaintiff, fraudulently prepared a note and mortgage for the same amount payable to himself, and, with intent to deceive said Glovers, represented to them that the note and mortgage were made in favor of plaintiff, in accordance with the terms of the agreement, and pretended to read the papers to the Glovers, but fraudulently read the name of plaintiff as payee; that, relying upon the representations and deceived by the false practices, the Glovers executed the note and mortgage fraudulently prepared by Munroe, believing that they were payable to plaintiff and in accordance with their agreement; that the note and mortgage were so executed without the knowledge or consent of plaintiff, who did not know of the fraud until after the assignment to the bank.

The note and mortgage were without consideration, and were taken by Munroe in violation of his duty, and in fraud of the rights of plaintiff. At the time of the execution of said note and mortgage, said Glovers well knew that Munroe had no authority to accept such a note and mortgage, or any note or mortgage in his own name. Afterwards, on the 23d of February, 1892, said Munroe assigned the note and mortgage to defendant bank as security for the payment of a note of $1,000 then borrowed by Munroe from the bank. Prior to receiving said assignment and to the loaning of said money by the bank, its cashier, for the purpose of ascertaining the value of the property, and also whether said Glovers had any set-off or other defense to the note and mortgage, went with Munroe to the residence of George W. Glover, and thereupon said Munroe, without the hearing of the cashier, stated to Glover that he (Munroe) had bought the note and mortgage from plaintiff. Thereupon, said cashier told said Glover that the bank was about to loan to Munroe $1,000 upon the note and mortgage which he and Mrs. Glover had given, and asked how much he was owing on it, and if it was all right, to which Glover replied that $1,300 was due on the mortgage, and it was all right. Glover did not then know that Munroe had been named in the note and mortgage as payee, but believed that the note and mortgage had been purchased by Munroe. The representation was made without any intent to mislead the bank, and in the honest belief that Munroe had bought the note, and had the right to hypothecate it. The court failed to find whether the bank loaned the money to Munroe, and took the assignment in good faith, without notice of plaintiff's equities. The evidence shows, however, without contradiction, that the appellant acted in entire good faith, without knowledge that plaintiff had any claim to the debt, or that Munroe had ever been her agent, or that she had been the owner of the land.

The first question which presents itself is whether there was a valid delivery of the deed. There was an agreement in writing, in which the terms of the sale were fully stated. The Glovers, therefore, knew perfectly well that the deed was not to be delivered until the note and mortgage were executed to plaintiff. Munroe was a special agent, and the possession of the deed under the circumstances had no tendency to show ostensible authority. The delivery of the deed was therefore in violation of the power of the agent. Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053, is not opposed to this conclusion. In that case the purchaser did not know of any conditions in regard to the delivery of the deed, other than those with which he had complied. He had made an offer for the land. The agent of the grantors notified him of the acceptance of his offer. As a matter of fact, according to the finding, the grantees did not accept the offer, but asked further consideration. The agent falsely told the purchaser that his offer was accepted, and the grantors that their counter offer was accepted. The deed was then passed, each party believing upon terms he had proposed. The misunderstanding was through the fraud of plaintiff's agent. The vendors and vendee met several times during the negotiations. It was held that the agent was enabled to accomplish the fraud in consequence of the negligence of the grantors. They were therefore compelled to bear the loss. Plaintiff here has been guilty of no neglect. Nor can I see how the case differs as to the appellant. The claim is that because Munroe was the agent of plaintiff, and was placed in a position where he could consummate the fraud because of such agency, therefore plaintiff must bear the loss. There may be language in some of the cases which would sanction this broad statement of the rule. The rule, however, is not peculiar to the law of agency, but is general. Generally, it is stated as in our Code: "Where one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. The statement is slightly self-contradictory, but really, I think, states the true rule. Beyond this, I see no justice in it. The fact that one has been placed by my act in a position which will enable him to defraud another does not make me liable,—not even if I have trusted a dishonest man, and thereby raised his credit. If I lend my horse to one who proves to be a rogue, and he, taking advantage of his possession, sells the horse, the purchaser cannot hold me for it. But it was not even the trust reposed in Munroe by plaintiff that placed in his hands the instrument which enabled him to defraud appellant. Her instructions were explicit, and were well known to the only parties with whom he was authorized to deal. Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of $1,300.

But the case is very different between Glover and the bank, assuming, as we must, that the bank took the security without notice. The note was nonnegotiable, and naturally the obligor could interpose any defense against a purchaser which he had against the payee named. But the bank, before taking the security, sent its agent to Glover, and, after informing him of the contemplated loan, inquired if he had any defense, and was informed by Glover that he had none. It is found that Glover did not then know that the note had been originally given to Munroe, but believed that plaintiff had assigned it to Munroe. Even had such been the fact, it was a lack of diligence to assure the bank that Munroe's title was all right upon Munroe's word that he had bought the note. But there was gross negligence in the execution of the note. I do not mean to say that Glover could not have defended against Munroe, though some of the cases seem to go that far. But it is the precise case provided for in the maxim quoted,—that, when one of two innocent men must suffer, he shall bear the loss whose negligence has occasioned it. There would be very little use in having written instruments if there were no presumption that when one signs such he does so knowing what he is signing. Men do not usually execute such papers until they have carefully examined them. It must be, therefore, that to execute them without such care is negligence. The business of the world could hardly be carried on upon any other hypothesis. There was no fiduciary relation between Munroe and Glover. On the contrary, their interests were adverse. It appears further that Munroe practiced no arts to induce Glover to sign without reading. The mortgage and note were filled out at Glover's house, and in his presence. The note was a printed form, and with only a few blanks to fill, one of which necessarily was the name of the payee. When they were finished and ready to sign, Munroe did not volunteer to read them, but handed them to Glover and requested him to read them. Glover said his eyes were bad, and requested Munroe to do so. It is hard to believe, under such circumstances, that Munroe contemplated any such deceit as the court finds. The notary, the only really disinterested witness, testified that the note and mortgage were correctly read. There was, however, conflicting testimony, and the court finds that they were incorrectly read. But Glover had no right to trust his adversary, and, when the question is whether he or an innocent party must suffer for his negligence, he must bear the loss. Hawkins v. Hawkins, 50 Cal. 558; Blaisdell v. Leach (Cal.) 35 Pac. 1019; Plummer v. Bank, 90 Ind. 386; 2 Herm. Estop. § 1004.

As there is no finding upon the question raised as to the good faith and want of notice of the bank, the case should be remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending to show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for $1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending tc show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for $1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

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104 Cal. 30

PALMER et al. v. LAVIGNE et ux. (No. 19,394.)

(Supreme Court of California. Sept. 8, 1894.)

MECHANIC'S LIEN — FOR WHAT GIVEN — CLAIM — SUFFICIENCY — PLEADING.

1. Code Civ. Proc. § 1183, providing that all persons and laborers of every class performing labor on the construction, alteration or repair of any building shall have a lien therefor, includes work done in moving a building.

2. Where a statute requires a lien claim to state "the name of the owner or reputed owner if known," a claim which states that it was to be paid by "J. L., who was and still is the reputed owner" of the land, and that J. L. and M. L. are the reputed owners of the building on which the claim rests, is sufficient.

3. Where copy of a lien claim made part of a complaint on foreclosure states that the contract was made with the wife, and the complaint itself states that the claimant "entered into a contract with the defendants," i. e. the wife and the husband, the complaint is demurrable as ambiguous and uncertain.

4. When the claim and notice of lien stated that the contract on which a lien is based was made with the wife, and the complaint alleges that it was made with both husband and wife, the variance is fatal to the admission of the lien claim and notice in evidence.

5. Under Code Civ. Proc. § 1192, which provides that "every building constructed on any land with the knowledge of the owner shall be held constructed at his instance and subject to liens unless such owner within three days posts a notice disclaiming responsibility," liens may be created on a homestead without the joint action of husband and wife.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by J. D. Palmer and another against John E. Lavigne and Mary C. Lavigne to foreclose a mechanic's lien. Judgment for plaintiffs, and defendants appeal from an order denying a new trial. Reversed.

Aitken & Smith, for appellants. Works & Works, for respondents.

SEARLS, C. This is an action to foreclose a mechanic's lien upon a dwelling house and the land adjacent thereto, taken under the Code of Civil Procedure, to secure the sum of $60, due the plaintiffs as copartners and as original contractors for moving the house upon which the lien is claimed from San Diego to the ranch described in the complain. Plaintiffs had judgment of foreclosure, from which judgment, and from an order denying a motion for a new trial, defendants appeal.

The defendants are husband and wife, and the real estate upon which the lien was foreclosed is the homestead of the defendants under the laws of the state of California. Defendants filed separate demurrers to the amended complaint, differing in some respects, but each averring that the complaint does not state facts sufficient to constitute a cause of action. The first point made by appellants is that, under section 1183 of the Code of Civil Procedure, plaintiffs were not entitled to a lien for moving a building. Their contention is that the section specified only gives such lien for labor performed or materials furnished in the construction, alteration, or repair, either in whole or in part, of a building, and that labor performed in removing a building from one point to another is not within the scope or intent of the statute. So much of section 1183 as is essential to the question is as follows: "All persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to or repair, either in whole or in part, of any building * * * shall have a lien upon the property upon which they have bestowed labor or furnished materials." We regard the construction of appellants as being erroneous. "All persons and laborers of every class performing labor upon," etc. Manifestly the preposition "upon" refers to and has for its objective the noun "building," and is to be read as though the word "building," with its qualifying word "any," followed immediately after the word "upon." The lien to material men is only given to those who furnish materials to be used in the construction, alteration, addition to, or repair of, the building, etc.; that to laborers is given to all who perform labor upon it, whether technically coming within the definition of construction, alteration, etc., or not. The case of Trask v. Searle, 121 Mass. 229, cited and relied upon by appellants, is not in point, for the reason that the statute of Massachusetts varies from our own. It is in part as follows: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration or repair of any building or structure upon real estate," etc. As will be observed, there the lien for labor is given for those who have performed or furnished labor in the erection, alteration, or repair of the building, while our statute gives a lien to all laborers who have performed labor upon the building, etc. It follows that the point is not well taken.

The next point is that there is no sufficient statement in the lien which is attached to the complaint of the ownership or reputed ownership of the defendants in the property sought to be foreclosed. The language of the lien is, after stating the manner and time of payment, the last of which, it is averred, was to be paid out of the wages of "John Lavigne, her husband, who was, and still is, the reputed owner of the said Lavigne ranch." And as to the building which was moved upon the ranch, it is averred the defendants, Mary C. and John E. Lavigne, are the reputed owners. This was sufficient. The statute only requires the claim of lien to state "the name of the owner or reputed owner if known," which was done.

The demurrer of defendant Mary C. Lavigne to the amended complaint specifies that said complaint is ambiguous, in that it cannot be determined therefrom whether the contract alleged in the complaint "to have been entered into by the plaintiffs and the defendants, or one of them, was made by the defendant Mary C. Lavigne, or by the defendant John E. Lavigne, or both;" that it cannot be ascertained therefrom whether plaintiffs seek to hold this defendant under an alleged contract made with her, or on account of some interest which she holds in the land. There are also separate specifications of uncertainty, and that it is unintelligible, for the same causes set out under the head of ambiguity. The statement in the claim of lien attached to and made a part of the complaint is that the contract was made with Mary C. Lavigne, and that the "contract was made with the full knowledge and consent of John E. Lavigne, and the work was carried on with his full acquiescence." The allegation of the complaint is that plaintiffs "made and entered into a contract with defendants," etc. The defendants are John E. Lavigne and Mary C. Lavigne. It has been said that when the allegations of a complaint are inconsistent with an exhibit attached, demurrer for ambiguity and uncertainty is well taken. Mendocino Co. v. Morris, 32 Cal. 145; Frazer v. Barlow, 63 Cal. 71; Malone v. Gravel Co., 76 Cal. 578, 18 Pac. 772; Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537. The fact that a contract was made with Mary C. Lavigne, and that John E. Lavigne had knowledge of it, consented thereto, and acquiesced in the work under it, did not make it his contract. The defendant Mary C. Lavigne had a right to know whether it was sought to charge her upon a contract made with her individually, or upon a joint contract entered into with her and the other defendant. Her personal liability, in the one case, for any residue after exhausting the property covered by the lien, would be quite different from that in the other. We think the complaint was both ambiguous and uncertain. The demurrer, having specifically and separately stated these causes of demurrer, and the reasons therefor, should have been sustained, and the order overruling it was erroneous.

There is nothing in the point made by appellants that a mechanic's lien cannot be created upon the homestead, except by the joint action of the husband and wife. See section 1192, Code Civ. Proc. Walsh v. McMenomy, 74 Cal. 356, 16 Pac. 17, was decided upon a construction of section 1241 of the Civil Code, as it stood prior to the amendment of March 9, 1887, and has no application to the law as it at present exists. A homestead is free from forced sale, except as provided by the statute. Among the cases in which it may be sold under execution, precisely as though it was not impressed with the homestead character, are those under judgments obtained upon debts secured by "mechanics', contractors', subcontractors,' artisans', architects', builders', laborers' of every class, material men's, or vendors' liens on the premises." The claim and notice of lien was offered in evidence, and objected to, among other things, upon the ground of variance for like reasons with those stated in the demurrer. The objection was overruled, and defendants excepted. The variance was fatal. Malone v. Gravel Co., at page 581, 76 Cal., and page 772, 18 Pac.; Reed v. Norton, 90 Cal. 592, 26 Pac. 767, and 27 Pac. 426; Cox v. McLaughlin, 63 Cal. 207. The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer of Mary C. Lavigne to the amended complaint.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer of Mary C. Lavigne to the amended complaint.

103 Cal. 506

QUINT v. HOFFMAN et al. (No. 18,306.)

(Supreme Court of California. Sept. 7, 1894.)

Department 1.

Order striking out a portion of a former opinion. 37 Pac. 514.

PER CURIAM. It appearing to the court that the question discussed in the opinion in the above case as to the validity of the tax levied by the board of directors of the irrigation district is not necessarily involved in the disposition of the appeal upon its merits, it is hereby ordered that such portion of the opinion of the court as contains a discussion of the aforesaid question be, and the same is, stricken therefrom. It is further ordered that the word "judgment" in the concluding sentence of said opinion be stricken out, and the word "order" inserted instead thereof.

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104 Cal. 49

BEAN v. STONEMAN et al. (No. 19,396.)

(Supreme Court of California. Sept. 10, 1894.)

IRRIGATION—CONTRACT TO FURNISH WATER—CONSTRUCTION — COVENANTS RUNNING WITH THE LAND.

1. A grantor conveyed a portion of a tract of land, and also conveyed to the grantee a certain proportion of all the water rising on the tract, and covenanted to suffer the water to flow to the grantee's line through a trench which the grantor was at the time using. There was no way provided for measuring the water at the grantee's line, but it was to be taken from a reservoir on the grantor's land, being permitted to flow to the grantee in an "augmented head" once in 10 days. *Held*, that the place of delivery of the water was at the reservoir, and not at the grantee's line, he having an easement in the trench for that purpose.

2. On abandonment of the trench by the grantor it was the duty of the grantee to keep it in repair.

3. The "augmented head" provided for must be limited to the capacity of the trench at the reservoir, and any change in the delivery of the water from the reservoir, provided the discharge still equaled the full capacity of the trench at the reservoir, was permissible.

4. The covenant for the delivery of the water was a covenant running with the land.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by C. F. Bean against Mary O. H. Stoneman and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

A. Brunson, for appellants. Sheldon Borden and Anderson & Anderson, for respondent.

HAYNES, C. This is an action to recover damages for a failure to furnish water for irrigation, whereby it is alleged the orange and other trees, corn, and vegetables of the plaintiff were injured or destroyed. A jury trial was had, and resulted in a verdict for plaintiff for the sum of $4,580. Defendants moved for a new trial, which was denied, and this appeal is from the judgment and the order denying a new trial.

In 1873 the defendant George Stoneman was the owner of a ranch then and now known as the "Stoneman Ranch," upon a portion of which were springs and water sources, the waters from which were collected in a reservoir constructed upon the ranch, and from which the water, or a portion of it, was conducted through a ditch for the purposes of irrigation. In March of that year he sold and conveyed to Barrows and Furrey 18 acres of land, part of said Stoneman tract, together with a certain portion of the waters rising upon the unsold part of the ranch. The covenant contained in the deed relating to the water right is as follows: "And the party of the first part, for the consideration aforesaid, hereby conveys, bargains, and grants, and agrees to deliver and suffer to flow, to the parties of the second part, their heirs and assigns of said above-conveyed lands, an amount of water equal to two-fortieths (2-40) of all the waters rising upon the lands of the party of the first part, so far as such waters can be brought to the northern line of the above-conveyed lands by the present ditch, or by such further ditch or flume as the party of the first part may hereafter construct; said amount of water to be delivered so that the parties of the second part, their heirs and assigns, shall, if by them required, have water for irrigation, as often at least as once in every ten days: provided, that in lieu and stead of receiving such amount and proportion of water by the ditch or flume of the party of the first part, the right is hereby granted to the parties of the second part, at their option, to take such quantity and proportion of water from the reservoir about to be constructed by said Stoneman in front of his house, and to conduct the same thence onto the above-conveyed lands by an underground pipe through the intervening lands of the party of the first part, at the expense of the parties of the second part, and in a careful manner, and without injury to trees, vines, and other improvements on said intervening lands; and for the purpose of the laying of said pipe the right of way and entry is hereby granted."

At the date of this conveyance the parcel sold was not improved, but the ditch above mentioned was constructed to the land sold, and was used for irrigating other lands of the grantor; the length of the ditch, or distance from the reservoir to the parcel sold, being about one mile and a quarter. The plaintiff became the owner of the 18 acres so conveyed to Barrows and Furrey, in June, 1887, together with said water right. Prior to 1891 the water was discharged from the reservoir into the ditch through a square, wooden box or flume, which passed through the embankment or dam near the bottom of the reservoir, and which was closed by a gate; the dimensions of the box being about 14x16 inches. In the winter of 1890-91, a portion of the dam was washed out, when the box was found to be decayed, and was replaced with an eight-inch steel pipe. From 1873 to 1891, whenever the lot now owned by plaintiff required irrigation, the water was turned into the ditch in what is termed an "augmented head;" that is, the two-fortieths to which the lot was entitled did not flow into the ditch continuously, but was permitted to accumulate until needed, when it would be discharged in a volume approximating the capacity of the ditch. The evidence shows quite clearly that, if the water to which plaintiff is entitled were permitted to flow continuously into the ditch, it would be absorbed by the ditch, and no part of it would reach plaintiff's land. Prior to 1890, Mrs. Stoneman, who succeeded to the unsold portions of the ranch, as well as her husband before the conveyance to her, irrigated a vineyard upon the ranch, containing from 120 to 140 acres, through the same ditch; but in 1890 the vineyard was destroyed by a disease which attacked the vines, and after that the defendants used no water through that ditch, their orange orchard and ornamental grounds being irrigated through another channel from the same reservoir. Mr. Graves owns a place in the vicinity of plaintiff's lot, and he also obtained water for irrigation from defendant's reservoir, but his water was conveyed through an iron pipe. In 1894, Mr. Hall, who then owned the lot now owned by plaintiff, and a Mr. Anderson, who owned land in that vicinity, were permitted to tap Mr. Graves' pipe, and obtain water for irrigation through it. Mr. Hall used that source entirely until he sold to plaintiff, and the plaintiff thereafter used it almost exclusively until 1890, when the license was revoked. From these causes, together with the destruction of defendants' vineyard, the ditch was little used in 1890, and it was not attempted to be used in 1891, until on or about the 4th of June, when the plaintiff undertook to obtain water through it to irrigate his land. Shortly before this attempt he applied to Mrs. Stoneman to clean out and repair the ditch, which she declined to do, and the plaintiff thereupon did that work. Upon turning the water into the ditch the first day, the water flowed down the ditch about halfway to plaintiff's land. At the next effort a little water reached the plaintiff towards night, and another attempt brought the water a little earlier, but not in sufficient quantity to do much good, the greater part of it being taken up by the ditch. The failure to obtain sufficient water is attributed by plaintiff to the insufficient size of the pipe by which the water is discharged from the reservoir into the ditch, and to a perforated hood placed over the upper end of it, and a hydrant through which it is discharged at the lower end. The quantity of water rising upon the ranch and flowing into the reservoir was found by measurement to be 38 miners' inches.

The principal question in the case involves the construction of the covenant in the deed from Stoneman to Barrows and Furrey, hereinbefore quoted, and is directly presented by the following instruction given to the jury: "By the deed of George Stoneman to Barrows and Furrey, said Stoneman agreed to deliver the water at the northern line of the 18-acre tract, as far as said water could be brought to that point by means of the ditch then extending to said land. By this agreement it is incumbent on said Stoneman and his successors to keep said ditch in reasonably good repair." We think the court erred in this instruction as to the place where the water is to be delivered, and as to the obligation to keep the ditch in repair, though it is conceded that the same duty and liability which rested upon George Stoneman now rest upon Mrs. Stoneman, who has succeeded to his estate by a subsequent grant, and that appellants' contention that the covenant was personal, and did not run with the land, and become obligatory upon Mrs. Stoneman, cannot be sustained. The quantity of water granted by the deed is two-fortieths of all the water rising upon the ranch, and no more. The water so granted was intended to be taken, and, except as to the water procured through the pipe of Mr. Graves, had been taken, through the ditch above mentioned. The two-fortieths of the 38 inches rising above the reservoir is a fraction less than 2 inches; and, as a loss is necessarily sustained in conveying water through an open ditch, if defendant is required to deliver that quantity at the north line of plaintiff's land, it is evident that a greater proportion than two-fortieths must be used. What such excess must be depends upon the character of the soil or earth in which the ditch is constructed, the care taken in its preservation, and the frequency or constancy of its use. The testimony of Mr. Purcell was to the effect that in a ditch kept in the best condition the loss was equal to about 25 per cent.; while the effort of plaintiff to procure water through this ditch in June, 1891, showed almost an entire loss. In this connection it may be noticed that the grant, instead of designating the quantity of water in inches, specifies the proportion of the water rising on the ranch, and thus strongly suggests, if it does not positively show, that the water was apportioned to the entire ranch, each parcel as sold taking only its proportion; and, if so, the loss in conveying the water to the different portions must be borne by such portions, else the loss must be borne by the defendants, leaving a part of the land remaining in their ownership without water,—a result that could not have been contemplated or intended. This, we think, is conclusive of the quantity to be delivered, there being nothing in the language of the grant inconsistent with it. As to the place of delivery it also has a material bearing. It will be observed that the grant does not expressly state where it is to be delivered, nor how the quantity is to be ascertained. No means or mode of measurement was provided at the north line of plaintiff's land, nor was any measurement at that place ever used, so far as the record shows. It was to be taken from the reservoir. At that place the capacity of the reservoir, the quantity of water flowing, and the gate by which it was discharged, each or all together, furnished at least an approximate mode of ascertaining the quantity, and, in the absence of an express agreement or manifest intention to the contrary, it must be held to be the place of delivery. The place of delivery being at the reservoir, the covenant was that Stoneman would "suffer to flow to the parties of the second part * * * an amount of water equal to two-fortieths, * * * so far as such waters can be brought to the northern line * * * by the present ditch, or by such further ditch as the party of the first part may hereafter construct." The place of the sale and delivery of the water being at the reservoir, here was the grant of an easement for its conveyance to plaintiff's land, through which the grantor covenanted he would "suffer the water to flow" over his intervening land. The grantee or owner of the easement is bound to keep it in repair, and this applies as well to water ditches as to private ways. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302. In Prescott v. Williams, 5 Metc. (Mass.) 429, a case cited in Durfee v. Garvey, supra, it was said: "The duty of making repairs, and the labor necessary for keeping the water course in a state fit for use, rests wholly upon him who claims an easement on his neighbor's land; and, as a general rule, easements impose no obligation upon those whose lands are thus placed in servitude to do anything." See, also, Godd. Easem. pp. 285, 443. The owner of the servient estate can do no voluntary act to destroy or impair the easement, and hence the grant would not permit the destruction of the ditch then in existence, unless another should be provided, or the grantee should obtain the water from the proposed new reservoir, by a pipe to be laid at the grantee's expense. The fact that the grantor was using this ditch at the date of the grant could not of itself impose upon him the obligation to always continue its use, and the grant contained no express covenant that he would do so, or that he would keep the ditch in repair.

As to the change made by defendant from the wooden flume to the steel pipe, the court correctly charged the jury that she was not bound to maintain precisely the same system of discharging the water from the reservoir; but, in the view we have taken as to the place of delivery, the latter part of the instruction should be modified. The testimony of the engineer who made the change was that the area of the pipe is 50¼ square inches; that the former dam was low, and at the time the pipe was put in the dam was raised "pretty near five feet;" and that, with a full reservoir, the outlet end of the pipe would discharge 206 miners' inches, and that the capacity of the ditch is about 150 miners' inches, and that the pipe would carry the full flow of the water (that is, the full flow of the water as it rose in the cañon) when the pipe was just covered, and, as the head was raised, the discharge would be increased. Whatever an "augmented head" or an "augmented flow" may be held to be, as applied to this case, we think that it must at least be limited by the capacity of the ditch; and by that we mean the capacity of the ditch to carry the water at the upper part of it, and before it is diminished by seepage. If, therefore, the steel pipe which replaced the wooden flume is capable of supplying the capacity of the ditch at or near the head, certainly no more can be required of the defendants; and the duty rests upon the plaintiff to put and keep the ditch in such condition that it will convey the water his needs require, or adopt some other mode of conveying it. A simple calculation will show the quantity of water to which the plaintiff is entitled. The deed requires that he shall have it at least once in every 10 days. The entire flow is 38 inches. If the entire flow for 10 days were accumulated, it would equal 380 inches for 1 day. The two-fortieths, or one-twentieth, of that is 19 inches constant flow for 24 hours, to which quantity the plaintiff is entitled; or, if delivered in 12 hours, it would be 38 inches, or the natural flow of the water rising in the cañon for 12 hours in each 10 days.

Whether the hydrant attached to the lower end of the pipe is of sufficient capacity to discharge that quantity of water in 12 hours or less, is a question of fact which ought to be capable of exact ascertainment. The testimony of Mr. Purcell, the engineer who put in the pipe and hydrant, based upon calculation, and not upon actual measurement of the water discharged, would tend to show that the discharge, when the reservoir was full, was largely in excess of 38 miners' inches, and equal to the capacity of the ditch; while the plaintiff contends that the quantity discharged was much less than formerly. While the manner in which the water was formerly delivered may be conclusive of the question as to plaintiff's right to receive the water in an augmented head instead of a continuous flow of two-fortieths, it is not conclusive of the extent of the augmented flow; but the covenant must have a reasonable construction, since the plaintiff's right is not based upon prescription, but upon a written contract, which requires the water to be delivered "at least once in ten days;" but, while the covenant does fix a limit to the quantity that can be used every 10 days, it does not determine, in terms, whether that quantity shall be discharged in 24 hours, or in 12, or in any less number of hours. All that can be said, as an abstract proposition of law, is that it should be discharged in such volume that, the ditch being in good condition, it will give the plaintiff a reasonable use of the water; not, however, in such volume as a larger ditch would carry, nor such as might be used by a large force of men distributing it, nor yet requiring a larger flow to compensate for the loss of water by reason of the ditch not being in proper condition. The evidence shows, we think, that the ditch, at the times the plaintiff attempted to use it, was in bad condition; and, if the failure to obtain sufficient water for irrigation was fairly attributable to that cause, the plaintiff was not entitled to recover.

The amendment to the complaint was within the discretion of the court, and did not prejudice the defendants, and their motion for a nonsuit was properly overruled, inasmuch as there was evidence tending to show that the means of discharging the water from the reservoir into the ditch was inadequate. The plaintiff was not required to elect upon which count he would proceed, and the ruling of the court thereon was right, and evidence was properly received under paragraph 6 of the complaint.

The remaining specifications of error, so far as the same are important or likely to arise upon a new trial, are sufficiently noticed and controlled by the general discussion of the controlling questions in the case. We think the judgment and order appealed from should be reversed, and a new trial granted.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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4 Cal. Unrep. 788

PERKINS v. SUPERIOR COURT OF FRESNO COUNTY. (No. 15,711.)

(Supreme Court of California. Sept. 10, 1894.)

APPEAL FROM JUSTICE—FILING OF BOND.

An appeal will not be dismissed because the bond was not filed within 30 days after the rendition of the judgment by a justice of the peace, if the bond was delivered and left at the office of the justice, but was not received or marked "Filed" by him until 2 days after the 30 days.

In bank.

Petition by one Perkins for a writ of prohibition against the superior court of Fresno county to prevent proceedings on appeal. Writ denied.

Warlow & Hargrove and Wm. Grant, for petitioner. Miles Wallace, for respondent.

BEATTY, C. J. The petitioner moved the superior court to dismiss the appeal from a judgment rendered in his favor by a justice of the peace. The ground of the motion was that the undertaking on appeal had not been filed within 30 days after rendition and entry of the judgment. The superior court denied the motion, and this is a petition for a writ to prohibit further proceedings upon the appeal. It appears from the allegations of the petition that ample evidence was adduced at the hearing of the motion to warrant the superior court in finding that the undertaking was delivered and left at the office of the justice of the peace within the 30 days, and that it was not received by him, or marked "Filed," until two days after that time because of his absence from his office and from the county. If this was the case the superior court has jurisdiction of the appeal. Writ denied.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

DE HAVEN, J.: I concur in the judgment.

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104 Cal. 60

SAN LUIS OBISPO COUNTY v. FELTS et al. (No. 19,426.)

(Supreme Court of California. Sept. 10, 1894.)

POLL TAX — COMPENSATION FOR COLLECTION — RIGHTS OF COUNTY ASSESSOR—COMPENSATION—INCREASE DURING TERM.

1. Const. art. 13, § 12, provides that the state poll tax "shall be paid into the state school fund." Const. art. 9, § 6, provides that the "entire revenue derived from the state school fund shall be applied exclusively to the support of primary and grammar schools." *Held*, that the word "exclusively" confines the use of school funds to the grammar and primary schools, to the exclusion of other schools mentioned in the same section, and does not forbid the use of any of the poll tax to pay the expenses of its collection.

2. Pol. Code, § 3862, providing that "the assessor for services in the collection of poll taxes shall receive the sum of 15%," and section 1857, providing that no assessor shall receive pay for collecting or handling school money, "provided that said assessor shall receive 15% of the collections by him of poll taxes," are not in conflict with Const. art. 13, § 12, which provides that the poll tax "shall be paid into the state school fund."

3. Act March 31, 1891, § 216, allows county assessors compensation for the collection of poll taxes, and, as the last expression of the legislative will, controls all former legislation on the subject, and renders nugatory the effect of the act of March 10, 1891, so far as it requires the assessor to pay all fees for services to the county treasurer.

4. Pol. Code, § 2652, authorized the levy of a poll tax for road purposes, and allowed the road overseer 15 per cent. for collecting it. St. 1891, p. 478, transferred the duty of collecting the tax to the county assessor. *Held*, that the latter statute, though passed during the term of office of an assessor, did not conflict with Const. art. 11, § 9, which prohibits any increase of compensation to county officers during their term of office, since it merely allowed the previously established percentage for the collection of poll taxes, and increased the assessor's work in the proportion in which it increased his pay.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by San Luis Obispo county against J. M. Felts and others, sureties on his bond, to recover certain percentages of the poll tax withheld as compensation for collection. Judgment for plaintiff, and defendants appeal. Reversed.

E. P. Unangst and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent. H. C. Dillon, Dist. Atty., amicus curiae. Dudley & Buck, amicus curiae, for assessors of seven other counties. H. A. Barclay, for Los Angeles assessor.

BEATTY, C. J. This is an action brought by the county against the county assessor and his sureties to recover the amount of certain percentages of personal property taxes, and of the state and road poll taxes, claimed and withheld by him as his legal compensation for making the collections. The complaint contains three counts, —the first, for $350, being 6 per cent. of the personal property tax; the second, for $350, being 15 per cent. of the state poll tax; and the third, for $310, being 15 per cent. of the road poll taxes. On the first cause of action the superior court gave judgment for the defendants. On the second and third causes of action the judgment was in favor of the plaintiff, and from this part of the judgment the defendants appeal. In support of their appeal the defendants cite various provisions of the Political Code and the county government law, which clearly authorize the assessor to retain as his compensation for his services 15 per cent. of all poll taxes collected by him; but the respondent contends that, as to the state poll tax, all these provisions are in conflict with the mandate of the constitution which appropriates that tax exclusively to the support of the public schools; and, with respect to the road poll tax, the contention is that no law in existence prior to the election of this assessor gave him the collection of the road poll tax, and to allow him a percentage for collecting it under a law passed subsequent to his election would be to increase his compensation contrary to the inhibition of the constitution against any increase of the compensation of public officers after their election. The first section of the constitution cited by counsel for respondent in support of its contention is section 12 of article 13, which reads as follows: "The legislature shall provide for the levy and collection of an annual poll tax of not less than two dollars on every male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots, insane persons, and Indians not taxed. Said tax shall be paid into the state school fund." In connection with this they also cite section 6 of article 9, which reads as follows: "The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and technical schools as may be established by the legislature, or by municipal or district authority; but the entire revenue derived from the state school fund and the state school tax shall be applied exclusively to the support of primary and grammar schools."

It is upon the last clause of the latter section that particular reliance is placed, and especially the word "exclusively," therein contained, which, it is contended, clearly evinces an intention on the part of the framers of the constitution that no part of the proceeds of the state poll tax shall ever be diverted to the payment of the expense of collecting it. We think, however, that the whole force of this word is directed to the point that the state school funds must only be applied to the support of primary and grammar schools to the exclusion of the other classes of schools which may be established by the legislature, or by municipal or district authority. If we are right in this view, the only remaining question is whether the statutes referred to are in conflict with section 12 of article 13. The question, in other words, is whether, by that section, the legislature is deprived of the power to make the poll taxes pay the expense of their own collection?

As bearing upon this question, it is material to note the fact that from the very beginning of legislation in California, until the adoption of the present constitution, the collectors of poll taxes were always authorized to retain a percentage of their collections as compensation for their services. The various statutory provisions on this subject are cited in the briefs of counsel, but we deem it sufficient in this place to refer only to sections 3839, 3862, and 1857 of the Political Code, as they existed from its adoption in 1872 up to the adoption of the constitution in 1879, in which the substance of the earlier statutes is embodied. It is material, we say, to note this uniform course of legislation, because the framers of the new constitution must be presumed to have been familiar with it; and we are therefore entitled to expect that, if they intended to effect a radical change in the system, their purpose will be found plainly and unequivocally expressed. We do not, however, see anything in either of the sections of the constitution above referred to, or in both combined, which clearly deprives the legislature of the power to make the poll taxes pay the expense of collection. It is fair and reasonable and just that they should be charged with such expense, and indeed the fact that they are exclusively a state tax makes it peculiarly appropriate that the agents for their collection should be compensated by a percentage of their collection, rather than out of the salary or general funds of the counties. The fact that the legislature might abuse the power claimed is no argument against its existence. Most if not all of the unquestioned powers of the legislature are capable of being abused.

but there is no presumption that they will be; and, as to this particular matter, no change has been made in the rule that had existed for nearly 30 years before the adoption of the present constitution, and which has scarcely been questioned during the 15 years that have since elapsed. Independent of authority, we should feel little hesitation in holding upon these grounds that the law in question here is entirely consistent with the constitution, and this conclusion is only strengthened by reference to the cases decided in other states having similar constitutional provisions. Besides the cases in which it has been held that it is only just that every tax should bear the necessary expense of its collection, the case of Shaver v. Robinson, 59 Ala. 195, is directly in point, and clearly sustains the validity of this law. State v. Donnelly, 20 Nev. 214, 19 Pac. 680, involves the same principle, and is decided the same way. And, while it appears that several other states have similar constitutional provisions and similar legislation, the validity of such legislation does not seem to have been questioned. The case cited and relied upon by the respondent and by the learned judge of the superior court as sustaining a contrary view will be found, on careful examination, to involve no constitutional question, but to have been decided altogether upon a construction of the statutes of Indiana, by which it was expressly provided that the fees of officers for collecting, managing, and disbursing the tuition fund should be paid by the counties. State v. Commissioners of St. Joseph Co., 90 Ind. 362. Our conclusion is that the statutes in question are not in conflict with section 12 of article 13 of the constitution.

But counsel for respondent further contends that the only law under which Felts can claim a percentage of poll taxes was passed after his election, and therefore it is, as to him, inoperative, by reason of section 9 of article 11 of the constitution, which prohibits any increase of compensation of county officers after their election, or during their term of office. His argument is that the enactment of section 4334 of the Political Code, on March 10, 1891, and subsequent to the election of Felts, operated a repeal by implication of the various statutory provisions then in force allowing compensation for collecting poll taxes, and that Felts can claim nothing under the law thereafter enacted. We think it very doubtful, in the first place, whether there is any such necessary conflict between the terms of section 4334 of the Political Code and the laws in question as to operate a repeal by implication; but, assuming that there was such direct conflict that both could not operate together, no repeal took place, because the amendment to the Code did not take effect until 60 days after its passage, before which time the county government law had been passed, and took effect March 31, 1891. St. 1891, p. 295. This was the last expression of the legislative will, and must prevail (Goodwin v. Buckley, 54 Cal. 295), and it allows the compensation claimed. See section 216. For these reasons, we conclude that the superior court erred in its judgment as to the percentage of state poll taxes.

As to the road poll tax, that is a tax collected under the law, and not, as assumed in respondent's argument, by virtue of the county ordinance passed subsequent to the election of Felts. By section 2652 of the Political Code the supervisors of each county are authorized to levy a poll tax not exceeding three dollars; and by the same law the road overseer, when charged with the duty of making the collection, was allowed 15 per cent. of the amount collected for his services. Section 2654. By an amendment to section 2652, which took effect in January, 1893, the duty of collecting this tax was transferred to the county assessor (St. 1891, p. 478); and it was no increase of his compensation, within the sense of the constitution, to allow him for those collections the previously established percentage for the collection of all poll taxes. In other words, if a law is in existence at the time an officer is elected, which gives him a certain compensation for performing a certain service, it is no violation of the constitution to pass a subsequent law, under which he is compelled to perform the same service oftener than before, for, although the gross income of the office may thus be increased, the compensation of the officer has not been increased, in the sense of the constitution. The rule is the same, first and last, i. e. a certain sum for a certain service,—compensation in proportion to duty, —the very rule which it was the design of the constitution to establish. The part of the judgment appealed from is reversed.

We concur: McFARLAND, J.; HARRISON, J.; FITZGERALD, J.; DE HAVEN, J.

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104 Cal. 67

ROBERTS v. GEBHART et al. (No. 19,398.)

(Supreme Court of California. Sept. 12, 1894.)

PUBLIC LANDS—SELECTION BY STATE—APPROVAL BY SECRETARY OF INTERIOR.

1. Where the selection of land by a state in lieu of other land has never been approved by the secretary of the interior, a purchaser from the state has no equity as against one who holds a patent for the lands, though issued with notice of his prior claim.

2. The decision of the land commissioner in vacating a selection of land made in lieu of other land by a state is final where the state does not appeal, though the reason assigned for such order is insufficient.

3. Where the purchaser of lands selected in lieu of other land by a state has notice of an order vacating the selection, and fails to appeal therefrom, but permits another to perfect a homestead claim to the land, such laches will bar him from any relief.

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by Nathan P. Roberts against Sherman W. Gebhart and others. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

John D. Pope and D. K. Trask, for appellant. Rolfe & Rolfe and Goodcell & Leonard, for respondents.

DE HAVEN, J. The state of California, on May 16, 1885, upon the application of the plaintiff, filed with the register of the proper United States land office its selection of the land described in the complaint in lieu of a portion of a certain thirty-sixth section. This selection was approved by the register of the United States land office, and on July 25, 1885, the state issued to the plaintiff a certificate of purchase of said land. On July 16, 1885, the commissioner of the general land office canceled the state's selection, giving as his reason for such action that the land in lieu of which the selection was made had already served as the basis of a prior selection by the state, and on the 23d of the same month the state was notified of such cancellation. No appeal was ever taken from this ruling of the commissioner. On July 23, 1886, the defendant Gebhart was allowed to enter the same land as a homestead entry under the laws of the United States, and on September 22, 1887, he was permitted to commute his homestead entry, and to make final proof and payment for the land. It further appears that in September, 1888, the commissioner of the general land office discovered that the order of July 16, 1885, canceling the selection made by the state, was based upon a mistake of fact, and said order of cancellation was thereupon rescinded, and the state's selection reinstated upon the records of the general land office. The discovery of this mistake seems to have been induced by a letter written to the commissioner by the attorney for the plaintiff some time after the month of August, 1886. November 11, 1890, the commissioner again ruled that the state's selection must be canceled because of the fact that the entry of the defendant Gebhart had been perfected after the former cancellation of such selection, and before the order for its reinstatement. Upon an appeal herefrom, taken by the plaintiff to the secretary of the interior, this latter decision of the commissioner of the general land office was affirmed, and thereafter the United States issued to the defendant Gebhart its patent for the land in controversy. The plaintiff seeks by this action to obtain a judgment and decree that he is the equitable owner of the land, and that the defendant Gebhart holds the legal title thereto in trust for him, and that the other defendants, claiming under defendant Gebhart as mortgagees, accepted their mortgages with notice of plaintiff's equitable right to the land. The defendants recovered judgment in the superior court, and the plaintiff appeals.

1. It is argued in behalf of plaintiff that one who first initiates proceedings to acquire the legal title to public land has the superior right thereto, if he does or offers to do all that the law requires of him in order to entitle him to a patent therefor; and if, by the wrong or mistake of the officers of the land department, he fails to secure the legal title from the government, and a patent is issued to another, with notice of his prior rights, a court of equity will, under such circumstances, protect the first applicant by decreeing that the person who has thus taken the legal title conveyed by the patent holds such title in trust for him who was first in time in the commencement of proceedings to acquire such title. There is abundant authority for this proposition. Lytle v. Arkansas, 9 How. 314; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; Lindsay v. Hawes, 2 Black, 554; Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330. But we are of the opinion that the facts of this case are not such as to entitle the plaintiff to invoke this equitable rule. In the first place, the selection made by the state upon application of the plaintiff was not approved by the secretary of the interior, and therefore such attempted selection did not give to the state any legal or equitable right to the land therein described. In the case of Buhne v. Chism, 48 Cal. 471, this court, in passing upon the effect of such a selection, and the necessity for its approval by the secretary of the interior, said: "We think the approval of the secretary of the interior was essential to a valid selection and location by the state; and that it was incumbent on the plaintiff to show affirmatively that he had approved it. The act of March 3, 1853, provides in terms that the selection shall be subject to his approval, and we have no authority to dispense with it. This condition was doubtless inserted for the reason that, in the opinion of the highest officer of the land department, the land might be required in the future for public uses; and it was intended that he should exercise his judgment in the premises before the selection should be valid." It is true the question in that case related to the legal title of the land there in controversy, but the reasoning of the court will go far to support the position that such a selection, when the secretary of the interior has acted upon and refused to approve it, does not confer even an equitable right upon the state, or upon one claiming under it, such as would authorize or justify a court of equity in reviewing the grounds or basis for such refusal. It is the consent of the United States, as manifested by the approval of the secretary of the interior, which gives legal efficacy to the application or selection made by the state; and without such approval neither the state nor its grantee is in a position to call in question any future disposition which the United States

may make of the land embraced in the attempted selection. In Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341,—a case in which the question of title to a selection of lieu land under a grant made to the state by congress to aid in constructing a railroad was involved, the act making the grant requiring the selection to be approved by the secretary of the interior,—the court held: "The act of the secretary of the interior in approving the selection of indemnity lands by a railroad land grant company to supply deficiencies in selections within the place limits is judicial, and until it is done the company has no equitable right in the selected tracts; and this rule is not affected by the fact that such a refusal was given under a mistake of law, and was subsequently withdrawn, and an assent given." The above quotation is taken from the syllabus, but it correctly states the decision of the court upon the point; and the court, in the course of its opinion, uses this language, which is entirely applicable here: "The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company, which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any of the lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. * * * Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title."

2. But, even if it should be conceded that the plaintiff, by virtue of his application, and the selection made by the state, is in a position to call in question the grounds of the decision of the secretary of the interior in refusing to approve the state's selection, the concession would not help him, for, in our opinion, the action of the secretary ought to be sustained for the reasons stated by him in affirming the decision of the commissioner. In that decision the secretary said: "It is asserted by counsel for Gebhart that the state had notice, July 23, 1885, of your decision of July 16, 1885. This is not denied. The local officers were directed to give the state notice. Under these circumstances, and in the absence of any showing to the contrary, it will be assumed that notice was given of that decision. If the state was dissatisfied with the order for cancellation of that date, it should have appealed; and in failing to do so that action should have been final, although the reason assigned in that order may not have been sufficient. * * * But in any event, I do not see that the appellant, Roberts, has any cause for complaint. He says, in his affidavit, that he knew of the order of July 16, 1885, canceling the state's selection in August, 1886. Granting that this was the first information he had or the state had, he then had sixty days in which to appeal. This information was within forty days after Gebhart made his homestead entry, and, the land then being subject to entry by your order under the land laws of the United States, it was his (Roberts') privilege to contest the entry of Gebhart on the ground of prior settlement. Again, he allowed Gebhart to make final proof and payment for the land a year after he had knowledge of the order, without protest. It will be assumed that he had personal knowledge of Gebhart's claim, as it is shown that both parties were actually residing on the land from the date of Gebhart's entry to his final proof. So that it would seem appellant has slept on whatever rights he may have had." In these views we entirely concur. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

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104 Cal. 85

WILLIAMS et al. v. WILLIAMS et al.

(No. 18,309.)

(Supreme Court of California. Sept. 13, 1894.)

FINDING—ACCOUNTING.

In an action for a settlement of a mining copartnership, a finding that certain defendant copartners are indebted to the "copartnership" does not authorize a judgment that the sum be paid to "plaintiffs."

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Mrs. M. Williams and others against John W. Williams and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

A. J. Ridge, for appellants. J. M. Walling, for respondents.

McFARLAND, J. This is an action brought by five tenants in common of a mining claim against four other tenants in common in said claim, for a partition of the mining claim, and the settlement of a mining copartnership. Judgment was rendered generally for plaintiffs, and defendants appeal from the judgment on the judgment roll alone.

We do not see anything necessary to be noticed in any of the points made by appellants except the last one, to wit, that the findings do not support the judgment, because the former shows that each of the defendants is indebted in a stated amount to the partnership, while the judgment declares that each defendant is indebted to the plaintiffs in the said amount of money, and decrees that the said amount of money owing by each defendant to the partnership be paid to the plaintiffs. It is quite probable that the words "to the partnership," in the findings, were placed there inadvertently; but we must take the record as we find it. Of course, a finding that certain copartners are each indebted in a stated amount to the copartnership does not warrant a judgment that the same amount be paid to the partners. For this reason the judgment must be reversed.

Respondents move to dismiss the appeal upon the ground that the judgment was satisfied before the appeal was taken, but the affidavit on file does not show that fact. The motion to dismiss is therefore denied. The judgment is reversed.

We concur: FITZGERALD, J.; DE HAVEN, J.

104 Cal. 81

In re CARRIGER'S ESTATE. (No. 15,515.)

(Supreme Court of California. Sept. 13, 1894.)

Review on Appeal—Discretion of Court.

An order granting a new trial will only be reversed for an abuse of discretion.

Department 2. Appeal from superior court, Sonoma county; R. W. Crawford, Judge.

Proceedings for the probate of the will of William W. Carriger. There was a verdict for contestant, Kate C. Carriger, that the will was executed by testator while under undue influence; and, from an order granting a new trial, contestant appeals. Affirmed.

Wm. S. Barnes, Dunne & McPike, and J. P. Rogers, for appellant. Barclay Henley and S. V. Costello, for respondent.

McFARLAND, J. The alleged last will of William W. Carriger, deceased, having been proposed for probate by the executor therein named, a contest thereof was made by Kate C. Carriger, the widow of the deceased, upon the grounds: First, that the deceased was not of sound and disposing mind and memory at the time the will was made; and, second, that the will was made under the undue influence of Alfred Boggs Carriger, a brother of deceased. Nine special issues were presented to a jury. The first issue was this: "Was said William Carriger, at the time of the making of said will, a man of weak mind, vacillating, and easily led?" To this the jury answered, "No." The next seven issues so presented were about intermediate probative facts, and were answered by the jury favorably to the contestant. The ninth and last issue, which contained the pith of the charge of undue influence, was as follows: "Did the said William W. Carriger, at the time of the making of the will in question, understand and know what he was about, and does it express his real wishes, and dispose of his estate in accordance with his own independent judgment and desire, entertained by him at the time of its execution?" To this the jury answered, "No." The proponent moved that the verdict be set aside, and for a new trial, and the court below granted the motion, and ordered a new trial. From the order granting a new trial the contestant appeals.

The motion for a new trial was based upon alleged errors of law occurring at the trial, and upon the insufficiency of the evidence to justify the verdict, the particulars of said insufficiency being fully set forth. The order of the court below granting the motion for a new trial does not state the ground upon which it was based. It must be sustained, therefore, if it be justified on any of the grounds upon which the motion was made. We will pass over the alleged errors of law, which do not seem to be of vital importance, and assume that the motion was granted for insufficiency of the evidence to justify the verdict. Taking this view of the case, we see no good reason for disturbing the order appealed from. When the judge of a trial court is satisfied that a verdict is not warranted by the evidence, he should set it aside; and when he does so his order granting a new trial will not be reversed, unless it appears to this court that he had no reasonable and just ground for holding that the verdict was against the weight of the evidence. The mere fact that there is some conflicting evidence on the points at issue does not preclude him from exercising the supervisory power of granting a new trial, which is clearly given him. Dickey v. Davis, 39 Cal. 569; Sherman v. Mitchell, 46 Cal. 580; Irving v. Cunningham, 58 Cal. 306; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Bronner v. Wetzlar, 55 Cal. 419; Pierce v. Schaden, Id. 406; Phelps v. Mining Co., 39 Cal. 410; Peters v. Foss, 16 Cal. 358; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806. This court, will, of course, reverse orders denying or granting new trials in extreme cases. No absolute rule of universal application can be formulated. This court has approximated such a rule, as nearly as may be, by saying that a motion for a new trial is addressed to the sound, legal discretion of the trial judge, and that an order granting or refusing it will not be disturbed unless it appears that there has been a manifest abuse of discretion. See cases above cited. Such language has been used by nearly every justice who has sat on this bench, and it is not open to just adverse criticism.

It would serve no useful purpose to recite here the evidence given at the trial of the case at bar. The most that could be said of it favorable to the contention of appellant is that it was somewhat conflicting. But it would be preposterous to say that the evidence was of such a character that the judge, in holding it insufficient to warrant the verdict, stepped out of his legitimate province, exceeded his real powers, and manifestly abused his discretion. The will in question was made by a man in the prime of life, and in the full possession of his mental powers. He went alone to a lawyer's office, and, after some consultation, directed him to prepare his will according to his instructions then given. In a day or two he returned alone to the lawyer's office, and, the will having been prepared according to his instructions, he then and there executed it in accordance with the forms of law. The occupant of a neighboring office was called in, who, with the lawyer, signed as subscribing witness. Neither his brother Boggs nor any other relation or person was with the testator upon these occasions. To set aside a will made under these circumstances is a serious matter, and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil. In the case at bar the judge may well have thought that the verdict was founded (insensibly, perhaps) more upon the jury's own notion of what the will ought to have been, than upon a conclusion from the evidence that the instrument in question did not express the testator's own wishes, and is not, therefore, his will. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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104 Cal. 186

MONTGOMERY v. SANTA ANA & W. RY. CO. (No. 19,277.)

(Supreme Court of California. Sept. 13, 1894.)

RAILROAD IN STREET—RIGHTS OF ABUTTING OWNER—EJECTMENT—WHEN LIES.

1. Civ. Code, § 1112, provides that "a transfer of land bounded by a highway passes the title to the soil of the highway to the center thereof." *Held*, that where land is acquired by a city, the owner of land abutting on a street, though owning to the center of the street, cannot complain of its use for railroad purposes conducive to the public good, and not interfering with his right to its use as a highway.

2. Ejectment cannot be maintained by an abutting owner against a railroad company operating its road on his half of a public street under permission from the city, he having no present right of possession, of which he has been deprived.

3. A railroad operated in a public street imposes no greater burden on the abutting property by carrying freight than by carrying passengers only.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Ejectment by Victor Montgomery against the Santa Ana & Westminster Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jas. G. Scarborough, for appellant. Victor Montgomery, in pro. per.

PER CURIAM. This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out (1) that it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along, and upon any street, avenue, or highway; (2) that a strip of land 30 feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of and in the possession of the board of trustees of said city; (3) that said board of trustees, by ordinance, authorized and licensed defendant to construct and operate a railroad through and over said street, for carrying freight and passengers in cars to be propelled by dummy or motor engines; (4) that it constructed its road on said street, and operated it as provided in said ordinance; (5) that it has not excluded plaintiff or others from the street, and has only used it for the purpose aforesaid, and in common with the public, and has not impaired said street, or curtailed the use thereof by others, etc. To this defense plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the court, and defendant declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus: Can the owner in fee of land abutting upon a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town, which company, under and by virtue of an ordinance of the trustees of the first-designated town empowering it to do so, has constructed and is using a railway track upon and over said public street, and upon the side or half thereof adjoining the land of such abutting owner? The question is stated thus for the reason that, while the evidence in the case, consisting of the deed to respondent and the city map together, show that his land abutted upon the street in question, viz. Second street, in the city of Santa Ana, yet by section 1112 of the Civil Code "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto. All streets are highways, but not all highways are streets. Common Council v. Croas, 7 Ind. 9; City of Lafayette v. Jenners, 10 Ind. 74; Clark v. Com., 14 Bush, 166. In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely-populated limits. It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation, and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made; but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways." People v. Kerr, 27 N. Y. 202; City of Cincinnati v. White's Lessee, 6 Pet. 432; Thomp. Highw. p. 7; Elliott, Roads & S. p. 305. It is said by Elliott, in his work on Roads and Streets, at page 299, that "it is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." It authorizes the use of the street for the track of a street-car company under license by the city authority, without compensation to the owner of the fee. Finch v. Railway Co., 87 Cal. 598, 25 Pac. 765.

A "street railway" has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers." Elliott, supra, 557. It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily-laden freight trains are drawn cannot be considered a street railway. Street cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree, and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width, and structure of roadbed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned,—so far as ease, speed, and economy are involved,—improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with.

The thirteenth subdivision of section 862 of the municipal government act of this state authorizes the boards of trustees of municipalities of the sixth class, of which Santa Ana is one, "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon * * * in the public streets." The world moves. Legislation in recent times has kept pace with the progress of the age. The trend of judicial opinion, except where overshadowed and incrusted with stare decisis, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment, and progress. In Paquet v. Railway Co., 18 Or. 233, 22 Pac. 906, which was an action to enjoin a steam-motor railway company from constructing and operating its road upon a street in the city of Portland and upon a county road outside the city, abutting upon both of which the plaintiff owned land, with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, C. J., in deciding the cause against plaintiff, said: "The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out, of the entire present beneficial interest, of a private nature, which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age." McQuaid v. Railway Co., 18 Or. 237, 22 Pac. 899, enunciates a like doctrine. In Henry Gauss & Sons Manuf'g Co. v. St. Louis, K. & N. W. Ry. Co. (Mo. Sup.) 20 S. W. 658, the supreme court of Missouri held, in substance, that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the constitution. The court said: "When land is dedicated generally, and without restrictions, or condemned, for a public street, in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted, which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. * * * For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages." This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In Barney v. Keokuk, 94 U. S. 324,—which was ejectment in the United States court for the district of Iowa, to recover certain premises within a public street in Keokuk, occupied with railroad tracks, buildings, sheds, etc.,—upon error to the supreme court of the United States, that tribunal held that although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietors, and without compensation, whether the fee of the streets, as in that case, be in him or in a third person. The court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein. Kucheman v. Railway Co., 46 Iowa, 366. In New Jersey it is held: (1) That the legislature has power to authorize the use of a public highway for the purpose of a railway. (2) That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit. (3) The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands, as is contemplated by their constitution. (4) That the easement of the highway is in the public, although the fee is practically in the adjacent owner. "It is the easement only which is appropriated, and no right or title of the owner is interferred with." Morris & Essex R. Co. v. Mayor, etc., of Newark, 10 N. J. Eq. 352. In Spencer v. Railroad Co., 23 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the court used the following language: "Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title or possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it and to use it as a street; and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant,—a mere easement,—and it has taken nothing from the plaintiff, and therefore, under West Virginia authorities referred to, she is entitled to no injunction." In Railroad Co. v. Sawyer, 92 Ill. 377, the supreme court of Illinois held that the public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and, where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.

This being an action of ejectment to recover a specific piece or parcel of land, and it appearing from the stipulation of the parties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property, other than to such public street, within the purview of section 14 of article 1 of the constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in Railroad Co. v. Reed, 41 Cal. 256, and Muller v. Railway Co., 83 Cal. 240, 23 Pac. 265, and it does not necessarily follow that ejectment will lie, if the facts set out in the answer are true. The cases above quoted were to recover damages. The cases of Weyl v. Railroad Co., 69 Cal. 203, 10 Pac. 510, and Finch v. Railway Co., 87 Cal. 597, 25 Pac. 765, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street, without valid license from any authorized body. The rule, as defined in Mahon v. Road Co., 49 Cal. 270, is regarded as the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseisin." In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise." The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment. The case of Redfield v. Railroad Co., 25 Barb. 54, is on all fours with the present case; and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie,—intimating, but without deciding, that trespass was in such a case the proper remedy. Railroad Co. v. Sawyer, supra, is to like effect. The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do or may the public buildings of the municipality. A writ of restitution which should put the plaintiff in possession of the street, except as one of the public, would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A. to be placed in possession of real property, subject to the possession of B., is an absurdity. Where A. enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in Weyl v. Railroad Co. and in Finch v. Railway Co. This rule proceeds upon the theory that, as defendant does not justify under one having a right to possession, it matters not, as to him, that another than the plaintiff may have a better right than either of the parties to the action. A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses. So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public, of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant. The judgment is reversed, and the court below directed to overrule the demurrer to defendant's second defense, set out in his answer.

Neither BEATTY, C. J., nor DE HAVEN, J., participated in the foregoing decision.

1 Cal. Unrep. 794

KRAFT v. WILSON. (No. 18,281.)

(Supreme Court of California. Sept. 14, 1894.)

UNAUTHORIZED ACT OF AGENT—RATIFICATION BY PRINCIPAL—ACQUIESCENCE.

1. As the ratification of an agent's act is equivalent to a prior command, a finding that an agent had authority to do an act is sustained by evidence that his principal ratified such act.

2. The question of ratification of an unauthorized act of an agent is a question of fact.

3. Plaintiff purchased from defendant's son-in-law certain stock, part of which belonged to him and defendant and part to defendant and his son, and all of which were running on the same ranch, and credited the amount on the son-in-law's account with him. Defendant, being told of the sale, gave other stock to his son, to satisfy him, but did not say anything to plaintiff, who had previously purchased stock from the son-in-law under similar circumstances, as was known to defendant. Defendant took an assignment from his son-in-law of all his interest in the stock on the ranch, and made several payments on what he himself owed plaintiff, and for which he had given his note, and also told him that his son-in-law had plenty of property to pay his debt, and at last gave him a mortgage two years after the sale to secure a balance he owed plaintiff. *Held*, that defendant, who had become the assignee of his son's interest, could not deny the son-in-law's authority to sell the stock belonging to defendant and his son.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by Herbert Kraft against H. C. Wilson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Johnson & Chase and Reddy, Campbell & Metson, for appellant. N. P. Chipman and L. V. Hitchcock, for respondent.

SEARLS, C. This is an action upon a promissory note made by the defendant December 1, 1888, for $7,981, payable to plaintiff or his order one day after date, with interest at 9 per cent, per annum, and in case of a suit for the collection thereof with 5 per cent. upon the amount found due as attorney's fees. Plaintiff claims a balance due of $3,838, besides interest, and $191.90 as attorney's fees and costs. Defendant answered, admitting the execution and validity of the note, and set up two counterclaims, aggregating $5,937.50. These counterclaims were disallowed by the court, and judgment rendered in favor of plaintiff, from which, and from an order denying defendant's motion for a new trial, he appeals.

The whole case turns upon the validity of defendant's counterclaims. The cause was tried by the court without a jury, and the facts as found, bearing upon the questions involved, although lengthy, are essential to an understanding of the case, and are as follows:

"(1) That said C. G. Alexander is a son-in-law of defendant, and was so related to defendant ever since 1880; and the said H. F. Wilson was a son of H. C. Wilson, and that said H. F. Wilson is now deceased.

"(2) That the defendant owns, and has for many years owned, a large body of land in Warner valley, in the state of Oregon, used as a stock ranch, upon which he raised horses, mules and cattle.

"(3) That some years prior to 1883 the defendant and C. G. Alexander entered into a contract, by the terms of which the defendant let Alexander have charge of a number of mares and cattle. Alexander was to run these animals on the said Warner Valley ranch, and at the expiration of the lease or contract was to return to the defendant the same number of animals he had originally received; that is, to make the old stock good;

and the balance, or the increase, was to be owned equally by the defendant and C. G. Alexander. In 1883 the defendant and Alexander had a settlement under the terms of their contract. All the animals at that time were branded with the 'heart' brand. In this settlement the animals that were counted out to make the old stock good were branded with the 'bar-heart' brand, to distinguish them from what might be termed the increase. The defendant then turned over to his said son, H. F. Wilson, all animals branded with the 'bar-heart' brand upon a contract by which said H. F. Wilson was to run the 'bar-heart' stock on the said Warner Valley ranch on shares, to pay all the expenses of running them, and at the end of the contract make the old stock good, and divide the increase between his father, the defendant, and himself. The 'heart' brand animals, of which C. G. Alexander was the owner of one-half, were then turned over to the said C. G. Alexander under a contract by which he was to run them on shares on the Warner Valley ranch, pay all the expenses of running them, and divide the increase equally between himself and the defendant, H. C. Wilson. All the stock in which H. F. Wilson was interested with defendant, and that in which C. G. Alexander was interested with the defendant,—the animals branded with the 'heart' brand and those branded with the 'bar-heart' brand,—ran promiscuously upon the Warner Valley ranch.

"(4) Accounts for supplies for the ranch were run at various stores in which supplies for all the ranch and all the stock upon it were charged, without any attempt to segregate the expenses incident to running the stock that H. F. Wilson had on shares from the expenses of the stock that C. G. Alexander had on shares.

"(5) From 1883 to 1889 H. F. Wilson was most of the time on the Warner Valley ranch, and while there had chief control of affairs. About 1889 he left, and did not return. A hard winter came, and destroyed 90 per cent. of the stock. H. F. Wilson and his father had no settlement, and H. F. Wilson, after the hard winter, practically abandoned the Warner Valley enterprise.

"(6) From the year 1884 up to the bringing of this action H. F. Wilson, C. G. Alexander, and H. C. Wilson did a large banking business with H. Kraft, the plaintiff. H. F. Wilson created an individual indebtedness with the plaintiff. C. G. Alexander created a large individual indebtedness with the plaintiff, and H. C. Wilson had an individual indebtedness with the plaintiff. In 1884, at the request of H. C. Wilson, an account was opened with H. Kraft under the name of H. C. Wilson and Alexander. The account ran along, until in March, 1886, it had grown quite large, amounting to over $7,000, when the defendant gave a note to the plaintiff, signed 'H. C. Wilson and Alexander,' in settlement of the account to that date. After this, checks continued to be drawn against the H. C. Wilson and Alexander account up to December 1, 1888. In September, 1886, H. C. Wilson paid the note in full of March, 1886. December 1, 1888, the amount of the H. C. Wilson and Alexander account had reached the sum of $7,981. On that day H. C. Wilson, at the request of plaintiff, gave his individual note for that amount, and the account of H. C. Wilson and Alexander was credited with the same amount, and closed. This note of December 1, 1888, is the one upon which this action is brought.

"(7) In the meantime the individual account of C. G. Alexander with the plaintiff had been growing from year to year. Some settlement of accounts had been made by Alexander by giving his individual notes. In September, 1890, he owed H. Kraft in all about $17,000.

"(8) In August, 1890, there was upon the Warner Valley ranch a large number of horses, mules, and cattle. The stock was in three different brands; some branded with a 'heart,' some with a 'bar-heart,' and some branded 'A. X.' H. C. Wilson and C. G. Alexander each owned an undivided one-half interest in the 'heart' brand animals. H. C. Wilson and H. F. Wilson each owned an undivided half interest in the 'bar-heart' brand animals, and C. G. Alexander owned the 'A. X.' brand animals.

"(9) In August, 1890, C. G. Alexander was in Warner Valley in charge of the ranch and all the stock on it, regardless of brands. During all the year 1890, H. C. Wilson resided, and for many years prior thereto had resided, in Tehama county, California, in which county H. Kraft also resided, and also H. F. Wilson. The defendant went to the Oregon ranch once or twice a year, and there remained from one to three weeks.

"(10) In August, 1890, 49 head of mules from the Warner Valley ranch were at Lakeview, Oregon, in possession of one Hereford, and held by him under a chattel mortgage signed 'Wilson & Alexander,' to secure a debt of over $2,100, due Cogswell & Ross, of Lakeview, jointly owned by H. C. Wilson and C. G. Alexander. The signatures thereto were written by Alexander, and at the time of their execution H. C. Wilson did not know of their execution.

"(11) In August, 1890, the plaintiff, being desirous of having something paid on the C. G. Alexander indebtedness to him, sent a man by the name of Estes to buy mules of Alexander, and credit the amount agreed to be paid upon Alexander's indebtedness. Estes, in pursuance of his employment, bought of Alexander 33 mules branded with a 'bar-heart,' 29 mules branded with a 'heart,' and 12 mules branded 'A. X.' For part of these mules he agreed to pay eighty dollars per head, and for a part eighty-five dollars per head. $2,100 were paid in cash to release the mules that were in pledge in Lakeview, Oregon, which mules were a part of his purchase, and the balance of the purchase price was credited on the individual indebtedness of C. G. Alexander to plaintiff.

"(12) After the purchase of said mules they were driven to Tehama county, California, and delivered to the plaintiff.

"(13) After the sale of the said mules, and after they had been delivered to the plaintiff, defendant, in September, 1890, went to Oregon, and had an interview with C. G. Alexander, at which time he was informed of the sale of the mules to plaintiff, and also as to what disposition had been made of the proceeds.

"(14) Defendant, H. C. Wilson, then took a bill of sale from C. G. Alexander of all his interest in the stock on the Warner Valley ranch in part payment of a large indebtedness due him (defendant) from Alexander.

"(15) Upon his return to Tehama county soon after, defendant had an interview with his son, H. F. Wilson, in which, for the purpose of preventing H. F. Wilson from informing plaintiff that he (H. F. Wilson) had an interest in a part of the mules sold to him by Alexander, he (defendant) let H. F. Wilson have mules of his to satisfy him (H. F. Wilson) for the mules Alexander had sold, and thereby prevent his (H. F. Wilson) saying to the plaintiff that Alexander had sold to plaintiff mules he had no authority or right to sell.

"(16) In November, 1890, defendant, at the request of plaintiff, gave to plaintiff a crop mortgage for the full amount of the note now being sued upon. After the execution of this mortgage defendant paid upon the said note as follows: July 11, 1891, $320.62; August 26, 1891, $1,833.05; December 26, 1891, $3,592.66; in all, $5,746.33.

"(17) June 5, 1891, defendant Wilson was again at Warner Valley, Oregon, and had an interview with C. G. Alexander, at which time Alexander gave to defendant a letter addressed to H. Kraft, in the following words and figures: 'Warner, June 5, 1891. H. Kraft: The mules I sold you last year, one-half of thirty-three head of "hearts," sixteen and a half, and the thirty-one "bar-hearts," I had no right to sell. Please turn them over to H. C. and H. F. Wilson. C. G. Alexander.' In a few days thereafter defendant returned to Tehama county, where he then resided, and where he has resided for many years, bringing the above letter with him. He did not deliver it to plaintiff nor inform him of its contents, but kept it until a day or two before this case was commenced, to wit, until January 21, 1892, when he handed it to one of his attorneys, who afterward read it to Mr. Kraft.

"(18) On June 21, 1891, C. G. Alexander and the plaintiff had a settlement, and on that day C. G. Alexander mailed to the plaintiff a new note for what he then owed the plaintiff. In arriving at the amount of this new note, what was agreed to be paid for the mules (less $2,100) had been deducted from the total indebtedness of the said Alexander, and the note was sent for the balance. Alexander signed this new note, and on the 22d day of June, 1891, inclosed it in a letter, and it reached the plaintiff in due course of mail.

"(19) During the summer and fall of 1891 defendant continued to make payments on the note now in suit, and several times had the plaintiff's bookkeeper figure up the amount due. As late as November 14, 1891, plaintiff wrote to defendant about the balance then due on note in suit, and told him he was getting tired of waiting for his money. In response to this letter, defendant came up and said he was not ready to sell the wheat. Prices were not high enough to suit. He would like to hold on a little longer. Had plaintiff's bookkeeper figure up how much the wheat would bring at a certain price, and how much that note amounted to, and talked about turning over some wheat that Harry had as further security. He didn't say a word at that time about H. Kraft owing him anything for mules. Again, after the 28th of December, in response to another letter from the plaintiff, the defendant came up again. He told Kraft, the plaintiff, that Harry was going to let him have the wheat, and he was going to sell it, and pay the money in, and talked about some wool he had—something he was going to turn also. On December 26, 1891, the defendant sent to plaintiff wheat receipts amounting to $3,599.66, for which he was given credit on the note in suit. This left a sum due to plaintiff from defendant, H. C. Wilson, much less in amount than the sum now claimed in the said defendant's counterclaim to be due from the said plaintiff to the said defendant.

"(20) At no time from August 9, 1890, to January 22, 1892, did defendant make any claim for the mules, or intimate that C. G. Alexander had done anything he did not have full authority to do." The foregoing are special findings, and are in addition to the general findings in the case in which it is found that Alexander had authority to sell the mules, etc.

From the findings, the court below concluded as matter of law "that the defendant, by his subsequent acts, conduct, and silence, as set forth in the above findings, has ratified the sale of all the mules sold by Alexander to the plaintiff, and should not now be permitted to question the validity of said sale." The propriety of this conclusion involves the important question in the case. "Ratification is the adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void; and, by the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract." Herm. Estop. p. 1157. Where ratified by the principal, the unauthorized act of his agent is as binding upon him as though previous authority had been conferred upon such agent. The subsequent ratification has a retrospective effect, and is equivalent to a prior command. To say that an agent entered into a contract without authority from his principal, and that the principal subsequently ratified such contract, is, in legal intendment and effect, the equivalent of saying the agent was duly authorized to make the contract. The question of whether a contract made by an agent, or by one purporting to be such, has been ratified or adopted by the principal is one of fact, to be determined by a jury or by the court sitting in lieu thereof. Therein it differs from an estoppel in pais, which is a legal consequence,—a right arising from acts or conduct. Bigelow, Estop. (4th Ed.) p. 447. A full knowledge by the principal of all the material facts is a prerequisite to a finding that such principal has by his silence, acts, or declarations, in fact adopted the contract. Whart. Ag. § 65. The evidence which will authorize an assumption of ratification is or may be anything which convinces the mind of the intention on the part of the principal to adopt or approve the act, thus: (1) A principal who permits an unauthorized agent to act for him, and who stands by without interference while third persons deal with such agent as agent, cannot afterwards dispute the authority of such agent. (2) Silence of the principal when informed that the agent has entered into obligations in his name indicates acquiescence. (3) Proof of ratification may be inferred. We may infer ratification when the acts and conduct of the principal are inconsistent with any other theory than that he intended to ratify the transaction. It may be said, generally, that any act, conduct, or declaration from which an intent on the part of the principal to adopt the act of the agent appears is sufficient. Ratification being, as before stated, a fact, and the court having found thereon in favor of plaintiff, such finding must be upheld if supported by the evidence. The language of the general finding is "that said C. G. Alexander had authority to make said sale." The retrospective effect of a ratification is to place the contract and the contracting parties in the same position as though previous authority had been given; hence, if there was in fact proof of such ratification, the court was authorized to find the authority as stated in the finding.

Turning to the record, and we think the findings have substantial support in the evidence. Twelve of the mules purchased by plaintiff from Alexander were the property of the latter, and no question can arise as to them. As to the 33 mules included in the same purchase, owned by defendant and Alexander jointly, there was certainly evidence tending to show that Alexander had authority to make the sale, and hence to support the finding of the court to that effect. That Alexander held a power of attorney from the defendant, authorizing him to transact all business at the ranch in Oregon, seems conceded. The precise date at which this power was revoked (if revoked at all by the defendant) is left in doubt. Alexander, testifying as a witness, says: "I thought I had authority from H. C. Wilson to sell to Kraft or to any one else his half interest in the mules branded with the straight 'heart.' My opinion is based upon previous actions between us, and business matters. I had authority at one time so to sell—that is, up to three or four years ago—two years ago. It was a power of attorney to transact any and all business for him and in his name. It embraced everything, I supposed. Whether it embraced the stock or not, I do not know. It was a written authority. I have not the instrument. I had authority about eight years. It ceased about two years ago, when Mr. Wilson put that notice in the paper that he would not be responsible for any person in this county." Wilson himself testified that he published the notice in the paper after the sale of the mules to plaintiff. It is true, the extent of the authority under this power does not clearly appear, but, as I do not find that the defendant, who testified at length on his own behalf, and referred to the power, denies that it authorized a sale of stock, it is believed the court below was warranted in finding from all the circumstances that as to the mules branded with a "heart" Alexander had authority to sell. As to the mules branded with what is called a "bar-heart," and which were owned by defendant and his son, H. F. Wilson, no previous authority in Alexander to sell appears, and the sole question presented is as to the fact of ratification by the defendant, who is the assignee of his son, of all the interest of the latter therein. To discuss the testimony at length in support of the finding can subserve no useful purpose beyond the decision of the present case, and as the conclusion is irresistible that, although there is a substantial conflict in the testimony, there is yet such a showing in favor of the ratification by defendant of the sale that this court is not warranted in disturbing the finding.

If, however, it be conceded that where one has wrongfully taken the property of another, and sold it, not as agent, but on his own account, mere silence on the part of the owner does not confirm the sale, and that the confirmation must rest upon some consideration upholding it, or upon an estoppel,—a question upon which the authorities are divided,—still the evidence and the special findings are, as it is believed, sufficient to uphold the judgment. It is not the silence alone of the defendant, relied upon, but the care which he took to prevent knowledge of the true state of the case from coming to the plaintiff; his payments made upon the promissory note, when, if he claimed what he now sets up as a counterclaim, there was nothing due thereon; his giving a chattel mortgage to secure the amount due upon the note; his silence for nearly a year and a half, with full knowledge of all the facts, coupled with his declarations to plaintiff, as disclosed by the evidence, that Alexander was perfectly good for the amount he owed the plaintiff, had plenty of property, etc., at a time when he, the defendant, had an assignment of all of Alexander's interests in the stock, whereby plaintiff was lulled into security, and to take a new note extending credit to Alexander; and other minor circumstances indicating an intention to abide by the action of his son-in-law in the sale which the latter had made. That the testimony as to some of these facts was conflicting does not authorize us to discard the findings. Taken together, they bring the case within the rule enunciated by the lord chancellor before the house of lords in Cairncross v. Lorimer, 7 Jur. (N. S.) 149, where he said: "I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." Or, as was said in Nicholson v. Hooper, 4 Mylne & C. 179, by Lord Cottenham: "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction." That defendant, in the face of the testimony to the numerous sales made by Alexander of stock from the ranch, was aware that the latter "was dealing with the property as his own," cannot be doubted. Plaintiff had previously purchased stock from Alexander under circumstances that may reasonably be assumed to have been known to the defendant, yet the latter offered no objection. Indeed, it appears from some of the testimony that defendant, his son, and Alexander in many respects acted as ostensible partners in all the stock, and in other respects acted as though they were severally owners of it.

Numerous objections were made to the introduction of testimony and to the refusal of the court to permit questions to be answered, but I fail to see that any of the errors assigned to the rulings of the court in this respect are well founded. A large number of these exceptions are based upon the action of the court touching testimony going to show that defendant and Alexander were copartners in the stock and in the business of conducting the ranch. As the court did not find a partnership to exist between the parties, such exceptions become unimportant. The exception urged in the brief of appellant, founded upon the refusal of the court below to permit defendant to testify as to how the account stood between Alexander and himself after witness received an assignment of Alexander's interest in the stock, is of no moment, for the reason that in answer to the very next question defendant was permitted to answer that the stock assigned to him did not pay his demand against Alexander by $30,000. So, too, the objection that defendant was not permitted to testify that his only knowledge of the sale was that Alexander had sold the stock as his own, and not as agent for defendant, was immaterial, for the reason that all the testimony tended to show that, whatever the authority of Alexander may have been as to a portion of the stock sold, he in fact sold it in his own name, and not in the name of or as the agent of defendant; and there is nothing in the findings in conflict therewith. There are other exceptions to evidence, but they are of no greater moment than those noticed, and need not be reviewed. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 150

JENNINGS v. JENNINGS et al. (No. 18,278.)

(Supreme Court of California. Sept. 21, 1894.)

MORTGAGE BY GUARDIAN TO WARD — VALIDITY — DELIVERY—SATISFACTION.

1. The individual mortgage of a guardian of a minor to his ward to secure a debt due from him to the estate is good as against a subsequent mortgage, though the debt is secured by the guardian's bond, and there is no order of court fixing the amount thereof.

2. Where the guardian of a minor's estate makes his individual mortgage to his ward, to secure a debt due from him to the estate, has it recorded, and then delivers it to the mother of the minor, to be kept for him, there is a sufficient delivery.

3. A mortgage given by a guardian to his ward cannot be satisfied by the guardian without authority of court, and without payment of the debt.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by W. O. Jennings, Jr., by his guardian, against W. O. Jennings, Sr., Frank G. Waterhouse, and others, to foreclose a mortgage. Judgment was rendered for plaintiff, and defendant Waterhouse appeals. Affirmed.

Holl & Dunn, for appellant. A. M. McCoy, H. P. Andrews, and James P. O'Brien, for respondents.

BELCHER, C. On March 5, 1887, W. O. Jennings, Sr., was appointed guardian of the estate of his minor son, W. O. Jennings, Jr., and thereafter he duly qualified and entered upon the discharge of his duties as such guardian. On the 23d day of the same month he received for and on account of his said ward the sum of $1,000 in money, which he thereafter held and used until April 9, 1889. On the last-named day he executed to his ward his promissory note for $1,204.17, being for the said $1,000 and interest thereon to that date at the rate of 10 per cent. per annum, compounded annually, and also a mortgage upon certain real property to secure payment of the note; and on the same day he caused the mortgage to be properly recorded in the records of the county, and shortly thereafter delivered both the note and mortgage to the mother of the boy, to be kept by her for him. On April 28, 1890, while he was still the guardian of the boy, he undertook to satisfy and discharge the said mortgage, and to that end made and entered upon the margin of the record thereof an indorsement as follows: "State of California, County of Tehama—ss.: Full satisfaction of this mortgage is hereby acknowledged this 28th day of April, A. D., 1890. W. O. Jennings, by Guardian of W. O., Junior. Attest: W. R. Hall, Recorder." On July 21, 1890, he and one Barnes executed to Frank G. Waterhouse their joint promissory note for $2,500, and a mortgage on the premises covered by the mortgage to the boy, and certain other real property, to secure payment of said note, which mortgage was also duly recorded. He continued to be the guardian of his son until August 19, 1891, when, by an order of court, he was removed, and his letters of guardianship were vacated and annulled. And at the same time A. J. McClure was duly appointed guardian in his place, and he was by the court ordered and directed to turn over to McClure all the property and estate belonging to his said ward. On March 21, 1892, W. O. Jennings, Jr., by his guardian, A. J. McClure, commenced this action to foreclose his mortgage of April 9, 1889, alleging, among other things, that the note secured thereby was due and wholly unpaid; that the attempted satisfaction of the said mortgage was invalid and void, and made without any authority or power in the said W. O. Jennings, Sr., so to do, and without any consideration whatever; and that the interest of the defendant Frank G. Waterhouse in the said premises, as mortgagee, was subsequent and subject to the lien of plaintiff's mortgage. The defendant Waterhouse demurred to the complaint upon several grounds, and his demurrer was overruled. He then answered, denying many of the averments of the complaint, and, among others, that the attempted satisfaction of plaintiff's mortgage was invalid and void, and setting up his own note and mortgage, and praying that they be adjudged to be a first lien upon the premises described in the complaint. After trial the court found the facts very fully, and, among others: "That the aforesaid satisfaction undertaken to be made and purporting to be made, and the said indorsement upon the margin of said record, were made and executed without any order or other authority of the court so to do, and without the said indebtedness, or any part thereof, having been paid, discharged, or in any way satisfied; and the said purported satisfaction of mortgage and the said indorsement upon the margin of said record were, and each of them was, wholly invalid and void, and of no legal force and effect. * * * That the said mortgage is now, and at all times since the said 9th day of April, 1889, has been, in full force and effect upon and against the land contained and described therein. That neither said note nor mortgage, nor any part of the principal sum therein mentioned, nor of the interest thereon, has ever been paid, and said mortgage has never been paid nor satisfied nor discharged." That the note and mortgage set up in plaintiff's complaint in this action were made for a valuable consideration, and were delivered as in these findings hereinbefore stated; and said note and mortgage were accepted by the mother of plaintiff for and on behalf of plaintiff, and it is for the interest of plaintiff that he should accept and receive said mortgage." Judgment was accordingly entered foreclosing the plaintiff's mortgage, and directing the sale of the mortgaged premises, and the application of the proceeds, after paying costs, expenses, and attorney's fees, to the payment of the amount found due the plaintiff; and from this judgment the defendant Waterhouse appeals.

1. The demurrer was properly overruled. The complaint stated facts sufficient to constitute a cause of action, and was not obnoxious to any of the objections raised to it.

2. The appellant contends that the note and mortgage were given to secure payment of money already secured by the guardian's bond, and hence were without consideration; and also that when the mortgage was made the accounts between the guardian and his ward had not been settled, and the amount of the indebtedness established, by a competent court, and therefore the mortgage never had any validity. This contention cannot, in our opinion, be sustained. The note and mortgage were given for money which was the property of the mortgagee, and for which the mortgagor was personally responsible. This constituted a sufficient consideration for making the papers, and the fact that the mortgagor was the guardian of the estate of the mortgagee, and had given a guardian's bond, did not in any way affect the question. He had a right to give further security if he chose to do so. Nor was it necessary that the amount of the indebtedness be fixed and determined by any court in order to give validity to the mortgage.

3. The appellant further contends that the note and mortgage never became valid and

binding obligations, because they were never delivered to any person authorized to receive them for the plaintiff. This contention is also, in our opinion, untenable. The case shows that the papers were properly executed, and the maker at once caused the mortgage to be duly recorded, and then delivered them both to plaintiff's mother for him. This, under the decisions in this state and elsewhere, constituted a sufficient delivery. In De Levillain v. Evans, 39 Cal. 120, the question arose as to the acceptance of a deed of gift of certain real property, and it was held that, "if the donee be of mature years, he will be presumed to have accepted it, if it be for his advantage, unless the contrary appears;" and that, "if the donation be to a minor, and to his advantage, the law accepts it for him." In Wedel v. Herman, 59 Cal. 515, it is said: "But it is contended that the court below erred in overruling objections made to the offer in evidence of the deed to the plaintiff from his father, on the ground that it was not delivered. The deed was produced by the plaintiff. It was a deed from father to son. It showed that it had been duly acknowledged and recorded at the request of the grantor, and these constituted sufficient proof of delivery." In Cecil v. Beaver, 28 Iowa, 241, the court, by Dillon, C. J., said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is, in law, a sufficient delivery to the infant, and the title to the lands will pass thereby. In such case actual, manual delivery and a formal acceptance are not necessary." And see, also, Rivard v. Walker, 39 Ill. 413; Mitchell v. Ryan, 3 Ohio St. 377; Spencer v. Carr, 45 N. Y. 406; Gregory v. Walker, 38 Ala. 26.

4. The only other question which need be considered is that relating to the attempted satisfaction of the mortgage by the mortgagor. A similar question arose in the case of Aldrich v. Willis, 55 Cal. 81. In that case Henry M. Willis received and appropriated to his own use money belonging to his infant daughter, Amelia. For the money he executed to Amelia his promissory note, and a mortgage to secure its payment, which he caused to be duly recorded. Subsequently, "acting as guardian," he entered upon the margin of the record a satisfaction of the mortgage, and then mortgaged the property to another party. At the time he received the money, and up to the time of the trial, he was acting as guardian of Amelia, but in fact he was not the guardian of her estate, never having received letters of guardianship, nor qualified as such. In department, this court, by McKinstry, J., said: "Nevertheless, Henry M. Willis was a trustee, holding the money of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit, and the fact that it is set up in her answer by her guardian ad litem, and relied upon herein, constitutes sufficient proof of delivery to and acceptance by her." And it was held that the mortgage was not satisfied, but was still in full force and effect. On petition for rehearing in bank, the court, by Thornton, J., delivered an opinion, concurred in by four other justices, in which, referring to the language above quoted, it is said: "To which we desire to add: 'And this must be so, since, if it [the mortgage] had not been for the benefit of the infant, the court below, it must be presumed, as it had control over the conduct of the guardian ad litem, would not have allowed him to set it up.'" And the opinion closes with the following statement: "Whether Henry M. Willis was guardian or not we consider immaterial. The same result follows whether he (Willis) was or was not the general guardian of the infant, Amelia Willis." It is earnestly claimed for appellant that the language last above quoted was entirely obiter, and should be disregarded; but we cannot see it in that light. Conceding that the statement was not necessary to a decision of that case, still we think it declared the law applicable to the case correctly. To hold otherwise, and say that a guardian, without any authority of court, and without the payment of the indebtedness, can, at his pleasure, satisfy and release a mortgage given by him to his ward, might greatly endanger the estates of wards, and lead to results not contemplated or authorized by law. Applying the rule declared in that case to this, it must be held that Jennings, Sr., under the circumstances shown, had no right to satisfy the mortgage to his ward, and that the attempted satisfaction of it was ineffectual and void. We find no errors in the record calling for a reversal, and therefore advise that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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104 Cal. 73

HOUSE v. LOS ANGELES COUNTY. (No. 19,404.)

(Supreme Court of California. Sept. 13, 1894.)

BOARD OF SUPERVISORS—CONTRACTS—ULTRA VIRES.

The appointment by the board of supervisors of a county of an agent to procure the redemption of lands sold to the state for taxes, and to collect the amount of such taxes due the county, with an agreement to pay him a commission on the amount collected, is ultra vires.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinney, Judge.

Action by R. F. House against Los Angeles county to recover for services rendered in collecting delinquent taxes. A demurrer to the complaint was overruled, and, defendant refusing to plead further, judgment was rendered for plaintiff, and defendant appeals. Reversed.

H. C. Dillon, for appellant. McLachlan & York, for respondent.

PER CURIAM. This action was brought by R. F. House, the respondent here, to recover $460.56 for services rendered to the county of Los Angeles in the collection of money on account of delinquent taxes, in cases where real property had been sold to the state of California, and no redemption had. The plaintiff, in his complaint, sets out a contract in writing entered into on the 15th day of December, 1891, between him and the comptroller and attorney general of the state of California, in which the latter appointed the former to collect and cause to be collected, or cause to be redeemed, or to cause the payment of all moneys necessary to redeem, all property sold to the state for taxes from 1870, down to and including the forty-second fiscal year, and to take all necessary steps to cause said property to be redeemed; to serve all notices, etc. In consideration of which said House was to receive (1) all fees allowed by law for notices served; (2) such sum as the state board of examiners may allow on all moneys collected and paid to the county for the state, not exceeding 15 per cent. of the amount collected, etc. The appointment was for the territory embraced in what now composes the counties of Los Angeles and Orange. The complaint further avers that on or about December 29, 1891, the board of supervisors of the county of Los Angeles passed a resolution, of which the following is a copy: "Whereas, the state of California, through and by E. P. Colgan, state comptroller, and W. H. H. Hart, attorney general, has entered into a contract with R. F. House to proceed and cause to be collected from owners what may be due on account of sales of real estate heretofore made to the state for delinquent taxes, agreeing with him to pay him such percentage on such collections as the state board of examiners may allow, not to exceed fifteen per cent. (15 %) on the amount of such collection, it is therefore resolved, that the county of Los Angeles shall pay to said House such percentage on the amount of all redemptions as the state board of examiners may allow, not to exceed fifteen per cent. on such sum: provided, that such payment and allowance can be legally made; the said House to prepare and provide all necessary and proper books for the transaction of the above matter, which said books shall be at all times open to the examination of the county auditor of this county, its board of supervisors, and such persons as may be designated; the said books, on the expiration of said contract, to be by said House deposited with the county auditor, and become the property of the county. All of the matters and things above provided for to be done and performed without expense of any kind to this county; said commission, however, not paying the costs of any suit ordered brought." The plaintiff entered upon the discharge of the duties specified in his agreement with the state and the resolution of the board of supervisors, and between December 1, 1892, and April 30, 1893, by virtue of his appointment and employment, caused to be collected and paid into the county treasury for the use and benefit of Los Angeles county the sum of $3,070.28, to 15 per cent. of which he claims to be entitled, amounting to $460.56, as compensation for his services. He further avers that the state board of examiners allowed him 15 per cent. on the state's portion of the taxes so collected during said period, which has been paid; that his claim for $460.56, duly verified, was presented for allowance to the board of supervisors of the county of Los Angeles on July 22, 1893, which claim was disallowed by the board, whereupon, and in due time, this action was brought. Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, defendant refusing to answer, final judgment was entered in favor of plaintiff for $460.56 and costs, from which judgment the defendant appeals.

We have searched in vain among the general permanent powers conferred by the county government act upon boards of supervisors, and for other and special authority, either express or implied, under which the board of supervisors of the county of Los Angeles was authorized to enter into the contract with the respondent involved in the resolution set out in the complaint. Counties are bodies corporate and politic, and have such powers as are specified in, and such other powers as are necessarily implied from the powers conferred by, the act of March 31, 1891, entitled, "An act to establish a uniform system of county and township governments." St. 1891, p. 295: "Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." Section 2. By the fourth section of the act, it is entitled to: (1) "Sue and be sued." (2) "To purchase and hold land within its limits." (3) "To make such contracts and hold such personal property as may be necessary to the exercise of its powers." (4) "To manage and dispose of its property as the interests of its inhabitants may require." (5) "To levy and collect such taxes, for purposes under its exclusive jurisdiction, as are authorized by law." Among the general permanent powers conferred upon the board of supervisors by the twenty-fifth section of the act are, "under such limitations and restrictions as are prescribed by law:" (1) "To supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county charged with the assessing, collecting, safekeeping, management or disbursement of the public revenue; see that they faithfully perform their duties, direct prosecution for delinquencies," etc. (13) "To levy taxes upon the taxable property of their respective counties for all county purposes," etc. (17) "To direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same."

We must bear in mind that all the powers conferred upon the boards of supervisors, whether express or implied, are to be exercised "under such limitations and restrictions as are prescribed by law." Under the power conferred to levy taxes for county purposes, it might be, in the absence of other legislation, plausibly contended that the power to collect the taxes so levied, without which the levy would be of no avail, would be implied as a necessary corollary of the express power conferred. Where, however, a power is conferred by statute, and the mode of its exercise is also prescribed, the mode prescribed is usually held to be the measure of the power. The whole course of proceeding, from the levy of the tax to its collection, is confided to certain officers designated by the statute, whose duties, and the time and manner of their discharge, are specified by the law. The board of supervisors, by virtue of the power conferred upon it, may supervise the official conduct of the officers designated to assess for purposes of taxation, and to collect and disburse the taxes, to the extent of requiring them to faithfully discharge their duties under the law, and direct their prosecution for failure so to do; but the board cannot add to those duties, or relieve the officers from their discharge, as provided by statute. When taxes become delinquent, and real property is sold and purchased by the state for nonpayment thereof, it rests with the latter to determine, at its option, whether or not it will apply for a deed thereof. Like any other purchaser, it may desire a redemption to be had, or it may prefer to become the owner of the property, with a view to a more advantageous disposition. The owner may redeem land so purchased by the state, or not, at his option, at any time before the latter has disposed of it. The board of supervisors has no voice in the matter, and cannot intervene to accelerate or retard a redemption. If a redemption is made by the owner, it can only be by applying to the auditor for an estimate and certificates of the amount due, and by presenting such certificates, with the money specified therein, to the county treasurer, and procuring from the latter receipts showing the payment of such amount, which he must file, etc. Every step in the process is defined, and the officer or person by whom it is to be taken is designated. Nothing is left to the supervisors to do, or to cause to be done, except to see to it that the officers do their duty as it is nominated in the statute. Having no authority to act in the premises, and there being no right given by law to authorize them to appoint an agent who was or could be authorized to act, the attempted appointment by the resolution set out in the complaint was ultra vires, in the extreme sense of the term. What could the respondent possibly do under such an appointment? Simply nothing. He could not collect redemption money, or receipt for it. He could not, as the agent of the county, give notice to the owners of applications on the part of the state to procure deeds to lands purchased by it. This right or duty belonged to the state, and could only be exercised by it. We are of opinion that the board of supervisors, in the absence of positive law authorizing it so to do, cannot, in any case, appoint an agent to exercise powers which it cannot itself exercise. In the exercise of powers conferred upon it, it may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, but cannot go beyond this, and delegate to others duties, the discharge of which, calling for the use of reason and discretion, are regarded as public trusts. Scollay v. Butte Co., 67 Cal. 249, 7 Pac. 661. We do not, however, base our decision upon the ground that the duties devolving upon respondent are of such a character as called for the exercise of discretion and judgment, but upon the broader ground that, the statute having confided these duties to the officers specially designated by law for their discharge, the supervisors have no authority, express or implied, in the premises, and hence that the contract was beyond the jurisdiction conferred upon the board. Smith v. Los Angeles Co., 99 Cal. 628, 34 Pac. 439; El Dorado Co. v. Meiss (Cal.) 34 Pac. 716; People v. Johnson, 95 Cal. 472, 31 Pac. 611. The case of Lassen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365, was one in which Shinn and Maston, attorneys at law, were employed by the supervisors to collect from the state moneys due the county of Lassen on account of the keeping by the latter of indigent persons, and the contract for their payment was upheld. The decision went upon the ground that the county being entitled to recover the money, and the board being authorized to appoint attorneys, and the business such as might be supposed to require the services of attorneys, their acts were within the scope of their powers. It will be seen from the foregoing statement that there is a broad distinction between the underlying principle involved in that case and this. Here the board sought to confer powers upon its agent which it did not, and could not be presumed to, possess, because confided to other hands, —to contract for the performance of acts, no one of which could its agent perform, for like reasons. The only reason that can be urged in favor of such appointment must be, we think, that in case of the redemption of property purchased by the state the county becomes entitled to its pro rata share of the money paid, and hence is interested in having property so situated redeemed from the tax sale. The answer to it, if any is required, must be that if the laws which define the methods for redemption in anywise retard the process they should be amended, and that while they exist in their present form the process of redemption cannot be hastened, or rendered more effective, by ignoring them and the ministers designated for their execution.

These views render it unnecessary to pass upon the validity of the contract between respondent and the state comptroller and attorney general. The judgment is reversed, and the court below directed to sustain the demurrer to the complaint.

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104 Cal. 86

PEOPLE v. KILVINGTON. (No. 21,033.)

(Supreme Court of California. Sept. 13, 1894.)

HOMICIDE—BY OFFICER IN MAKING ARREST—EVIDENCE—PROVINCE OF JURY.

1. On indictment of an officer for murder while attempting to make an arrest, where the facts are undisputed, it is for the court to say whether defendant had reasonable ground to believe that deceased had committed a felony.

2. An officer who sees one running at night, pursued by another, shouting, "Stop thief!" has reasonable ground to believe that a felony has been committed.

3. Whether an officer is guilty of criminal negligence in shooting one whom he is attempting to arrest, and who he has reason to believe has committed a felony, is a question for the jury.

4. On indictment of an officer for killing one whom he was attempting to arrest, and who he believed had committed a felony, evidence that deceased was in that locality on lawful business is inadmissible.

In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

George Kilvington was indicted for murder, and convicted. From a final judgment, and from an order denying a motion for a new trial, he appeals.

The defendant, George Kilvington, was informed against by the district attorney of Santa Clara county for the crime of murder, alleged to have been committed at said county on the 3d day of May, 1892, by the felonious killing of one Henry Schmidt. The defendant was convicted of manslaughter, and adjudged to be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of seven years. This appeal is from the final judgment, and from an order denying a motion for a new trial.

It appears that the defendant was night watchman in Chinatown, San Jose, and was, as the court instructed the jury, a police officer of the city of San Jose. On the night of the 3d day of May, 1892, he had been at Chinatown with one Henry Burgess, for the purpose of showing the latter through a cannery. On their return from the cannery, about 9 o'clock in the evening, and when on Taylor street, they heard some one cry, "Stop thief!" two or three times, and upon looking around they observed two men running across a vacant lot or open ground fronting on the street northerly and diagonally to their course, in a direction which, if continued, would have taken them across defendant's line of travel 20 feet or more ahead of defendant and his companion. The two men running were not together, but one was in advance, and the other pursuing him, and crying out, "Stop thief!" according to the testimony of the defendant. The night was dark, but the parties were visible at some distance. Defendant ordered the man in advance to stop, and repeated the order two or three times. The order was not obeyed, but the stranger threw up his hands, when, as defendant claims, he saw something in his hands, and he drew his own pistol and fired, killing the man, who at the time was, say, 30 feet distant. The man fell upon his face, and upon examination proved to be one Henry Schmidt, and he had no weapons upon his person. Defendant did not, so far as appears, recognize deceased before firing the fatal shot, and did not consider himself in danger, but, as he testifies, intended to arrest the deceased, and for the purpose of intimidating and stopping him attempted to shoot over his head, but, the deceased being upon higher ground, about two or three feet, the ball entered his neck. Upon this point the defendant testified: "My object in ordering him to stop was to see why he was running away; what he had done. I thought he was some criminal, some thief, some sneak thief, or something of that kind, that time of night, to see a man running, and another man chasing him, calling, 'Stop thief!' I intended to find out,—to investigate,—and see what it was. I had every cause to believe by the calling of 'Stop thief!' that he was a criminal, and my object was to arrest him. I fired to intimidate him, and I endeavored to shoot over his head. * * * I heard a man call 'Stop thief!' and I couldn't tell whether this man had stolen a loaf of bread or robbed a bank." And in another part of his testimony he said: "For all I know, this man might have committed a murder, or robbed some one. I don't know what he was guilty of. I could not judge. All I know the man was running after another, hollering, 'Stop thief! stop thief!' " The man in pursuit of the deceased was one William H. Howard. The testimony of the latter was lengthy, but may be epitomized as follows: He was passing the house of one Mrs. Hayford, when the deceased ran out of the back yard, and the witness, thinking he was a criminal, pursued him, crying "Stop!" or "Stop thief!" for some distance, with the result as above stated.

Wm. P. Veuve, for appellant. V. A. Scheller and Spencer & Burchard, for the People.

DE HAVEN, J. (after stating the facts). There was no conflict in the evidence as to the circumstances under which the defendant killed the deceased, and, in order to determine whether his act was excusable or not, it was necessary for the jury to consider, first, whether the defendant was justified in attempting to arrest the deceased at all; and, if so, whether the act of shooting merely for the purpose of intimidating, and thus causing the deceased to stop, and without any intention of killing or wounding him, was or was not criminal negligence. It was important to the defendant to have these questions, and the law in relation to each, clearly and separately stated to the jury. The court correctly instructed the jury that a peace officer has the right, without a warrant, to arrest any person in the night, when the officer has reasonable ground to believe that such person has committed a felony. Pen. Code, § 836; Burns v. Erben, 40 N. Y. 463. But the court erred in the manner in which it submitted the question of probable cause to the jury. Upon this point the court gave the following instruction: "It is for the jury to determine from all the facts and circumstances of the case whether the defendant had reasonable cause to believe that a felony had been committed by the deceased. If you find from the evidence that he had such cause for belief, you will then determine whether, in the attempt to arrest the deceased, he used only such means as were necessary to prevent the escape of the deceased, and to effect his arrest." This instruction submitted to the jury the entire question in reference to the existence of probable cause upon the part of the defendant to arrest the deceased, and that body was called upon, not only to find whether the facts relied upon by the defendant to show such probable cause were true, but also, if true, to determine whether or not they were legally sufficient for that purpose. The instruction was erroneous, as it is not the province of the jury to decide in any case whether the facts and circumstances which they may find established by the evidence are sufficient to constitute probable cause. This principle of law is now settled beyond doubt or controversy, as a reference to a few of many cases which might be cited on that point will show. "This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts." Burns v. Erben, 40 N. Y. 463; Bulkeley v. Keteltas, 6 N. Y. 384; Masten v. Deyo, 2 Wend. 425; Pangburn v. Boll, 1 Wend. 345; Driggs v. Burton, 44 Vt. 124; Panton v. Williams, 2 Adol. & E. (N. S.) 169. And the supreme court of this state, in Harkrader v. Moore, 44 Cal. 152, in passing upon the same question, said: "The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and therefore one to be determined by the court. When the facts in reference to the alleged probable cause are admitted or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause." The same rule is also announced in Grant v. Moore, 29 Cal. 644; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; and in the late case of Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, where the whole question is elaborately discussed.

As already stated, the facts in this case were undisputed, and the court ought, therefore, to have instructed the jury as to their sufficiency in law to justify the defendant in attempting to arrest the deceased; that is, whether they were legally sufficient to induce a reasonable belief in the mind of the defendant that the deceased had committed a felony. The defendant requested the following charges upon this point: "Twelve. The court instructs the jury that, if the defendant saw the deceased running at night, pursued by Howard, and Howard was crying out 'Stop!' or 'Stop thief!' and the deceased, on being ordered to stop by the defendant two or three times, and refusing to do so, but continuing his flight, then the defendant had reasonable cause to believe the defendant [deceased] had committed a felony." "Fourteen. The court instructs the jury that the uncontradicted evidence in this case shows that the defendant had reasonable cause to believe, at the time of the killing, that the deceased had committed a felony." The refusal of these instructions presents the most important question of law arising upon this appeal, as it is manifest that, if either one had been given (the facts recited in the first one being established without any conflict whatever in the evidence), the inquiry of the jury would have been restricted to the single question whether the defendant exercised due care and caution in what he did in attempting to effect the arrest of the deceased; or, stated in another form, the question before the jury would have been, was the shooting in the direction of deceased, for the mere purpose of intimidation, without any intention of killing him, an act of criminal negligence upon the part of the defendant? The refusal of the court to thus narrow the inquiry was clearly prejudicial to the defendant, if, under the undisputed facts, he had, in the judgment of the law, probable cause to arrest the deceased; and this brings us to the consideration of the question, did the defendant, in view of the facts as presented to him at the time, have reasonable or probable cause to believe that the deceased had committed a felony? There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in Bacon v. Towne, 4 Cush. 217. "There must be such a state of facts," said he, "as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." Applying this rule to the facts of this case, we think it must be held that the defendant had reasonable cause to believe that the deceased may have committed a felony. It is true, the deceased was not charged in terms with the commission of a felony, but this was not necessary in order to justify the defendant in entertaining a reasonable suspicion that he was guilty of a felony. It was night. The deceased was fleeing, pursued by a person who was shouting, "Stop thief!" This was, in effect, a charge that the deceased had committed a theft of some kind, and the defendant had just as much reason to suspect or believe that the deceased may have committed robbery or burglary or grand larceny as to suppose that his pursuer only meant by the cry of "Stop thief!" to charge him with petit larceny. The defendant was called upon to act promptly, and, as the language used by the witness Howard was broad enough in its popular sense to import a charge of felony, the defendant was justified in attempting to arrest the deceased. An officer who would refuse to arrest a person fleeing and pursued under the circumstances disclosed in this case, because the charge was not more direct and specific as to the commission of a felony, would be justly censurable for a neglect of official duty. In considering this question of probable cause upon the part of the defendant to arrest the deceased, we are to look only at the facts and circumstances presented to him at the time he was required to act. The defendant did not recognize the deceased before he fired, and the fact that the latter was an innocent and respectable citizen, and who may have been fleeing from an assailant, cannot be allowed to affect the question we are now discussing. It is only necessary to add upon this point that, in our opinion, the court ought to have instructed the jury that the defendant had the right, under the circumstances established by the evidence, to arrest the deceased, leaving the jury to determine the further question whether the act of shooting the deceased in attempting to effect such arrest was or was not an act of criminal negligence upon the part of the defendant. This latter is purely a question of fact, and its determination must be left to the sound judgment and discretion of the jury, and in the decision of which question the defendant is entitled to the benefit of any reasonable doubt arising upon the evidence.

The court also erred in admitting the evidence of the witnesses Schloss and Weissel tending to show that deceased went down to the place near where he was shot on that particular night on lawful business. This fact was wholly irrelevant. The defendant knew nothing of the matter, and did not recognize the deceased at the time of the shooting. Under such circumstances the evidence was wholly irrelevant, as it threw no light whatever upon the question whether the defendant was justified in attempting to arrest the deceased under the circumstances as actually presented to him; nor did it have any bearing upon the question whether or not the defendant was guilty of criminal negligence in shooting the deceased.

The motion of defendant to set aside the information was properly denied, and the court did not err in refusing to give the instructions numbered 2, 3, 15, 18, and 24, requested by the defendant. We do not deem it necessary to notice the other points discussed in the brief of counsel. Judgment and order reversed, and cause remanded for a new trial.

We concur: **BEATTY, C. J.; FITZGERALD, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.**

(4 Cal. Unrep. 789)

SAN FRANCISCO & FRESNO LAND CO. v. BANBURY, County Treasurer, et al.[1]

(No. 19,370.)

(Supreme Court of California. Sept. 13, 1894.)

TAX SALE—PURCHASE BY STATE—NOTICE TO REDEEM—VALIDITY—PAYMENT OF FEE.

1. Where the state is the purchaser of land at tax sale, the comptroller and the attorney general have no authority to give notice for the state of an intention to apply for a deed.

2. There being no statutory provision for the disposition of a fee for notice of intention to apply for a deed of lands sold to the state for taxes, it must be taken as the legislative intent that no such fee should be charged.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the San Francisco & Fresno Land Company against J. Banbury, as treasurer of Los Angeles county, and others, to compel the acceptance of money paid for the redemption of land sold for taxes. Judgment for defendants, and plaintiff appeals. Reversed.

Holdridge O. Collins (James M. Allen and McAllister & Frohman, of counsel), for appellant. Spencer G. Millard, for respondents.

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[1] Reversed in banc. See 39 Pac. 439, 106 Cal. 129.

HARRISON, J. In June, 1892, the plaintiff, as the owner and successor in interest of 67 lots of land in McPherson's addition to the town of McPherson, formerly in the county of Los Angeles, but now in the county of Orange, sought to redeem them from a sale for delinquent taxes, made to the state of California March 12, 1889, and for that purpose tendered to the defendant Banbury, as treasurer of the county of Los Angeles, the sum of $225.60. It is conceded that this amount of money was sufficient to effect the redemption, unless the sum of $3 for each lot, amounting to $201, for giving the notice of an intention to apply for a deed and the affidavit therefor, fixed as a fee for giving such notice by section 3785 of the Political Code, should also have been tendered. The county auditor, in his estimate of the amount to be paid for redemption, included this item in the certificates issued by him under the provision of section 3817, Pol. Code, and the treasurer refused to accept the amount tendered, or to give to the plaintiff the certificates named in said section. The plaintiff thereupon brought this action to compel the treasurer to accept the sum tendered as above, and to give to it the triplicate receipts prescribed by the aforesaid section 3817. The cause was tried in the court below and judgment rendered for the defendant, from which, and from an order denying a motion for a new trial, the plaintiff has appealed.

Several questions are discussed in the briefs of counsel, but the conclusion which we have reached upon one of these questions renders it unnecessary to determine the others. In May, 1892, the defendant House, acting under the direction of the state comptroller, gave the notices referred to in section 3785, Pol. Code, and filed his affidavit thereof with the tax collector of Los Angeles county. These several notices were signed, "State of California, by R. F. House, Agent," and in the affidavit of service filed with the tax collector House stated that he was the "agent for the purchaser of the property described in the foregoing notice." House also testified at the trial that prior to the date of giving the notice "he had been appointed by the state of California, through the state comptroller and attorney general, and was authorized to serve notices to cause the redemption of property sold to the state for taxes." The question here presented is not the right of the state to the issuance of a deed, but the right of the delinquent taxpayer to redeem the land struck off to the state under the provisions of section 3773 of the Political Code, and this right depends upon his compliance with the requirements of the statute in that behalf, the particular questions here presented being whether there was a tender of a sufficient amount of money to effect the redemption. It is insisted by the defendants that the plaintiff, in addition to the amount tendered by it, should have also tendered $3 for each of the notices given by House, amounting to $201 in all; while the plaintiff insists that the notice given by House was without authority of law, and consequently that the item of $3 for giving such notice was not a part of the "costs and expenses of the redemption." Section 3817 of the Political Code provides that, when the state has become the purchaser of land sold for delinquent taxes, the person whose estate has been sold, or his successor in interest, may redeem the same by paying the amount of taxes due thereon at the time of the sale, with interest thereon, and any other taxes then delinquent thereon, together with a sum of money equivalent to the taxes that would have been subsequently assessed; "and also all costs and expenses, and 25 per cent. penalty which may have accrued by reason of such delinquency and sale, and the costs and expenses of such redemption." Unless the item of three dollars for giving the notice is a part of the "costs and expenses" which have accrued "by reason of the delinquency and sale," the plaintiff was under no obligation to tender it to the treasurer in order to effect a redemption from the sale. Section 3785 makes provision for the issuance of a deed to the purchaser in case there is no redemption from the tax sale, and requires that before making application for a deed the "purchaser" must serve upon the owner of the property purchased a written notice, containing certain statements, and that for the service of said notice and making an affidavit thereof the "purchaser" shall be entitled to receive the sum of three dollars, "which sum of three dollars shall be paid by the redemptioner at the same time and in the same manner as other costs, percentages, penalties, and fees are paid." The notice thus required is to be served by the purchaser, or by some one in his behalf, whom he has authorized to serve it. Such notice, served by a stranger, without any authority from the purchaser, would not satisfy the requirements of the statute, or entitle the purchaser to insist upon a payment or tender of the three dollars, in order that a redemption might be effected; and the rule in this respect is the same whether the state or an individual is the purchaser. The state can act only through officers or agents, and the duties of its officers or agents must be defined by statute, and the officer or agent who would give this notice must show his authority therefor under some statute. We have not been cited to any statute which confers upon either the comptroller or attorney general the right to appoint an agent for the purpose of giving this notice, or to take any step in reference to the issuance of a deed to the state for the property which may be struck off to it under the provisions of section 3775 of the Political Code. The duties of each of the above-named officers are defined in the Political Code,—those of the comptroller in sections 433 to 444, and those of the attorney general in sections 470 to 475,—and in neither of these sections can there be found any authority for either of these officers to give the above notices, or for the appointment of an agent to give the notices in behalf of the state. The provision in section 433, making it the duty of the comptroller "to superintend the fiscal concerns of the state," only designates him as the accountant of the state's finances, and does not give to him any function recognizing the same until the money over which he is to exercise a supervision or control has come into the hands of the treasurer, or some fiscal agent of the state, or has become an obligation in favor of the state, for which the state is entitled to an immediate enforcement. The duty imposed upon this officer by virtue of subdivision 16 of this section, "to direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue," arises only when the moneys thus to be collected are "due the state," and after there has been some official delinquency in relation to the collection or payment of the revenue. But, if the state has become the purchaser of land at a delinquent tax sale, the tax has been extinguished by the sale, and the state, instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer. The care and direction of the state's interest in land would naturally fall to the department of the surveyor general; but, whether that officer has been intrusted with any function in reference to the lands purchased at a delinquent tax sale, or whether the state has failed to make any provision in reference thereto, it is clear that neither the comptroller nor the attorney general has been intrusted with the duty of guarding the state's interest therein.

It is not the policy of the state to increase the burdens of taxation beyond the necessary cost of collection, or to impose any greater burdens in a redemption from a delinquent tax sale than is necessary to secure the payment of the original tax. All matters of taxation are resolved in favor of the taxpayer, and express statutes should be found for each item of cost to be imposed upon him. There is no provision of law for the disposition of the three dollars claimed herein as a fee for giving the notice. Neither the comptroller nor the attorney general is entitled to it as a fee, or as a compensation for any official duty; nor, if the state is entitled to receive it, are they authorized to give it to any agent they may select for the purpose of serving the notice. Section 3816 provides that "the original tax and the twenty-five per cent. and interest paid in redemption shall be apportioned between the state and county in the same proportion that the state tax bears to the county tax," and then declares, "the moneys received for delinquencies shall be paid to the county," and makes no provision for the disposition of this item. If the legislature had intended that the state, like any other purchaser, should be entitled to charge and receive this item of three dollars, it would have made some provision that it should be paid to it out of the redemption money, and not that it should be paid to the county. We are of the opinion that the amount tendered by the plaintiff was sufficient for the purpose of redeeming the lands in question, and that the treasurer should have received the money, and issued to it the certificates authorized by the statute. The judgment and order denying a new trial are reversed.

We concur: DE HAVEN, J.; VAN FLEET, J.

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104 Cal. 126

RANDALL v. DUFF et al. (No. 15,718.)

(Supreme Court of California. Sept. 14, 1894.)

APPEALABLE ORDER—DISMISSAL.

1. An order of the trial court ordering judgment to be entered as directed by the supreme court, and the judgment as modified, are appealable.

2. An appeal cannot be dismissed, on motion, on the ground that it is frivolous, as the record must be examined to determine its merit.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia K. Duff and others. From an order modifying the judgment as ordered by the supreme court, and from the judgment as modified, plaintiff appealed. Defendants move to dismiss the appeal. Denied.

S. M. Buck and W. C. Belcher, for appellant. W. L. Duff, H. S. Foote, and L. D. McKisick, for respondents.

PER CURIAM. Motion to dismiss the appeal herein on the following grounds: "(1) That the action of the lower court in modifying the judgment or decree in said action, as directed by the supreme court, was a ministerial act only, and one in which the lower court had no jurisdiction, and is not an act or order from which an appeal will lie. "(2) That the judgment or decree rendered in said action on the 3d day of June, 1892, and modified as directed by the supreme court on the 3d day of March, 1894, by the superior court, is a final judgment in said action, already approved and passed upon by the supreme court as a final determination of said action, and no further appeal lies therefrom. That the so-called order from which plaintiff has appealed is not an appealable order." When this case was last here on appeal (101 Cal. 82, 35 Pac. 440), the judgment of the court below was "affirmed in all respects, except as to the matter of interest, as to which the judgment was reversed and the cause remanded to the superior court, with direction to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly." The present appeal is taken from the order of the court below modifying the judgment as to the matter of interest, and from the judgment as modified. It may be true, as claimed, that the order and judgment appealed from were made and amended as directed by this court, and that the appeal is frivolous and vexatious, and was taken merely for the purpose of delay; but that is a matter which can only be determined by an examination of the record on appeal, and this, we have held will not be done on a motion to dismiss an appeal. In People v. McNulty, 95 Cal. 594, 30 Pac. 963, it was held that to dismiss an appeal "upon the ground that it is frivolous is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit, for to reach this conclusion the merits must be considered and the record must be examined." To the same effect is Howell v. Howell, 101 Cal. 115, 35 Pac. 443. As the order modifying the judgment and the judgment as amended are both appealable, it follows that the motion to dismiss the appeal herein should be denied. So ordered.

DE HAVEN, J., being disqualified, did not participate.

104 Cal. 40

HUMPHREYS v. BLASINGAME. (No. 18,256.)

(Supreme Court of California. Sept. 8, 1894.)

RIGHT OF WAY—ACQUIREMENT BY PRESCRIPTION—EVIDENCE—PAYMENT OF TAXES.

1. Plaintiff owned two tracts of land, separated by land of defendant. For five years before defendant purchased the land, plaintiff had used a road over it, connecting his tracts, and continued to do so for eight years thereafter, without asking defendant's permission, and without opposition on his part. *Held*, that the evidence sustained a finding that plaintiff had used the road under a claim of right, and not by permission of defendant, so as to perfect his easement by occupancy.

2. On an issue as to whether plaintiff had acquired a right of way over defendant's land by five years' use thereof, the deeds under which each holds are competent evidence to show the ownership of the tracts of land involved, and the dates of transfer.

3. Payment of taxes is not necessary to enable one to acquire title to a right of way which is not assessed separately from the land.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. C. Humphreys against A. A. Blasingame. There was a judgment for plaintiff, and defendant appeals. Modified.

Sayle & Coldwell, for appellant. C. C. Merriam, for respondent.

HAYNES, C. Plaintiff is the owner of about five acres of land, upon which he resides, and is also the owner of 160 acres separated from the residence parcel by intervening lands of the defendant, over which the plaintiff claims a right of way between his two parcels. The defendant having denied the plaintiff's right, and closed up the way, this action is brought to establish plaintiff's right, and to recover damages, and for an injunction. The cause was tried by the court without a jury, and the plaintiff had findings and judgment, and the defendant appeals from the judgment and an order denying a new trial.

The court found that plaintiff had been for 13 years and more the owner of the parcel mentioned, and that defendant, for a period of 8 years, had been the owner of said intervening land. The fourth finding is as follows: "That, for the period of thirteen years and upwards, plaintiff and his grantors have, under claim of right, continuously and adversely to all the world, and uninterruptedly, held, had, and used said right of way, and a certain roadway along the right of way above described, for travel by wagon and team, and of sufficient and ample width for such purpose." Other findings describe the way by courses and distances; that plaintiff is the owner of it; the interruption of the use by defendant; that plaintiff has sustained damage in the sum of five dollars; and that the acts of defendant prevent the use of plaintiff's larger tract. The findings are attacked upon the ground that they are not justified by the evidence.

Plaintiff had occupied his 5-acre lot for 17 years, and became the owner of the 160-acre tract about four years later, and used the way in controversy during all the time since becoming the owner of the latter tract. The 160-acre tract was patented by the United States to William Lowery in 1876, and from that time, if not before, the way in question was used by its owner. Defendant's land was acquired from the government by one Pitman, who afterwards sold and conveyed to E. T. Lowery, the brother of William; and this way was used during the ownership of Pitman and Lowery, and when defendant became the owner. Appellant insists that plaintiff used the way without any claim of right, and was permitted to do so by the defendant as a matter of neighborly accommodation, and that the way was one used by the defendant and his predecessors for the uses of the land now owned by defendant. There is no conflict in the testimony, as given by the witnesses, as to the facts of the use. It is with the facts inferred from the use under the circumstances detailed by the witnesses that appellant finds fault. But these inferred facts are as fully within the domain of the jury, or of the court sitting without a jury, as the facts from which they are inferred. The plaintiff testified that he found the way in existence when he bought the five acres;

that the way passed by defendant's house, and that portion of it between defendant's house and the Toll-House road was used by defendant and others, and that he supposed he had a right of way through there; that he used it from the time he acquired the 160 acres, to haul wood and hay and his farming implements, whenever he had occasion; that the fact that he owned the 160 acres, and that the road had always been there, gave him the right; that the right was never questioned until defendant closed the gate the preceding December; and that he never had occasion to tell defendant, until then, that he had such right, because the question never came up between them. In Thomas v. England, 71 Cal. 460, 12 Pac. 491, it is said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence, merely, of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from the facts and circumstances under which the use was enjoyed. The question is one for the jury, or for the court sitting as such, to determine as a fact, in the light of the relations between the parties, and all the surrounding circumstances." We think the evidence sufficient to support the finding that the way was used by plaintiff for more than the statutory period under a claim of right, and that the use was not merely permissive. He had used it five years or more before defendant acquired the property, and was so using it when defendant acquired it. The use could not, therefore, have originated in defendant's permission, either express or implied; and the fact that defendant made no objection, nor any inquiry as to plaintiff's right, is quite as significant of an admission of such right as it is of a mere permissive use, while the fact that plaintiff never asked permission to use the way is at least suggestive of a claim of right to use it. Other circumstances might be referred to which tend to strengthen the conclusion reached by the learned judge, but, as we see no ground upon which his finding can be set aside, it is not necessary to do so.

Several exceptions were taken to the admission and exclusion of evidence.

The ownership of the different parcels of land involved, and the dates of transfer, were material, and the deeds were competent evidence as to each of those facts.

The other exceptions related to the possibility or impossibility of reaching plaintiff's 160-acre tract otherwise than over the way claimed, the difficulties to be encountered, the distance, and other matters of like character. We think the evidence given by plaintiff upon these questions tended to shed light upon the question of plaintiff's claim to a right of way, though it seems to have been supposed by plaintiff that the difficulties of reaching his land by any other route were such as gave him a right of way of necessity across defendant's land, rather than a right by prescription. That he was mistaken upon a question of law does not affect the fact that he claimed a right to cross defendant's land by a road which he found in existence when he purchased the 160-acre tract. But, however that may be, if these rulings had been in favor of defendant, it could not have changed any finding or the result of the case; and therefore, if it be conceded that the court erred, the defendant was not prejudiced.

Counsel for appellant cites cases to the point that plaintiff's possession must have been hostile, and that such hostile possession must have amounted to an ouster of defendant. Plaintiff's use of the way under a claim of right was necessarily hostile, but it need not amount to an ouster or exclusion of the defendant from a right to use the way. The use of the way, if without right, is a trespass, which would have given the defendant a right of action; and that is all that is necessary to set the statute running, so far as a right of action is concerned. Hanson v. McCue, 42 Cal. 303; Ditch Co. v. Crane, 80 Cal. 183, 22 Pac. 76; Sullivan v. Zeiner, 98 Cal. 347, 33 Pac. 209. So the payment of taxes is necessary to the successful assertion of title by adverse possession, as provided now by statute; but that requirement does not apply to a mere easement, which is not separately assessed for the purposes of taxation.

It is further contended by appellant that the judgment is too broad, because it includes the right to use the way for driving over it cattle, sheep, and other stock; and, as respondent does not seriously object to this contention, the judgment should be modified in this respect.

We advise that the order appealed from be affirmed; that the judgment be modified so as to exclude the right of the plaintiff to use the way for driving cattle, sheep, hogs, or other stock, in herds, bands, droves, or when loose and not under control, and, as thus modified, it be affirmed, and that the costs of this appeal be taxed to appellant.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be modified so as to conform to the said opinion, and that as modified the judgment and order appealed from be affirmed, at the cost of appellant.

(4 Cal. Unrep. 820)

WOLFF v. WOLFF. (No. 15,417.)

(Supreme Court of California. Sept. 26, 1894.)

DIVORCE—ALIMONY—PRINTING AND COUNSEL FEES.

1. An order by the judge who tried a divorce case, granting $100 printer's fees and $250 counsel fee on a pending appeal from a judgment in favor of the wife, and a contemplated appeal from an order denying a new trial, will not be reversed as excessive.

2. In an action for divorce, an order granting a counsel fee for an appeal from an order denying a new trial, made before such appeal is taken, will not be reversed as premature where, on the hearing of the appeal from the order granting such allowance, it appears that an appeal from the order denying a new trial is pending.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action for divorce by Lillie Wolff against Henry Wolff. From an order granting an allowance for counsel fees and disbursements, defendant appeals. Affirmed.

Fox & Kellogg, for appellant. W. H. L. Barnes (W. W. Foote, of counsel), for respondent.

PER CURIAM. This is an appeal from an order made after judgment in a divorce case allowing alimony. The affidavit, among other things, states that the case has been tried, and judgment rendered for plaintiff; that an appeal had already been taken from the judgment, and a motion for a new trial had been made and denied; and that defendant contemplated an appeal from such order. Thereupon, the court allowed as alimony for the two appeals: For printing, $100; for counsel fees, $250. The affidavit also shows that, although alimony had been previously allowed to the amount of $1,700, only $250 had been paid; that plaintiff was destitute of means. It is contended that the allowance is excessive, but we cannot so conclude. The judge who made the order had tried the case, and was fully aware of the nature of the controversy. How much printing would be required would depend upon this. It would have been more prudent to forbear making an allowance for the second appeal until after it had been taken, but our records show that the appeal from the order denying a new trial was taken afterwards. We do not think the order should be reversed because the provision for this was premature. The order is affirmed.

104 Cal. 130

WALLACE v. McKENZIE et al. (No. 18,275.)

(Supreme Court of California. Sept. 17, 1894.)

MORTGAGES—PRIORITIES.

Where a mortgage on land is made under an express oral agreement that it shall be subject to one to be given to D., the fact that it is recorded before the mortgage to D. will not, in equity, destroy the priority of the latter as between the immediate parties.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Miles Wallace, assignee in insolvency of John Krohn, against McKenzie, Rule, and Dickey, to foreclose a mortgage. Judgment was rendered in favor of defendant Dickey, and plaintiff appeals. Affirmed.

Stuart S. Wright and J. P. Meux, for appellant. Frank H. Short, for respondents.

McFARLAND, J. The plaintiff, Wallace, as assignee in insolvency of one John Krohn, brought this action to foreclose a mortgage executed to said Krohn by defendants McKenzie and Rule. Dickey was made a defendant upon averment that he claimed some interest in the mortgaged premises which is alleged to be subsequent and subject to the lien of plaintiff's mortgage. Dickey, by answer and cross complaint, set up that he had a mortgage on said premises, executed by said McKenzie and Rule, which was prior and superior to the mortgage of plaintiff. The court found in favor of Dickey, holding plaintiff's mortgage to be second, and subject to that of Dickey. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The fact are substantially these: A few days prior to the execution of either of the mortgages, Krohn, who was a creditor of McKenzie and Rule, requested the latter to give him a mortgage to secure the amount owing by them to him; and they informed him that they would do so if he would accept the same as a second mortgage subject to one which they had given, or were about to give, to Dickey. To this Krohn assented. A mortgage which had been prepared by or for Dickey, who lived at Fresno, and forwarded to McKenzie and Rule, who lived near a place called Coarse Gold, was signed by the latter on or about November 8, 1889. On November 9th the mortgage to Krohn was drawn up by a notary at Coarse Gold,—being substantially copied, except as to amounts, etc., from the mortgage to Dickey,—and both mortgages were on said day acknowledged before said notary, the one to Dickey being acknowledged first. Krohn took his mortgage (the one sued on in this action) "with the express understanding and agreement that he would take and receive the same subsequent and subject to the Dickey mortgage, which, it was expressly understood and agreed, was and should be the first upon said premises." McKenzie and Rule "refused to execute a first mortgage of said premises to said Krohn" and "would never have delivered the mortgage to him, except that the said Krohn agreed to receive and did receive the same as a second mortgage upon said premises, and subject to the said mortgage of the said Dickey." Krohn had his mortgage recorded immediately. Dickey's mortgage was sent to him at Fresno the next day by mail, and was not recorded until several days afterwards. We think that under these circumstances the court below correctly held that the mortgage of plaintiff should be treated in equity as second and subject to the mortgage of defendant Dickey. Plaintiff stands in the shoes of Krohn, and there is no question of innocent holders without notice to be considered. Therefore, authorities cited by appellant which deal with the rights of third parties do not here apply. It seems that when Dickey received his mortgage he sent it back for some corrections, but it does not appear that any alterations were made, and it does appear that no material alteration was made. It dces appear that the notary, for some reason, changed the date of the acknowledgment; but that, in any view, is immaterial, for as Krohn had full knowledge of the existence of Dickey's mortgage, and expressly agreed to take his subject to it, it is unimportant whether or not the mortgage was properly recorded. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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104 Cal. 20

LOS ANGELES, P. & G. RY. CO. v. RUMP. (No. 19,374.)

(Supreme Court of California. Sept. 7, 1894.)

CONDEMNATION BY RAILROAD COMPANY — RIGHT OF WAY — SUCCESSIVE TRIALS — TAXATION OF COSTS—SATISFACTION OF JUDGMENT — EFFECT—EVIDENCE—DAMAGES.

1. Code Civ. Proc. § 1254, which provides that where, after an award in condemnation proceedings, a new trial is granted the owner, and he fails on such trial to obtain a greater compensation than on the first, the costs of the new trial shall be taxed against him, does not violate Const. art. 1, § 14, providing that private property shall not be taken for public use without just compensation.

2. Code Civ. Proc. § 1254, provides that if, after the judgment in condemnation proceedings, plaintiff wishes to take possession, it must pay into court the full amount of the judgment; that defendant, upon filing an abandonment of all defenses except as to the amount of damages on a new trial, shall be entitled to receive the amount of the judgment; and that the receipt of such amount shall be held to be an abandonment by defendant of all defenses excepting his claim for greater compensation. *Held*, that where defendant has filed an abandonment, and received the amount of the judgment, the only issue on a new trial is whether he is entitled to greater compensation; and, if the award is for a smaller amount, plaintiff is not entitled to a judgment against him for the difference.

3. In condemnation proceedings by a railroad company, defendant will not be allowed on a second trial to show the comparative value of her property before and after the construction

of the railroad, which took place after the first and before the second trial.

4. In condemnation proceedings by a railroad company, evidence will not be received of the cost of maintaining a fence along plaintiff's right of way, as the cost thereof is not an element of damage, under Code Civ. Proc. § 1248, providing that, if the property sought to be condemned be for a railroad, "the cost of good and sufficient fences" along the line of such railroad must be assessed as damages.

5. Defendant's motion to strike out the testimony of one of plaintiff's witnesses that "the railroad would prevent any further wash, and it affords a good embankment to protect the balance of the property," was denied. *Held*, that an instruction that "the compensation to be awarded * * * must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the railroad" was sufficient to remove any prejudice to the defendant from the refusal to strike out.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the Los Angeles, Pasadena & Glendale Railway Company against Minnie Rump to condemn a right of way. Judgment was rendered for defendant for a smaller amount than on a former trial, and she appeals. Modified.

P. W. Dooner, for appellant. Burnett & Gibson, for appellee.

HAYNES, C. Action to condemn a right of way over appellant's premises. Upon the first trial of this action by a judgment entered October 6, 1890, damages were awarded the defendant, Minnie Rump, as follows: Value of land taken, $75; cost of fencing, $100; damage by severance, $600; total, $775 and costs. The plaintiff paid the damages into court, and took possession and constructed its road. The defendant received the money so paid, and, having filed her abandonment of all defenses to the action except her claim to a greater compensation, moved for a new trial, and her motion having been denied, appealed to this court, and the judgment and order were upon such appeal reversed in May, 1892, upon the ground that the cost of fencing, as found, was against the evidence. 94 Cal. 432. In December, 1892, a second trial was had, and the damages awarded were as follows: Value of land taken, $106.43; cost of fencing, $125; damage by severance, $300,—total damages awarded, $531.43. Upon this state of the case the court entered a judgment by which the defendant was required to refund to the plaintiff the difference between the award of damages upon the two trials, amounting to $243.57, less the amount of costs awarded to her upon the first trial, amounting, with interest, to $177.57 (the same not having been paid); thus giving judgment against her for $66 and the costs of the second trial, amounting to $224.20, or a total of $290.20. Defendant thereupon moved for a new trial, which was denied, and this appeal is from said judgment and the order denying her said motion.

1. Appellant contends that the court erred in awarding costs to the plaintiff upon the second trial, notwithstanding the damages or compensation awarded her was less than that given upon the first trial, and which had been paid by plaintiff and received by her. Section 1254, Code Civ. Proc., after providing for an appeal to the supreme court in a condemnation proceeding, further provides: "In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain a greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him." This provision appellant insists is unconstitutional. We are not cited to any case in this state where that question has been considered. Section 1255, Code Civ. Proc., provides that, in proceedings to condemn property for public use, "costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court." In San Francisco v. Collins, 98 Cal. 262, 33 Pac. 56, it was held that section 1255 is limited by section 14 of article 1 of the constitution,[1] and that the payment of any part of the costs of the plaintiff in that case by the defendant would reduce the just compensation awarded by the jury by a sum equal to the costs so paid. The costs in controversy in that case, however, were not costs resulting from a second trial procured by the defendant for the purpose of securing larger compensation, but which resulted in a verdict for a less sum than that awarded upon the first trial. In Lewis on Eminent Domain (section 562) it is said: "Where the owner is dissatisfied with the amount of damages awarded him in the first instance, and takes an appeal or other proceedings to have a reassessment of the damages, it is usual to provide that he shall pay the costs of the appeal if he fails to secure an increase of damages, and such provisions are proper and valid." In Metler v. Railroad Co., 37 N. J. Law, 222, a similar statute was considered. At page 227 the court said: "The legal effect of these provisions is this: A verdict on a valuation greater than that of the commissioners will entitle the owner to costs, without regard to which party appeals. If the company is the appealing party, and the valuation of the jury is the same or a less sum than that of the commissioners, neither party is entitled to costs. But if the owner is the appealing party, and the jury finds the same or a less sum than the commissioners awarded, he must pay the costs. In that event he must pay the costs, because he has taken an unsuccessful appeal."

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[1] Provides that private property shall not be taken for public use without just compensation having been made to or paid into court for the owner.

Appellant's argument is, in effect, that her property cannot be taken without just and full compensation; that, if the award of $531.43 upon the second trial must be regarded as the just compensation to which she is entitled, she practically receives but $307.23, if she is required to pay the costs of the second trial, which amount to $224.20; or, if the first award remains as the measure of her compensation, she does not realize that sum by the amount of costs taxed against her. The result of the second trial, however, shows that the first award, if not more than she was entitled to, was at least just and full compensation; and, that sum having been paid by the railroad company and received by her, she cannot complain if the costs of an unsuccessful effort to obtain greater compensation are taxed against her.

2. Appellant contends, further, that she was improperly required to refund to the railroad company the difference between the first and second awards, amounting to $243.57. If appellant's second point can be sustained, the correctness of our conclusion upon the first point is placed beyond question. Upon this point, also, we are without any precedent in this state, and its solution must depend upon the construction of the Code provisions governing proceedings in such cases. But for the provisions of the Code now to be noticed, we would be inclined to hold that plaintiff is entitled to the benefit of the reduction made upon the second trial. In such case, however, the plaintiff should be charged with all costs, since it would litigate upon an equality with the defendant; and if the damages are set at large by the appeal, and remain undetermined until the final trial, the constitutional requirement that defendant shall receive full compensation cannot be complied with if the defendant is required to pay any part of the costs incurred in reaching such final determination. Section 1254, Code Civ. Proc., requires the plaintiff, if he would take possession and use the property for the purpose intended, to pay into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding. Said section further provides: "The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages he may be entitled to in the event that a new trial shall be granted. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation." In this case the condemnation money was paid into court by the plaintiff, and paid over to defendant, who filed her abandonment of all defenses except "her claim for greater compensation;" and the plaintiff took possession of the premises condemned, and constructed its road over the same. The payment of the money into court by the plaintiff was not accompanied by a motion for a new trial or notice of appeal or other objection to the amount found by the jury. It paid its money, and took possession of the land condemned. Under the statute, the defendant received the money without prejudice to any proceeding authorized by it to recover greater compensation, but under a condition that plaintiff's right to occupy the land shall not be questioned. Upon payment of the money, plaintiff acquired a vested right in the property, and the defendant a vested right in the compensation. City of Chicago v. Barbian, 80 Ill. 485, 486; Stacy v. Railroad Co., 27 Vt. 44. The abandonment by the defendant of all defenses except her claim for greater compensation confirmed plaintiff's right to the property, and estopped her from denying that right; and the plaintiff, we think, is equally estopped to say that the money received by the defendant is not hers.

It is urged, however, that the appeal from the first judgment vacated it, and with it the finding of the compensation awarded to the defendant. But, if that were true, the plaintiff's right to the possession was swept away with the defendant's right to the compensation. Plaintiff's right to possession, depending, as it does, under the constitution, upon compensation first made, cannot exist without it. It is therefore clear that the appeal of defendant, accompanied by her abandonment of other defenses, did not, as in ordinary cases, vacate the judgment. Nothing that was in issue upon the first trial was in issue upon the second. The sole questions were whether the defendant was entitled to "greater compensation," and, if so, how much additional compensation was she entitled to? The statute requires the court to pay to the defendant the damages awarded by the jury so deposited by the plaintiff, but makes no provision or requirement that any part of it under any circumstances shall be repaid. Under a statute of the state of New York containing a similar provision for the payment or deposit of the compensation for the land, etc., an appeal is provided for, and on such appeal a new appraisal may be ordered by the same or new commissioners, the second report to be final and conclusive on all the parties. The statute then provides: "If the amount of the compensation to be paid by the company is increased by the second report the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or deposited in the bank, as the court shall direct; and if the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same." 3 Rev. St. N. Y. (8th Ed.) p. 1745, § 18. Under the above statute, not only is the whole question of compensation set at large by the order for a new appraisement, but, if the amount is reduced, there is an express requirement that it shall be repaid, and express authority given the court to render a judgment therefor based upon the report of the commissioners; while under our statute we find no requirement that anything shall be refunded, nor any authority given the court to render a judgment for its repayment. If the defendant had not waived all other defenses, the money deposited would have remained under the control of the court, and "be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff," as provided in section 1257, Code Civ. Proc. We do not see that our conclusion does any injustice to the plaintiff. By the payment, without any effort to have a reassessment of damages, it assented that the amount assessed was the just compensation required by the constitution, and cannot therefore complain; and the court having paid it to the defendant, in obedience to the statute, we do not see how it can again assume control over it, or direct to what purpose the defendant shall apply it, in the absence of a statute authorizing it, the proceeding being purely statutory.

Some exceptions to evidence remain to be noticed. Defendant's property was mainly used for picnic purposes. Two years intervened between the first and second trial, and defendant sought to show the comparative value of the use of her property before and after the construction of the road. Plaintiff's objection was properly sustained. See Railroad Co. v. Galgiani, 49 Cal. 140, where the reasons for the exclusion of such evidence are clearly stated.

Appellant also contends that the court erred in not permitting a witness called for the plaintiff to testify upon cross-examination as to the cost of maintaining a fence along the plaintiff's right of way through defendant's land. Section 1248, Code Civ. Proc., relates to the assessment of damages. Subdivision 4 provides: "If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad." By this section, compensation must be assessed for each source of damage separately; and by section 1251, Id., the plaintiff, instead of paying into court the amount assessed as the cost of erecting the fences, may give bond in double the amount so assessed that it will build the fences within the time specified in the statute. By these provisions it would seem that the cost of maintaining the fences after their erection is not regarded as a distinct subject of damage under these proceedings. The Civil Code (section 485) provides that "railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. * * * Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right-of-way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals or persons who thus fail to construct and maintain such fence. * * *" It would therefore seem by the express language of the above-cited section of the Civil Code, as well as by subdivision 4 of section 1248, Code Civ. Proc., that, where the railroad company pays the cost of good and sufficient fences "with the award of damages allowed for the right-of-way," the duty of maintaining the fence is upon the owner, and the expense of doing so is included in the damages allowed for the right of way.

A witness for the plaintiff, having testified that defendant's land would not be damaged by the construction and operation of plaintiff's road, was asked to give his reason therefor, and in reply said "that the railroad would prevent any further wash, and it affords a good embankment to protect the balance of the property." Defendant's motion to strike out the answer was denied. It may be conceded that the answer of the witness tended to show that the construction of the road would be a benefit to the remainder of the land, but the court, in its instructions to the jury, expressly charged that "the compensation to be awarded the owner must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the road." This was an instruction to disregard all testimony tending to show benefits resulting to the remaining land, including that asked to be stricken out, and, we think, was sufficient to remove any prejudice to the defendant from the refusal to strike out.

The only errors being those committed in rendering the judgment, these may be corrected by a modification of it without a new trial. The costs of the first trial, taxed against the plaintiff and remaining unpaid, together with interest thereon, and the costs of this appeal, also taxed to the plaintiff, together with the costs of the former appeal, if unpaid, should be set off against the costs of the second trial, taxed to defendant, so far as they will compensate each other, and a judgment entered in favor of the party in whose favor the balance may be for the excess, leaving in defendant's hands the amount of the first assessment of damages which was paid over to her by the court, pursuant to the statute.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the order denying a new trial be affirmed, and that the judgment appealed from be modified so as to conform to said opinion.

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104 Cal. 205

In re ASBILL et al. (No. 21,086.)

(Supreme Court of California. Sept. 25, 1894.)

GAME LAW—INDICTMENT FOR VIOLATION—SUFFICIENCY.

An ordinance passed by the board of supervisors of Humboldt county makes it a misdemeanor to kill a female deer at any time, or to have in one's possession, at a time when it is unlawful to kill deer in said county, any deer skins from which the evidence of sex has been removed. *Held*, that an information stating that the accused "did willfully and unlawfully have in their possession deer skins," without stating that the evidence of sex had been removed, did not charge an offense under the ordinance.

Commissioners' decision. In bank.

Habeas corpus by P. Asbill, David Mackey, and Lancaster Lupton, convicted and imprisoned for violating a game ordinance, against T. M. Brown, sheriff of Humboldt county. Granted.

Cooper & Hill and Henley, Costello & Dimond, for petitioners. W. H. H. Hart, T. H. Selvage, and F. P. Deering, for respondent.

HAYNES, C. Petitioners were found guilty by a justice's court, in the county of Humboldt, of a misdemeanor, and were sentenced to pay a fine of $100 each, or be imprisoned, etc. The offense charged was for the violation of an ordinance passed by the board of supervisors of that county for the protection of game. The charging part of the complaint upon which they were tried is as follows: "That said [naming the defendants] on the 20th day of December, 1893, at Cooper's ranch, in the said county of Humboldt, state of California, did willfully and unlawfully have in their possession deer skins." The judgment followed the language above quoted. The defendants refused to pay the fine imposed, and were committed to jail, and now petition this court to be discharged on habeas corpus.

Petitioners contend that no offense is charged under the ordinance, and that the ordinance is unconstitutional. The complaint was made under section 10 of the ordinance, but a proper construction of that section requires the light of other sections. Sections 5, 6, 7, 9, and 10 are as follows:

"(5) Every person who, in the county of Humboldt, shall within the two years next (except from July 15 to October 15, in each year) after the passage of this ordinance, hunt, pursue, take, kill or destroy any male deer, elk, antelope, mountain sheep or buck shall be guilty of a misdemeanor.

"(6) Every person who, in the county of Humboldt, shall at any time hunt, pursue, kill, take or destroy any female deer, antelope, elk, mountain sheep or doe shall be guilty of a misdemeanor.

"(7) Every person who shall at any time hunt, pursue, take, kill or destroy any spotted fawn shall be guilty of a misdemeanor."

"(9) Every person who, in the county of Humboldt, shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope or mountain sheep shall be guilty of a misdemeanor.

"(10) Every person who, in the county of Humboldt, shall buy, sell, or offer for sale, transport or carry or have in his possession any deer, or deer skins, or any hide or pelt from which the evidence of sex has been removed, or any of the aforesaid game at a time when it is unlawful to kill the same, shall be guilty of a misdemeanor."

The construction given to section 10 by the justice before whom the petitioners were tried and convicted, and now insisted upon by respondent, is that it is unlawful to have in one's possession at any time when it is unlawful to kill deer any deer skin, whether the evidence of sex has been removed or not. The open season being from July 15th to October 15th, it would necessarily follow, if that construction is correct, that the complaint and judgment charging the possession of deer skins on December 20th stated an offense for which the petitioners might be properly convicted and imprisoned. But such construction cannot be maintained. It concedes, as all must concede, that it is lawful to have in one's possession, during the time it is lawful to kill deer, the skins or hides, provided the evidence of sex has not been removed. By section 9 it is unlawful to sell the hide or skin of any deer at any time, whether during the time it is lawful to kill male deer, or during the time it is unlawful to do so. But it is unlawful to kill a female deer at any time, and because of that prohibition, and as an aid to the detection of its violation, it is made unlawful to have in one's possession at any time the skin or hide from which the evidence of sex has been removed. If it were unlawful to have deer skins in one's possession at any time, there could be no reason for the provision that the evidence of sex shall not be removed from the skins. Coming back, then, to the concession that one may lawfully have in possession deer skins during the time male deer may be lawfully killed, if the evidence of sex has not been removed, what is to be done with the skins when that season closes? It is unlawful to sell them "at any time," and if it is unlawful to have them in one's possession after the season closes, what resource is left but to destroy them? And how would the destruction of all the hides on October 16th, each year, tend to the protection of game? It could have no such tendency; but, on the contrary, would tend to defeat the purpose of the ordinance to protect female deer by the requirement that the evidence of sex shall not be removed, since the destruction of the hide would be such removal. It would have been a singular requirement if the ordinance had provided that at the end of the open season all skins of deer should be destroyed; but it would not be more singular than it now is, if the construction contended for by the people can be sustained, which is that if you sell the hides you are guilty of a misdemeanor, and if you keep them after October 15th you are equally guilty. Indeed, the efficiency of the ordinance, so far as it relates to the protection of the female,—and that is its most important provision,—rests in the preservation of the skins, and keeping them in possession without removing the evidence of sex. We see nothing in the ordinance, either in its language or purpose, which would sustain the construction contended for by respondent. No offense known to the law being charged, the petitioners should be discharged.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the said petitioners be, and they are hereby, discharged.

GAROUTTE, J., being absent, did not participate in the foregoing decision.

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104 Cal. 165

GRANT et al. v. McPHERSON et al. (No. 18,189.)

(Supreme Court of California. Sept. 22, 1894.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

In an action to determine water rights in a running stream, where there is uncontradicted evidence tending to show a prior occupancy by the plaintiff, and the evidence as to adverse user by the defendant is conflicting, a judgment for plaintiff will not be disturbed.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by William Grant and others against Margaret I. McPherson and others to determine water rights in a running stream. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. W. Street and J. F. Rooney, for appellants. F. D. Nicol and E. A. Rogers, for respondents.

GAROUTTE, J. This is an action brought to determine that plaintiffs are entitled to have 100 inches of water flow to the head of their ditch in Sandy gulch, and to have it determined that they are entitled to divert that quantity of water for the purposes stated in the complaint. Defendants deny that plaintiffs are entitled to the relief sought, and base their denial upon the ground that defendants are the owners of the first right to the waters of Sandy gulch, and this because their grantors first appropriated the waters and, secondly, that, assuming plaintiffs to have acquired the first right by prior appropriation, still they have lost that right, and the defendants have secured the same by adverse user. A jury was impaneled to advise the court as to the facts, and 133 special issues were submitted to them for their consideration. The court adopted the findings of the jury upon these special issues as its findings of fact, and rendered judgment thereon. Appellants made a motion for a new trial, which was denied, and thereupon took the present appeal to this court from the order denying such motion. It is not insisted by appellants that the judgment is not in line with the findings of fact, but it is insisted that the findings have not sufficient support in the evidence, and the important matters raised by this appeal are exclusively questions of fact.

The principal question disclosed by the record is, did plaintiffs or defendants obtain title to the waters of Sandy gulch by actual appropriation? And the determination of that question rests upon the parol evidence of a great number of witnesses as to the acts of the grantors of these respective parties at least 40 years ago, and the conditions surrounding this water way at that time. The parties to this litigation not only rely upon acts of appropriation for their respective titles occurring so many years in the past, but the inception of these titles is laid at about the same time. Under such circumstances most naturally a conflict of testimony arose as to the fact of the first appropriation. A mass of evidence was placed before the court and jury upon this question, and upon such evidence the court and the jury found in favor of plaintiffs; and upon a careful reading of the record we cannot say that there is no substantial and positive conflict upon this disputed question of fact. It would serve no good purpose to take up the testimony of the various witnesses, and analyze it in detail, with the object of indicating specifically this conflict. Appellants base their rights upon actual appropriations made by several different parties, but rely principally upon appropriation by the Bacons. The respondents rest upon an appropriation made by one Morehouse, and, even conceding that the testimony preponderates in favor of appellants' claims, still a first appropriation is shown to have been made by Morehouse by the positive testimony of one John Curtin, whose credibility is not attacked in any way. And this evidence is sufficient to support a finding of fact in this regard. While a plaintiff is required to establish his case by a preponderance of evidence, a preponderance of evidence does not necessarily mean a preponderance of the number of witnesses; and upon a question of the character here presented this court cannot say that the evidence of two witnesses, or of three witnesses, must, as to certain facts, overthrow the evidence of one witness testifying to a contrary state of facts. Appellants concede that the evidence of the witness Curtin supports the finding of the court, but insist that his opportunities for observation at the time were limited, and that at most he was but a passing observer of unimportant events to him, and that his time and attention in those days were directed to more stirring scenes, and his mind resting upon more important things. This may all be true, and these things would seem to be arguments of weight before a jury or a court seeking to arrive at the truth, but we hold them of little moment here. His evidence was sufficient to establish a prima facie case, and, even though the weight of evidence was to the contrary, the finding of fact would not be disturbed. Lick v. Madden, 36 Cal. 213; Kile v. Tubbs, 32 Cal. 332; Jarnatt v. Cooper, 59 Cal. 706; Ward v. Waterman, 85 Cal. 504, 24 Pac. 930. The witness was not impeached in any of the ways provided by statute. Such impeachment was not attempted. Evidently his testimony was believed by the jury and by the court, and under the circumstances here presented we are not at liberty to cast it aside. A wall of adjudications to this effect has been raised up by this court, which we have no desire to pass over or batter down, for the wisdom of the rule declared in those adjudications cannot be gainsaid. There is evidence in the record other than Curtin's testimony tending to support plaintiffs' claims, but it is not necessary to call especial attention to it.

Have appellants acquired title to this water by adverse user? The verdict of the jury and the findings of fact made by the court declare that they failed to secure title in that way, and all that we have heretofore said upon the question of a substantial conflict in the evidence may be considered as again said upon this branch of the case. Experience has demonstrated that the only safe rule, and therefore the only wise rule, to follow where a substantial conflict in the evidence is disclosed by the record, is the one which this court has so long and so steadfastly adhered to. The evidence is clearly conflicting upon the question of adverse user for the statutory period, and we cannot disturb the findings of the court in that regard.

We do not think the other sources of title relied upon by appellants are sufficiently meritorious to defeat respondents' claims. Neither do we discern any errors of law upon the part of the court occurring during the progress of the trial that demand a reversal of the order. For the foregoing reasons the order denying the motion for a new trial is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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104 Cal. 171

McLAUGHLIN v. McLAUGHLIN et al. (No. 15,249.)

(Supreme Court of California. Sept. 24, 1894.)

MUTUAL BENEFIT ASSOCIATION—CHANGE OF BENEFICIARY—REQUIREMENTS OF BY-LAWS—WAIVER.

1. Where the by-laws of a mutual benefit association provide that, to change the beneficiary in a policy, the policy shall be surrendered, the beneficiary named in the policy is entitled to the money, though the insured, who married after taking out the policy, intended to make his wife the beneficiary, and a few days before his death handed the policy to his brother, who promised to have the wife made the beneficiary, but failed to do so.

2. A mutual benefit association cannot, after a policy holder's death, waive the requirements of the by-laws as to the mode of changing the beneficiary in the policy.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Hettie McLaughlin against Lottie McLaughlin and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Marcus Rosenthal, for appellants. Jones & O'Donnell, for respondent.

BELCHER, C. In July, 1886, Alexander McLaughlin became a member of Mission Council of the Order of Chosen Friends, a corporation organized and existing under the laws of the state of Indiana, and received a relief-fund certificate, stating that he had become a member of the order, "and entitled to all the rights and privileges of membership, and a benefit of not exceeding two thousand dollars from the relief fund of said order, which sum shall in case of death be paid to the nephews and nieces, John, Robert, Jennie, and Lottie McLaughlin, children of Armor McLaughlin, in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership." Afterwards Mission Council was dissolved, and he became a member of Home Council of the same order, and continued to be a member thereof, in good standing, until he died, on March 28, 1890. On February 18, 1890, he and the plaintiff intermarried, and thereafter were husband and wife up to the time of his death. In August 1890, the plaintiff commenced this action against the four beneficiaries named in the relief-fund certificate, their father, Armor McLaughlin, and the Supreme and Home Councils of the Order of Chosen Friends, alleging in her complaint facts which it was claimed entitled her to the $2,000 to be paid on the death of her husband. Before the trial of the action all the parties thereto entered into a written stipulation whereby the said councils disclaimed any and all interest or right in or to the $2,000 in controversy, and whereby it was agreed that the said sum of money should be deposited in a certain savings bank, in the names of the attorneys of the parties, in trust for the person or persons who should be found entitled thereto by the final judgment to be rendered in the action; and, in pursuance of this stipulation, the money was deposited as agreed, and the action was then dismissed as to the defendant councils. After trial the court found the facts to be substantially as alleged in the complaint, and, as conclusions of law, that the plaintiff was entitled to the said money. Judgment was accordingly entered in her favor, from which and from an order denying a new trial the defendants the McLaughlins appeal.

Appellants contend that the decision was not justified by the evidence, and was against law, and also that several errors of law were committed by the court in its rulings upon the admission of evidence.

The constitution and laws of the order contain the following provisions:

"Sec. 111. There shall be connected with this order a relief fund, from which each beneficiary member, the person or persons designated by said member related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw a sum not exceeding the amount named in his or her certificate, as hereinafter specified. During his or her life each member shall have full control of his or her interest in this fund," etc.

"Sec. 162. Each member shall enter upon his application the name or names of the person or persons related to him or her to whom he or she desires the benefit to be paid in case of death, subject, however, to such future disposal of the benefit as the member may thereafter direct, not in conflict with section 111, and the same shall be entered in the relief-fund certificate according to such direction."

"Sec. 172. A member in good standing may at any time surrender his or her relief-fund certificate, and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her as the member may direct, upon payment of the certificate fee ($1)."

To establish the plaintiff's right to the money as against the beneficiaries named in the certificate, evidence was introduced on her behalf showing the following facts: C. L. Stone was the secretary of Mission Council when Alexander McLaughlin became a member thereof, and continued to be its secretary until it ceased to exist, and as such secretary he issued to McLaughlin his relief-fund certificate. They were intimate friends, and in 1888 both became members of Home Council at the same time. McLaughlin never attended any of the meetings of either council after his initiation. Stone was never secretary of the new council, but he paid all of McLaughlin's dues, and from time to time furnished him with receipts therefor, signed by its secretary, who was a Mrs. Carroll. About a week after plaintiff and McLaughlin were married, he gave her his certificate, and she put it away, and thereafter retained possession of it until after his death. At the time of handing the certificate to her, he told her he was going out that day to see Mr. Stone, and have it changed to her name. He returned in the evening, and told her he had not been able to find Mr. Stone. On March 7th he saw Stone, and told him he desired to have the certificate changed, and made payable to his wife, and thereupon they agreed to meet at the next regular meeting of the Home Council, to be held on March 11th, and have the change made. Stone then told him that it would be necessary to write out an application to the secretary and to surrender the certificate. He told his wife of the appointment made with Stone, and together they went to the meeting agreed upon, but Stone was not there, and nothing was done. Three days later he was taken sick with pneumonia, from which sickness he never recovered. On March 23d plaintiff sent word to Armor McLaughlin, telling him of her husband's condition. Armor called that evening, and, finding his brother very sick, advised him to transfer all his property to his wife. Alexander then asked Armor to have the certificate changed and made payable to his wife, and asked her to get the certificate, which she did. Armor read it over, and then handed it back, saying, "I will attend to it to-morrow." As Armor was leaving the house that evening, he said to one Webster, a brother-in-law of the plaintiff, that he would go the first thing the next morning and have the certificate changed, and that, in case he could not get it changed, or his brother should die, he would draw the money in the children's names, and turn it over to the plaintiff. Armor called again the next day, and in his presence Alexander then transferred to his wife all his property, consisting of a lot in Seattle and $2,500, money on deposit in a bank, and during that day Armor stated to said Webster that he had sent one Hansen with $25 to see the secretary and have it all straightened out; and in the afternoon of the same day Alexander called Webster to his bedside, and asked him if everything had been straightened, and mentioned the certificate, and Webster, relying on what Armor had told him, said it had; and he said it was all right. Plaintiff first learned that she had not been substituted as beneficiary about a month after her husband's death. Meantime plaintiff had frequently asked Armor about the certificate, but he gave no definite answer, and said he did not know anything about the laws of the society, but, any way, she would not hear anything for 60 or 90 days.

It is urged on behalf of respondent that the laws of mutual benefit associations, providing how a change of beneficiaries may be made, are for the protection and benefit of the association alone, and that when in this case the councils entered into the stipulation above referred to, and thereby disclaimed any right to the money in controversy, they in effect waived, as they might do, a compliance with their laws by McLaughlin, and hence that appellants cannot invoke them for their benefit. It is further urged that since McLaughlin expressed a desire to have the certificate changed by substituting respondent as beneficiary therein, and took the steps indicated to accomplish that end, it should be regarded, under the rule that equity will consider that done which ought to be done, as in fact changed, so as to entitle respondent to the money. We do not regard the stipulation as in any way material to a determination of the case. It shows only that the councils made no claim to the money, and were willing to pay it into court, and let it go to the party or parties who might be adjudged entitled to it. It is true that during his life McLaughlin had full control over his interest in the fund, and had a right at any time to have his certificate changed by substituting a new beneficiary; and, while he lived, the beneficiaries named in the certificate had no vested interest in the money to be paid on his death; but, when he died, the right to the money did vest either in the respondent or appellants, and the councils had thereafter no power, by stipulation or otherwise, to change or affect that right. The question, then, is, did the expressed desire of McLaughlin to have the respondent substituted as beneficiary, and the steps taken to that end, have the effect to make the change, when the certificate was not surrendered, but remained all the time in respondent's possession, and no application was made to the secretary or other officer to have it changed? This is the first time that a question of this character has ever been presented to this court for decision, but there have been numerous decisions in other states directly bearing upon it. The general and prevailing rule, as shown by these decisions, is that, when the laws of a benefit society prescribe a mode of changing the beneficiary, the mode prescribed must be followed, and no change can be made in any other manner. See Nibl. Mut. Ben. Soc. § 221 et seq., and cases cited; also, Bac. Ben. Soc. § 307, and cases cited. In Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470, it was held that, as the provisions of the constitution pertaining to the subject were a part of the contract of insurance, the insured could not make any change of beneficiaries, except by compliance therewith, and also that expressed intentions and oral declarations can have no effect to change beneficiaries; and in that case, as in this, it was claimed that, as the order was willing to pay the money into court to be disposed of as should be directed by the final judgment, it had waived a compliance with its laws. The court said: "But it is said this is a matter to which the defendant can only object. We think differently. While the heirs, during the life of the assured, had no right in the policy, their interest being nothing more than in expectancy, upon his death they acquired rights which cannot be cut off except in the manner prescribed by the contract. If that was not done, the defendant could not, even by positive consent after their rights had attached, by act or word do anything to defeat these rights. It is controlled by the contract as it was at the death of the assured." In Supreme Conclave v. Cappella, 41 Fed. 1, the general rule is declared as follows: "In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer." It is said in that case, however, that the general rule is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued. The same exceptions are recognized in some of the other cases, but it is evident that this case does not come within either of them. Here the council did not waive a compliance with its laws, and issue a new certificate, and it was not beyond the power of the insured to comply literally therewith. Nor did the insured pursue the course pointed out by the laws, and do all in his power to have the change made. He might have had the certificate surrendered as required, but this was never done or attempted to be done, and no application to the secretary for a change was made. We conclude, therefore, that the case falls within the general rule, and that the beneficiaries named in the certificate were entitled to the money, and the court below should have so determined. We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

104 Cal. 156

LANGE v. BRAYNARD et al. (No. 18,252.)

(Supreme Court of California. Sept. 21, 1894.)

NEW PARTIES—HOW AFFECTED BY PREVIOUS PROCEEDINGS — RIGHT TO CROSS-EXAMINE WITNESSES.

Where, in an action to subject land to a judgment, a person to whom the land was conveyed before the commencement of the action is, by order of the trial court, made a party thereto, he may demand that a deposition already taken be stricken out, and that he be allowed to cross-examine the witnesses who have already testified.

Department 2. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action by H. D. Lange against C. P. Braynard and others to subject land to the payment of a judgment. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Chas. G. Nagle, Nagle & Nagle, P. B. Nagle, and W. Henry Jones, for appellants. A. M. McCoy and H. P. Andrews, for respondent.

DE HAVEN, J. This action was originally commenced by the plaintiff against the defendants C. P. Braynard, William Nagle, and P. M. Cleghorn, for the purpose of subjecting the land described in the complaint to the payment of a judgment theretofore recovered by plaintiff against defendant Braynard, the complaint alleging that said land had been conveyed by said Braynard to the defendant William Nagle, and by said Nagle to the defendant Cleghorn, and that said conveyances were both made without consideration, and for the purpose of delaying and defrauding the plaintiff and other creditors of the defendant Braynard. The defendants William Nagle and Cleghorn filed an answer, denying the material allegations of the complaint, and thereafter, on May 4, 1891, and before the commencement of the trial of the action, the deposition of defendant Braynard was taken by the plaintiff, the defendants Cleghorn and William Nagle being represented at the taking of such deposition by their attorney in the action, P. B. Nagle. The action was commenced in April, 1891, and it appears that prior thereto the defendant Cleghorn conveyed the land in controversy to the said P. B. Nagle, but said deed was not recorded until August 17, 1891. Upon the trial, which was commenced in December, 1891, after the said deposition of Braynard had been read in evidence, and the testimony of other witnesses given, and the plaintiff had rested his case, and some testimony had been offered in behalf of defendants, the court made an order directing that the said P. B. Nagle be made a party defendant, which was accordingly done. It is shown by the bill of exceptions that upon the making of this order the said P. B. Nagle "then and there objected to being made a party defendant, and objected to said order, unless he had the privilege of examining the witnesses introduced on behalf of the plaintiff and those already introduced upon behalf of the other defendants, and of cross-examining said witnesses, and each and every one of them; and objected and requested and moved the court that, so far as he was concerned, and against him, that the evidence of said plaintiff and his witnesses be not considered against him without his right to cross-examine the same, and moved the same be stricken out as to him; and on the further ground he objected to all the evidence and depositions heretofore introduced as against him, on the ground that the privilege of cross-examining and objecting to their evidence had not been accorded him, and as against him the same is and was irrelevant, immaterial, and incompetent." These objections and motions were denied, and in so doing the court stated "that the same objection and rulings and exceptions on the part of the other defendants may be considered as taken by P. B. Nagle." The plaintiff recovered a judgment in accordance with the prayer of the complaint, from which, and the order denying their motion for a new trial, the defendants appeal.

The defendants contend that the evidence was insufficient to justify the findings, and complain of many of the rulings made during the course of the trial, but we only deem it necessary to notice the question presented by the ruling of the court in refusing to strike out the deposition of Braynard, and in refusing to allow the further cross-examination of the other witnesses whose testimony was given before the defendant P. B. Nagle was made a party to the action. This ruling was erroneous, and, as the evidence to which it related is material, the judgment and order appealed from must be reversed. Although the defendant P. B. Nagle derived his title to the land in controversy from the other defendants, yet, such title having been acquired prior to the commencement of the action, he would not have been affected by the judgment therein without being made a party thereto. Brady v. Burke, 90 Cal. 6, 27 Pac. 52; Campbell v. Hall, 16 N. Y. 575. "To make one a privy to an action he must be one who has acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party to the action subsequent to its institution. A privity antedating the action does not work an estoppel. Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses, are considered as resting on the same principle." Bryan v. Malloy, 90 N. C. 508. In the case of a party brought in by way of substitution,—as, for instance, the executor of a deceased party, or the purchaser of the interest of a party with notice of the pendency of an action against his grantor,—such substituted party takes the case as he finds it, and is bound by the prior proceedings to the same extent as was his predecessor, and this is so because such substituted party is in privity with his predecessor. Thus, the rule is stated in 2 Barb. Ch. Pr. p. 79: "It is also laid down that in cases of alienation pendente lite the alienee is bound by the proceedings in the suit after alienation and before the alienee became a party to it; and depositions of a witness, taken after the alienation, and before the alienee became a party, may be used by the other parties against the alienee as they might have been used against the party under whom he claims." But here the title of defendant P. B. Nagle was not acquired pendente lite, but before the commencement of the action, and when he became a party the action was, as to him, a new action (Borst v. Boyd, 3 Sandf. Ch. 501), and he could not be compelled to accept depositions taken or testimony given in the case before he was made a party. In the case of Jenkins v. Bisbee, 1 Edw. Ch. 377, it was held that a person made a party to a suit after testimony taken cannot be affected by such proof; and to the same effect are the cases of Hutchinson v. Reed, Hoff. Ch. 316, and Pratt v. Barker, 1 Sim. 1. In Wood v. Swift, 81 N. Y. 31, the case had been referred to a referee, and witnesses examined, when the complaint was amended by adding new parties defendant; and, upon such amendment being made, the trial court entered an order to the effect that the case should "remain, continue, and be tried before the referee * * * as though all parties now to the record had thus been from the beginning of the action," "the added defendants, however, to have the privilege of cross-examining the witnesses theretofore examined." This order was reversed by the court of appeals, the court saying: "It is conceded by appellants' counsel that the court had the power, under section 452 of the Code, to bring in the appellant and the other persons as parties defendant to the action; but, even if it could do that, it could not compel them to accept the referee who had been appointed, and to accept the evidence which had been taken, even with the right of cross-examination which was secured to them. * * * The appellant had the right to have the cause tried by the court without a jury, and he at least had the right to be heard as to the appointment of a referee, and he had the right to be present when the witnesses were sworn and examined." The principle thus declared is controlling here. A party can no more be compelled to accept a deposition taken in an action to which he was neither party nor privy, than to accept a referee under the circumstances appearing in the case just cited. Nor is the case at all changed by the fact that the deed to Nagle was not recorded at the time of the commencement of the action, or when the deposition of Braynard was taken; nor by the further fact that Nagle was the attorney for the other defendants when such deposition was given, and when the evidence of the other witnesses was admitted, and that as such attorney he cross-examined such witnesses for his clients. Conceding all these matters, the fact still remains that the deposition was taken in an action to which P. B. Nagle was not a party, and therefore was not admissible against him, and the court ought to have given him the opportunity to cross-examine the witnesses previously testifying at the trial, if he desired so to do. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

104 Cal. 128

WALSER v. AUSTIN. (No. 18,249.)

(Supreme Court of California. Sept. 17, 1894.)

SPECIAL LAWS—APPOINTMENT OF OFFICERS.

Act March 31, 1891, § 170, subd. 21 (County Government Act), which provides that in counties of the eighth class only district attorneys may appoint assistants, violates Const. art. 11, § 5, which directs that the legislature, by general and uniform laws, shall provide for the election or appointment of county officers, and prescribe their duties. Welsh v. Bramlet, 33 Pac. 66, 98 Cal. 219, followed.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Mark Walser against R. H. Austin. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

C. C. Merriam, for appellant. Sayle & Caldwell, for respondent.

DE HAVEN, J. It was held in the case of Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66, that subdivision 21 of section 170 of the county government act, approved March 31, 1891 (St. 1891, p. 295),[1] contains local and special legislation, and is in conflict with section 5 of article 11 of the constitution of the state, which directs that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of such county, township, and municipal officers "as public convenience may require, and shall prescribe their duties and fix their terms of office." We can add nothing to the reasoning by which that conclusion was reached, and upon the authority of that case the judgment and order herein must be affirmed. Judgment and order affirmed.

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[1] Provides that in counties of the eighth class only district attorneys may appoint assistants.

FITZGERALD, J. I concur.

McFARLAND, J. I concur in the judgment solely upon the authority of Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66, and Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092, in which cases I could not concur.

SORENSEN v. DORRIS. (No. 18,339.)

(Supreme Court of California. Sept. 24, 1894.)

DISMISSAL OF APPEAL.

An appeal will be dismissed where appellant fails to file his printed points and authorities within the time prescribed by a rule of court.

In bank. Appeal from superior court, Siskiyou county.

Action between one Sorensen and one Dorris. From the judgment, Dorris appealed, and Sorensen moves to dismiss the appeal. Dismissed.

R. M. J. Soto, for appellant. L. F. Coburn and J. N. Parker, for respondent.

PER CURIAM. The appellant herein having failed to file with the clerk of this court his printed points and authorities on appeal within the time prescribed by subdivision 4 of rule 2 of this court, respondent's motion to dismiss the appeal from the judgment and order must be granted. Appeals from judgment and order dismissed.

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104 Cal. 198

KINGS COUNTY v. JOHNSON. (No. 18,285.)

(Supreme Court of California. Sept. 25, 1894.)

MANDAMUS—JURISDICTION—TAXES COLLECTED BY WRONG COUNTY—PAYMENT TO PROPER COUNTY—ENFORCEMENT—CREATION OF NEW COUNTY.

1. Mandamus will not lie to compel the tax collector of one county to pay over to the collector of another county taxes belonging to the latter county which he has unlawfully collected, as mandamus cannot serve the purpose of an action for money had and received.

2. Act March 22, 1893, providing for the formation of K. county, provides that the tax collector of T. county shall, on demand, furnish and assign to the collector of K. county a list of all the unpaid taxes levied on property within K. county. *Held*, that mandamus will lie to compel the collector to furnish such list.

3. Act March 22, 1893, entitled an act to "create the county of Kings," etc., which provides for the manner in which the unpaid taxes which have already been levied on property within its boundaries shall be collected by the county, is not unconstitutional as embracing matter not indicated by its title.

4. The provision for the collection of the taxes levied being a part of the creation of the county, the act is not special legislation, except so far as the creation of a new county is such.

5. Const. art. 6, § 5, provides that process of the courts shall extend to all parts of the state, and that "said courts and judges shall have power to issue writs of mandamus, certiorari, * * * and habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." *Held*, the phrase "in their respective counties" limits the power of the court merely in regard to the writ of habeas corpus, and therefore mandamus may extend beyond the county.

Commissioners' decision. Department 2. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Petition by Kings county for a writ of mandamus against J. Sub. Johnson. From a judgment granting the writ, defendant appeals. Modified and affirmed.

Bradley & Farnsworth, for appellant. M. L. Short, for respondent.

TEMPLE, C. This is an appeal from a judgment awarding a peremptory writ of mandate, entered upon an order overruling a demurrer to the petition; the defendant declining to answer. The petition shows that defendant was and is tax collector of Tulare county, the affiant being tax collector of Kings county. That Kings county was created March 22, 1893. That the fifteenth section of the act creating the county reads as follows: "Sec. 15. It shall be the duty of the tax collector of the county of Tulare upon the demand of the tax-collector of the county of Kings to furnish, assign and transfer to the tax-collector of the county of Kings a complete list of all unpaid taxes assessed and levied during the year eighteen hundred and ninety-two, on property within the boundaries of the county of Kings. The tax-collector of the county of Tulare shall file a duplicate list of such unpaid taxes assessed within the boundaries of the county of Kings with the county auditor of Tulare county. The tax-collector of the county of Kings shall give to the tax-collector of the county of Tulare a receipt for said list of said unpaid taxes, and shall file a duplicate list with the auditor of the county of Kings, and thereupon all such unpaid taxes shall become payable to the tax-collector of the county of Kings, and he is hereby authorized to collect and receipt for the same." June 29, 1893, affiant, as tax collector of Kings county, demanded from defendant that as tax collector of Tulare he furnish, assign, and transfer to said affiant a complete list of the unpaid taxes assessed and levied during the year 1892 on property within the boundaries of the county of Kings. That defendant utterly refused so to do, but, on the contrary, proceeded to collect such unpaid taxes to the amount of $1,300, which he now holds in his possession, and refuses to deliver to the tax collector of the county of Kings. Wherefore petitioner demands a writ of mandate commanding said defendant to furnish such list. An alternate writ was issued, commanding defendant, as tax collector of Tulare county, to furnish such list, and to deliver to affiant, tax collector of Kings county, all taxes collected by said tax collector within the boundaries of Kings county since the formation of such county, or show cause, etc. On the return day defendant demurred to the petition on two grounds: (1) It appeared that the court had no jurisdiction to issue the writ; (2) insufficiency of facts. The demurrer was overruled, and defendant declined to answer. Thereupon judgment was entered awarding a peremptory mandate in the terms of the alternate writ.

I know of no warrant for that portion of the mandate which commands defendant to pay to the tax collector of Kings county moneys which defendant has collected from the taxpayers of Kings county. The act of the legislature contains no authority on the part of the tax collector of Kings county to demand or receive such money. It does not authorize the tax collector of the county of Tulare to collect any taxes for the county of Kings. In fact, by implication it prohibits any collections on his part in the county of Kings after the demand provided for has been made by the tax collector of Kings county. Nor do I see any right which the county of Kings can assert to taxes collected by the tax collector of Tulare prior to the demand. The lien of the taxes for the year 1892 had already attached, and, unless the legislature saw fit to provide otherwise, such taxes due upon property situated in that portion of the former county of Tulare which was set off to the new county was collectible by the tax collector of Tulare. The only provision made in regard to the matter is that upon demand the unpaid taxes in that portion set off to the new county shall be transferred to the new county, and may be collected by the tax collector of Kings. There is no language which would seem to imply that any taxes collected prior to the demand, and since the creation of the new county, shall belong to the new county. On the contrary, the law requires the tax collector of Tulare to pay over each month all taxes collected by him, and I do not see what defense defendant could make to an action on the part of Tulare to compel him to pay into the treasury all taxes collected prior to such demand. But mandamus cannot serve the purpose of an action for money had and received. It can only compel the performance of a duty enjoined by law. The act imposes no duty upon the tax collector of Tulare to the county of Kings, or in which that county is interested, except his duty to furnish the list of unpaid taxes. He has, by his wrongful act, come into the possession of money which belongs to Kings county. At least either such is the case, or his collection is void, and the taxpayers still owe the tax. He can probably be made to pay it to the county of Kings. But it is not due to the tax collector of the county of Kings, nor can the payment be compelled by mandamus. But I think the tax collector of Tulare may be compelled by mandamus to furnish the list provided for. Here the act imposes a plain duty, in regard to which the officer had no discretion.

It is contended, however, that section 15 is unconstitutional, because the subject-matter of the section is not expressed in the title of the act, and because it is special legislation. I do not think either objection can be sustained. It is admitted that the legislature has the power to provide for the organization of new counties; that this act, so far as it creates the new county, is valid. Of course, to do this it must—or at least may—provide in detail for its organization and its working machinery. As its territory must be taken from other counties, such law could naturally provide for a division of the public property, if it must be divided, and for the payment of indebtedness. It would evidently be proper for such law to provide for the collection of the taxes which would become due on property in the new county. The lien of the taxes might attach, as here, before the new county would be organized, but the tax, in whole or in part, be collected afterwards. I see no constitutional objection to a provision in regard to the collection of these taxes, and as to whom they shall belong. It would seem eminently proper that such provision should be made. If entitled to criticise the act under consideration in this respect, I should say it is defective in that it is not sufficiently specific, and does not go far enough. Now, all these matters, and many others which would naturally be regulated in such an act, are included in the subject expressed in the title of the act. Ex parte Liddell, 93 Cal. 636, 29 Pac. 251. The title of the act is, "An act to create the county of Kings, to define the boundaries thereof, and to provide for its organization and election of officers, and to classify said county." All the matters stated in the title constitute but one subject, to wit, the creation of the county of Kings; and section 15 is a natural and logical part of that subject. This being so, it is not special legislation, except as the creation of a new county is special legislation.

I have so far not noticed the proposition that the court had no jurisdiction to issue the writ. It is argued that the writ cannot be issued to run out of the county, or to be executed out of the county. The claim is founded upon a construction of section 5, art. 6, of the state constitution. That portion of the section which is material here reads as follows: "They shall be always open (legal holidays and non-judicial days excepted), and their process shall extend to all parts of the state; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated.

Said courts and their judges shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunction and writs of prohibition may be issued and served on legal holidays and nonjudicial days." It is said that there should be a comma after the word "custody," and that the phrase "in their respective counties" limits the power of the court as to all the writs mentioned. It is somewhat strange if the convention provided first that the process of these courts shall extend throughout the state, and immediately add that certain important processes shall be issued only in their respective counties, meaning thereby that they shall not extend throughout the state. And how inapt the language to accomplish the supposed purpose. Why should the constitution prohibit the courts from issuing their writs anywhere else than in their respective counties? All writs, whether extending throughout the state or not, would be issued there. The phrase is exactly adapted to express a limitation to the jurisdiction of the court in matters of habeas corpus to the county in which a person is held in actual custody, and we find precisely the same phrase was used twice in the former constitution for the same purpose. And, if the section is to be construed as is contended by appellant, it will apply quite differently to matters of habeas corpus from what has always been understood and practiced. One might be in San Francisco, and yet hold a child in custody in Kings county. Which court would have jurisdiction,—San Francisco or Kings? As the law has always been understood, the court in the county of Kings would have jurisdiction and could extend its writ to San Francisco or elsewhere to reach the responsible party. I think the order or judgment should be modified so as to confine its operation to the duty prescribed in the statute, to wit, to require the appellant to furnish, assign, and transfer the tax list described in the complaint, and that, as modified, it should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order or judgment is modified so as to confine its operation to the duty prescribed in the statute, to wit, to require the appellant to furnish, assign, and transfer the tax list described in the complaint, and that, as modified, it is affirmed.

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104 Cal. 237

KELLY v. BRADBURY. (No. 15,554.)

(Supreme Court of California. Sept. 28, 1894.)

REVERSAL ON APPEAL.

Where, on appeal on the ground of insufficiency of the evidence, the respondent not only fails to file a brief, but also to argue the case orally, the judgment will be reversed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Thomas Kelly against William B. Bradbury. There was a judgment for plaintiff, and defendant appeals. Reversed.

Gordon & Young, for appellant. Chas. A. Low, for respondent.

PER CURIAM. It appears from the record that the verdict of the jury is assailed by the specifications on the ground of the insufficiency of the evidence to support it. There is no brief on file by respondent, nor was the case orally argued in his behalf. It therefore follows, on the authority of Richter v. Irrigation Co. (Cal.) 36 Pac. 96, and Davis v. Hart (Cal.) 37 Pac. 486, that the judgment and order appealed from should be reversed. So ordered.

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4 Cal. Unrep. 805

TODD v. MARTIN. (No. 18,307.)

(Supreme Court of California. Sept. 17, 1894.)

ACTION AGAINST ADMINISTRATOR — SERVICES AS NURSE—EVIDENCE — DEFENDANT'S COMPETENCY AS WITNESS.

1. A verdict rendered on conflicting evidence will not be disturbed.

2. Evidence showing that services were rendered by one as nurse to deceased is sufficient to charge the estate therefor, without proof of an express request by deceased.

3. Where plaintiff, after the death of deceased, continued in his former work of taking care of the latter's stables and stock without any authority from the administratrix, such services form a charge of necessity on the estate.

4. Expenses incurred by the widow before she was appointed administratrix, and not apparently for the benefit of the estate, are not chargeable against it.

5. Code Civ. Proc. § 1880, disqualifies parties or assignors of parties to an action against an executor or administrator, or persons in whose behalf such action is prosecuted on a claim against the estate of the deceased, from testifying as to facts occurring before the death of the deceased. *Held*, that the disqualification applies only to those parties who assert claims against the estate.

6. Code Civ. Proc. § 2049, provides that the party producing a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and show former inconsistent statements. *Held*, that the plaintiff in an action against an administratrix, having called her to testify in his behalf, is not necessarily bound by her answer.

7. In an action against an administratrix for services as nurse to deceased, one who served in the same capacity alternately with plaintiff may testify as to the nature and amount of the services.

Commissioners' decision. Department 2. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by E. N. Todd against Isabell J. Martin, administratrix of the estate of John Martin, deceased, to recover for services as nurse to the deceased in his last illness, and for other services. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter H. Linforth, for appellant. James W. Bartlett, for respondent.

HAYNES, C. The defendant appeals from the judgment entered against her upon the judgment roll and a bill of exceptions setting out the evidence. A demurrer to the complaint was overruled. No point is made thereon in appellant's brief, and, as the complaint states a cause of action, the other objections raised need not be noticed. The claim consisted of several items, aggregating $876.66, and stated several credits, leaving an alleged balance due plaintiff of $368.16, and was allowed by the administratrix, upon presentation, for the sum of $57.08. The jury returned a verdict for $361.16, upon which judgment was entered for plaintiff. Appellant reserved a large number of exceptions to evidence, and also specifies particulars wherein the verdict is not justified by the evidence. The sufficiency of the evidence will be first considered.

1. The first item in plaintiff's claim is for the sum of $93, alleged to have been given by the plaintiff to John Martin in May, 1891, to be placed in his safe for safe-keeping. There was evidence from which the jury would be justified in finding the delivery of the money to Martin, and that it was put in the safe. There was also evidence tending to prove that on February 5, 1892, the money had not been returned to plaintiff. When delivered to Martin, the money was in a purse, according to the testimony of Mr. Everhart, and was counted by Martin; and that on February 5, 1892, he, Everhart, heard Mr. Martin say to plaintiff that he was going below, to be gone some time, and asked Todd whether he wanted his purse, to which Todd replied that he did not. Mr. Martin died July 30, 1892. On August 17th, Mr. Spratt, the public administrator, took charge of the estate, and opened the safe, but did not find any purse containing money; that he found an empty leather bag, which was neither marked nor tagged. John Hewston, who had been in Martin's employ for about 15 years, testified that he knew of Martin's custom with reference to keeping money and packages in his safe for others; that he had frequently kept money for him; but that it was his invariable custom to tag or label all money, packages, or purses belonging to others with their names upon them. A period of nearly seven months elapsed after the conversation in relation to the purse, testified to by Everhart, before the death of Martin, during which the plaintiff had almost daily opportunities of receiving back his purse. On the other hand, plaintiff, during all the time after the deposit, was in the employ of Martin at a salary of $50 per month, and it does not appear that at any time he was in need of money beyond that which he received for his labor. Whatever may be our opinion as to the weight of evidence, we think the evidence was such as to require its submission to the jury, and that this court should not disturb the verdict thereon.

2. As to the amount of credits defendant was entitled to on plaintiff's account for services, the testimony was conflicting to such an extent that we are not permitted to say that upon that point the verdict is not justified by the evidence.

3. It is contended that there is no evidence tending to establish the fact that plaintiff rendered "fifteen days' service, or any number of days' services, to John Martin, as a nurse, at his request." Inasmuch as defendant admitted that plaintiff did serve as a nurse for John Martin for five days during his last illness, we infer that counsel for appellant bases the alleged insufficiency of the evidence upon the absence of direct evidence of a request by John Martin. We think the evidence was sufficient in both particulars. It is not necessary that there should be direct evidence of an express request. The fact that he was called from his regular employment at the livery stable, and devoted his time to the care of Mr. Martin, with his knowledge and that of his wife and the attending physician, is sufficient to show a request. Or, if Mr. Martin had been unconscious, the request of the wife or the physician would have been deemed his request.

4. One item in plaintiff's claim is for seventeen days' services at the stable, from August 1st to the 17th, which was after the death of Mr. Martin. It is objected that these services were not shown to have been rendered "at the request of Mrs. Martin, as administratrix of the deceased." The facts were that, prior to his death, the deceased conducted a livery stable, and plaintiff was employed therein for a year or more at a compensation of $50 per month. From the time of Martin's death until August 17th, there was no administrator or other person legally authorized to take charge of the estate, or to employ any one in any service connected therewith. It could not have been the duty of the plaintiff, in view of his past employment by Mr. Martin in that service, to have ceased to care for the property, or permit the horses to die of hunger or thirst. Services of this character so rendered prior to the appointment of an administrator must be deemed to have been included in the term of service contracted for by the deceased, and to form a proper charge against the estate; or, if it cannot be placed upon that ground, it is, while not a debt either of the intestate or the administrator, a charge thrown upon the assets by necessity, but for which the administratrix subsequently appointed would not be personally liable. It is analogous to a claim for funeral expenses paid by a person other than the administrator or executor, which, at common law, are a charge against the estate, though not strictly a debt due from the de-

cedent. In Patterson v. Patterson, 59 N. Y. 574, the defendant in an action upon an obligation made to the deceased, but payable to the executor, was permitted to set off the funeral expenses of the deceased paid by the defendant. In Hapgood v. Houghton, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. Humanity, as well as the interests of the estate, required that the stock be cared for, and no one could more appropriately assume that duty than one who had been employed by the decedent in his lifetime to perform the same service; and as to the value of the services, that compensation which had been paid plaintiff by the decedent will be deemed reasonable; and as to services rendered after the death of Mr. Martin, plaintiff is a competent witness.

The item in plaintiff's claim for the sum of $5 of plaintiff's money, expended in making a trip to Redding and return at the request of Mrs. Martin, August 6, 1892, for the purpose of bringing Henry Martin to Weaverville, is not a charge for which the estate is liable. Mrs. Martin was not then administratrix, nor does the service appear to have been for the benefit of the estate, and no evidence should have been received in regard thereto. It is clear, however, that this item was disallowed by the jury. This item was for $5. There was another item of $2 for "cash paid Lewis Moore, in change." The least of the remaining four items was $28.33. No evidence was given as to the $2 item. The verdict was for $361.16, while the amount claimed was $368.16, the difference being the amount of this and the $2 item above named. The error did not, therefore, prejudice the defendant.

Plaintiff called the defendant as a witness, and asked her to give the dates and items of the cash payments made to the plaintiff between the 1st day of June, 1891, and the 15th of August, 1892. Counsel for defendant objected, on the ground of incompetency, under subdivision 3 of section 1880, Code Civ. Proc., and the objection was overruled. Defendant thereupon, as such witness for the plaintiff, was permitted, over the objection of defendant, to testify from the books of the deceased to the several items of payments referred to in the question. Section 1880, Code Civ. Proc. provides: "The following persons cannot be witnesses: 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." This section has been several times considered by the court, but never under precisely the circumstances here existing. We think, however, that in Chase v. Evoy, 51 Cal. 618, a construction was given which may fairly be held to include this case. There the action was against the administratrix upon a claim against the estate, the claim consisting of a promissory note made by the decedent and two others, who were also defendants. The administratrix of the deceased maker called one of her codefendants, and proposed to prove by him "what, if anything, had been paid thereon, and how paid." This court, after saying that the language of the statute, if literally construed, might exclude all parties to the action, whether called to testify for or against the estate, but that to give it such construction would defeat the manifest purpose of the act, and that the language was capable of a different construction, further said: "Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer in esse, it was deemed unwise to permit the other party to testify to his version of the demand when called by the plaintiff in a proceeding to establish the demand. The statute, it is true, provides in general terms that 'the parties to an action or proceeding' against the estate shall not testify, but the obvious meaning of this provision is that a party to the action shall not testify against the executor or administrator." We think it could not have been the intention of the legislature to render incompetent as a witness in such cases the executor or administrator who is charged with the duty of protecting the estate against improper or unjust demands, as in many cases it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. Nor do we think the language of the Code inconsistent with such construction, but, on the contrary, that its manifest intent and purpose require it. We think it is only parties who assert claims against an estate who are rendered incompetent to testify, and that the word "parties" does not refer to the executor or administrator who is the party defendant. If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the person for whose benefit it is prosecuted, and upon that ground declare him incompetent, but does not do so simply because he is the party defendant. In Blood v. Fairbanks, 50 Cal. 420, it is true, it was said that all parties to the action were incompetent. But in that case it was not necessary to decide that question. Hewitt had assigned to Blood his interest in the contract, but for some reason he was made a party to the action, though, as he had no interest, he was merely a nominal party. He was held to be incompetent as a witness, because he was a party. But he would have been incompetent if he had not been a party, for the reason that he was an assignor of the plaintiff, and so within the express letter of the statute. In the case at bar we see no reason why the defendant was not a competent witness, and, being competent, because not within any of the grounds mentioned in the Code rendering her incompetent, the plaintiff had the right to call her as his witness.

Plaintiff was asked whether he had a conversation with Mrs. Martin, after the death of Mr. Martin, relative to the purse alleged to have been placed in the safe. The objection made by defendant was properly overruled. The question did not call for the conversation, and the conversation itself might have been of a character to make it relevant and competent. The conversation, as afterwards given by the witness, was unimportant; but, if it was not competent, there was no motion to strike it out.

The testimony of J. C. Todd is relevant so far as it shows the opportunity his employment as nurse gave him of knowing of the services of the plaintiff in the same capacity, and the character of the services required as a nurse in that case. The fact that plaintiff came in the evening, and assumed the duties of nurse, and that the witness found him there in the morning when he returned, was evidence from which the jury could properly infer, in the absence of evidence to the contrary, that plaintiff was on duty all night; and defendant's motion to strike out the testimony of the witness was properly denied.

As to appellant's contention that respondent, having called Mrs. Martin as a witness, is bound by her answers, it is sufficient to say that section 2049, Code Civ. Proc.,[1] lays down a different rule. The instruction given to the jury upon this point at defendant's request was not accurate, but was evidently not understood, either by the court or jury, to mean what counsel now contends it means. The court certainly did not understand by the words, "the plaintiff is bound by the testimony of the defendant given by her while a witness on his own behalf," more than is expressed in the section of the Code above cited. Besides, this instruction must be taken in connection with others requested by the defendant, to the effect that the jury were the exclusive judges of the evidence, and that they might "reject the most positive testimony of a witness."

The modifications of defendant's requests to instruct the jury were proper, and the instructions refused were properly refused. These modifications and refusals, so far as they represent any question of importance, fall within points already discussed, and need not be further noticed.

Finding no error which requires a reversal, we advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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104 Cal. 161

ALLISON RANCH MIN. CO. v. NEVADA COUNTY. (No. 18,310.)

(Supreme Court of California. Sept. 21, 1894.)

TAXATION — BOARD OF EQUALIZATION — INCREASE OF ASSESSMENT—NOTICE TO CORPORATE OFFICER.

1. A notice by a county board of equalization, addressed to "D., Owner" of a mine, is not evidence that the property was assessed to D.

2. Where a notice by a county board of equalization was to "D., Owner" of a mine, it may be shown that he was an officer of a corporation owning the mine, authorized to accept service of the notice.

3. A notice by a county board of equalization will not be rendered ineffectual by reason of any inaccuracy on the part of the clerk in making up the minutes of the proceedings of the board.

4. It is not necessary, to authorize a county board of equalization to increase an assessment, that a complaint or affidavit that the assessment is too low should be filed with the board.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Certiorari by the Allison Ranch Mining Company to review the proceedings of the board of equalization of Nevada county. Judgment was rendered for respondent, and petitioner appeals. Affirmed.

Chas. W. Kitts, for appellant. Thos. S. Ford, Dist. Atty., for respondent.

DE HAVEN, J. This proceeding was commenced in the superior court of Nevada county for the purpose of obtaining a judgment annulling an order of the board of equalization of the county of Nevada, increasing the assessed valuation of certain property belonging to the petitioner. The petitioner is a corporation, and alleges in its petition that the said board of equalization, "without any notice to petitioner, and without taking any evidence or proofs whatever, arbitrarily raised and increased the assessment upon its said property, as made by the assessor, from $12,000 to $25,000." Upon the filing of the petition a writ of certiorari was issued and directed to the county of Nevada. In its return to the writ the county filed an answer denying the allegations of the petition, and also caused to be returned to the court a certified copy of all the proceedings of the county board of equalization, so far as related to the matter of increasing the petitioner's assessment. Upon the hearing the superior court gave judgment to the effect that the petitioner take nothing by the action, and that the petition be dismissed. The judgment itself recites that "upon the evidence, arguments, proofs, and premises, the court finds as true each and every allegation of the answer, and finds as untrue such allegations of the petition as are denied." From this judgment the petitioner appeals, and the case is presented here upon the petition, answer, return, and judgment of the court, and without any bill of exceptions.

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[1] Code Civ. Proc. § 2049, provides that "the party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may show that he has made at other times statements inconsistent with his present testimony."

It is claimed by the petitioner that the following entries appearing in the minutes of the board of equalization show affirmatively that the order complained of was made without notice to the petitioner:

"July 11, 1893. A. E. Davis, owner of the Allison Ranch mine, in Grass Valley township, is hereby cited to appear and show cause why the assessment on said mine should not be raised from $12,000 to $25,000.

"July 17, 1893. A. E. Davis, owner of the Allison Ranch mine, heretofore cited to appear and show cause why the assessment on the Allison Ranch mine should not be raised from $12,000 to $25,000, appeared before the board through C. W. Kitts, Esq., who being duly sworn, made a statement in relation to the said mine. The board took the matter under advisement. Ordered, that the assessment of the Allison Ranch Mining Company, on the Allison Ranch mine, in Grass Valley township, be raised from $12,000 to $25,000."

It is argued in behalf of the petitioner that this record of the board of equalization shows that its order was based upon notice given to A. E. Davis, and not to the petitioner, and presumptively that the property was originally assessed to Davis as owner. We cannot accept this view. The mere recitals in the minutes of the board referring to A. E. Davis as owner of the Allison Ranch mine do not determine the title to the property. They do not show that the original assessment was not made to the conceded owner, the petitioner here, nor are these entries at all inconsistent with the fact that A. E. Davis was the president, secretary, or managing agent of the petitioner; and, if he was, the notice served upon him of the intention of the board to increase the assessment of the Allison Ranch mine was notice to the petitioner, and such notice was not rendered ineffectual by any want of accuracy upon the part of the clerk in making up the minute entries in relation to it. It was competent upon the hearing before the superior court to show by evidence aliunde the minutes that A. E. Davis was the president, secretary, or managing agent of the petitioner, and that the Allison Ranch mine was originally assessed to it; and we will presume, in support of the judgment of the superior court, that such proof was made. Such evidence would not contradict the record of the board of equalization, and would show that it acted within its jurisdiction in making the order complained of. We do not think that the board of equalization should be held to any very strict rules in the matter of keeping the minutes of its proceedings, and the rule as to the matter of notice to be given the property owner in such cases as this is properly stated in Waterworks v. Schottler, 62 Cal. 103, as follows: "In our opinion, as intimated in Patten v. Green, 13 Cal. 330, such tribunals as the boards of supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein; and if, under a rule or an order of such boards, a party has notice of the intended action of a board of supervisors, sitting as a board of equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the board, we will hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board."

It is urged that the order of the board was void because not based upon a complaint or affidavit filed with the board. There are two answers to this contention: First, the petition does not assail the jurisdiction of the board upon such ground, and there is nothing in this record to show that the objection was raised in the superior court. Second, under section 3673 of the Political Code, the jurisdiction of the county board of equalization to give notice of its intention to raise any individual assessment is not made to depend upon having before it a complaint or affidavit that such assessment is too low, and asking that the same be increased. The jurisdiction of the board to act in the matter of increasing an assessment is complete after giving to the person assessed the notice prescribed by that section, and the board may give such notice on its own motion. Judgment affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

104 Cal. 106

DAW v. NILES et al. (No. 19,140.)

(Supreme Court of California. Sept. 13, 1894.)

PAYMENT OF MORTGAGE TAX—PAROL AGREEMENT BY MORTGAGOR—FORFEITURE OF INTEREST.

A contemporaneous parol promise by a mortgagor to pay the mortgage tax does not invalidate the stipulations for interest, under Const. art. 13, § 5, providing that every contract obligating a debtor to pay the tax upon money loaned shall, in that respect, and as to any interest specified therein, be void. Garoutte and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George W. Daw against William Niles and John B. Niles to foreclose a mortgage. There was a judgment for plaintiff, from which defendants appeal. Affirmed.

A. W. Hutton and Minor & Woodward, for appellants. Albert M. Stephens, for respondent.

BEATTY, C. J. This is an action to foreclose a mortgage given to secure the payment of a promissory note for $10,000, payable 10 years after date, with interest at the rate of 7 per cent. per annum, and containing a stipulation to the effect that if the interest is not punctually paid the principal and accrued interest shall become immediately due and payable, at the option of the holder. Nearly four years having elapsed after the execution of the note, without the payment of any part of the principal or interest, the plaintiff exercised his option to treat the whole amount as immediately due, and sued to foreclose. The defendants, by way of defense to the action, allege that at the time of the execution and delivery of the note and mortgage, and as a part of the same transaction and contract, it was agreed between the plaintiff and the makers of the note and mortgage that they (the mortgagors) should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money or mortgage, anything in said promissory note or mortgage, or either of them, to the contrary, notwithstanding. And it is further alleged that said agreement was knowingly made and omitted from said mortgage with the intent to evade the provisions of section 5 of article 13 of the state constitution, and on that ground defendants deny that by their failure to pay the alleged interest on said note the same became or is due or payable. In other words, they take the position that, on the facts alleged in their answer, no interest can ever become due on the note, and no suit to collect the principal can be commenced short of 10 years from its date. This position is undoubtedly sustained by our decision in the recent case of Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310; but the difference between that case and this is that there the agreement to pay the taxes on the mortgagee's interest in the land was in writing, while here it is only claimed to have been by parol; and the question is not as to the sufficiency of the defense, as pleaded, but is wholly with respect to the competency of the evidence offered to sustain it.

At the trial, one of the defendants and joint makers of the note and mortgage, having been called and sworn as a witness on behalf of the defendants, was asked the following question: "Did you and your brother, John B. Niles, have any agreement with the plaintiff with reference to the payment by you and your brother of the taxes to be assessed or levied upon the mortgage set forth in the complaint, or the money secured thereby?" To which the plaintiff objected upon the grounds, among others, that it was incompetent, and that oral evidence was inadmissible for the purpose of contradicting or varying the terms of the note and mortgage, and that no oral agreement could be shown, binding the mortgagors to pay the taxes upon the mortgage, or upon the money thereby secured. The attorneys for defendants having admitted that there was no agreement in writing respecting the payment of said taxes, the court sustained plaintiff's objection to the question, and also to the further and more formal offer of the defendants to prove the allegations of the answer as above set forth. Thereupon, the cause was submitted for decision, and the decree of foreclosure was entered, including a direction to pay to the plaintiff, out of the proceeds of the sale of the mortgaged premises, the principal of the note, with accrued interest, counsel fees, and costs. The defendants appeal from the judgment upon a record showing the facts as here stated, and the question to be determined is whether the superior court erred in excluding evidence of an oral agreement to pay the taxes on the debt or mortgage. The appellants do not question the general rule as to the inadmissibility of oral evidence to add to, contradict, or vary a written agreement, but they claim to be within one of the well-understood exceptions to the rule.

Section 1856 of the Code of Civil Procedure states the rule and its exceptions as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties."

The contention of appellants is that the validity of their agreement to pay interest was the fact in dispute; that the parol promise which they offered to prove would have rendered said agreement void; and, therefore, that their offer came within the second exception to the rule. This conclusion seems to be inevitable if it be true, as the argument assumes, that the alleged parol promise to pay the taxes would have rendered the agreement to pay interest void, and the question therefore is narrowed down to this: Does a parol promise by a mortgagor to pay the mortgage tax invalidate the written stipulations for interest contained in the note and mortgage? This is a very serious question, the decision of which is fraught with the gravest consequences, not only to the entire business community, but more especially to those whose interests or necessities compel them to become borrowers of money. To hold that such a parol promise does invalidate the written agreement is not merely to punish actual transgressions of the supposed prohibition of the constitution; it is to set at large every written agreement by which the payment of money is or shall hereafter be secured; it is to introduce doubt and uncertainty where now is certainty and security; it is to multiply litigation, and to make possible infinitely more fraud than it can possibly prevent,—and all this for the sake of a more than doubtful advantage to necessitous borrowers, for, since there is no limit imposed either by the laws or constitution of California to the rate of interest that may be exacted by the lender of money, it would seem that any additional risk to which the business of lending is subjected can only result in an increase of the rates of interest. But the question before us is one of constitutional construction, and must be decided without reference to the argumentum ab inconvenienti, unless the provision in question is of doubtful or ambiguous import.

Section 5 of article 13 of the constitution reads as follows: "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." The parol promise of the defendants in this case does not come within the literal terms of this provision of the constitution, nor, we think, within that natural and unforced construction of its terms for which they contend. The language of the section is not happily chosen, and, literally taken, involves an absurdity, for it speaks of a contract which obligates the debtor, and is at the same time void. What is evidently meant, however, is a contract which, but for the invalidating effect of this provision, would obligate the debtor to pay the tax, and this contract must be a part of the contract to pay the interest, for it is the interest specified therein, i. e. in the contract to pay the tax, which is alone invalidated. Upon these conditions, it is legally impossible that a parol promise to pay taxes should invalidate a written promise to pay interest, for such parol promise could never obligate the debtor. Code Civ. Proc. § 1639. It could never be proved against him under the rule of evidence above quoted (Id. § 1856), for the reason therein stated,—that, with the exceptions enumerated, there is a conclusive presumption that the writing contains all the terms of the contract. But we would not be willing to rest our decision on this technical and literal construction of the clause in question, or upon its evident conformity to the whole tenor and natural import of the language used. We concede that if, upon a comprehensive view of the several provisions of the constitution relating to this subject, there is disclosed a well-defined policy and intention on the part of the framers of the constitution, which is capable of enforcement, we should give to this particular clause a construction in harmony with such policy, and an effect which will not only prevent any direct infringement of its terms, but every indirect attempt to evade them. The appellants contend that the policy of the constitution in this particular is to protect improvident and necessitous borrowers from the exactions of greedy money lenders; that its inhibition of contracts by which the debtor is obligated to pay the mortgage tax is in perfect analogy with the usury laws; and that, on the same grounds, and to the same extent, that parol evidence was admissible to prove that a contract was usurious, it must be admissible to prove a contract by the debtor to pay the mortgage tax. Conceding, for the present, the correctness of these propositions, let us see how far the authorities bear out the claim of counsel as to the admissibility of parol evidence to sustain a plea of usury.

At the outset of their argument, they quote the language used by Lord Mansfield in delivering the opinion of the court in Floyer v. Edwards, Cowp. 114, "And, where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute," and also a saying attributed to Lord Coke: "To them that lend money my caveat is that neither directly nor indirectly, by art or cunning invention, they take above six in the hundred, for they that seeke by sleight to creepe out of these statutes will deceive themselves, and repent in the end." Although unable to verify the quotation, we have no doubt that this language is correctly attributed to Lord Coke, for the first clause of the sentence contains almost a literal statement of the terms of the usury statutes, and the last is simply a variation of the statement subsequently made by Lord Mansfield of a perfectly familiar doctrine especially applicable to the laws against usury. But neither Lord Coke nor Lord Mansfield, nor any other English court or judge, so far as we are advised, ever held a case like this to be within the doctrine so stated. We have not, of course, been able to run through the almost countless cases in which the plea of usury has been interposed; but, so far as our research has extended, we have found no English case which sustains the contention of appellants on this precise point, and the industry of counsel seems to have been equally fruitless. What they have found, and all that they have found, are cases like that above cited from Cowper's Reports, of which there are a great number, all illustrating the precise meaning and limiting the application of the general statements of Coke and Mansfield above quoted. When a money lender took a written obligation by which his debtor expressly promised to pay the principal of the loan with more than legal interest, the case was one to which the maxim "res ipsa loquitur" applied, and of course the doctrine in question had no application; but there were a large number of cases in which a plea of usury was interposed to an action on a contract by which the debtor ostensibly agreed to pay money upon some other consideration than a loan, or by which he agreed to pay more than he had received, and these were the shifts and devices to which the sayings above quoted referred. The case of Floyer v. Edwards, supra, is a good illustration. The plaintiff was a refiner, and sold the defendant gold and silver wire upon an agreement made at the time of the sale that, in case the price was not paid in three months, the defendant should pay to the plaintiff a half-penny an ounce per month for so long a time as the money should remain unpaid. If this was a bona fide sale, the agreement was lawful, and in strict accordance with the custom of the Goldsmiths' Company, although a half-penny per ounce was far above the lawful rate of interest, while, if it was not a sale, but in fact a loan disguised as a sale for the purpose of evading the statute, the form in which it had been put would not protect it. The case was tried before Lord Mansfield at nisi prius, and parol evidence as to the negotiations preceding the transaction admitted for the purpose of determining whether it was in fact a loan or sale. Under his lordship's instructions the jury found for the plaintiff, and the rule for a new trial was discharged by the court in banc. In the course of his opinion, Lord Mansfield used the language above quoted, which, in that connection, meant only this: That, where the real consideration of a promise to pay money is a loan, that consideration may be proved, notwithstanding the written contract has recited a sale of goods as the consideration of the promise. But, of course, it was a matter of familiar knowledge to Lord Mansfield that not only this particular device, but a great number of others, had been practiced by money lenders from the very beginning of the legislation against usury, for the purpose of evading the statutory penalties, and no doubt he had those practices in mind. Among the earliest and most common of these contrivances was the grant of annuities or rent charges, redeemable and otherwise. A large number of the decisions upon such cases are reviewed by Chief Justice Marshall in his opinion in Scott v. Lloyd, 9 Pet. 418, where such a grant was held to have been a mere cover for a loan at usurious rates. Another device was to compel the borrower to buy from the lender a half interest in a clock, to be kept by the lender, or an impossible wardrobe, or other article of furniture, or a horse or a slave, or goods of any kind, at an extravagant price, and including this price in the note or bond for the money actually loaned. Another was to exact a premium for the loan at the time of making the advance, or, in other words, to take a note for a larger sum than was actually loaned. Another was to exact a bill of exchange for the amount of the debt or loan, with a premium added largely in excess of the rate of discount on such bills. There were many others, as the decided cases show; but they all possessed one feature in common, and it was that particular trait which gave point and force to the observation of Lord Coke and Lord Mansfield, and which clearly indicates the extent of its just application. In every one of the cases to which we have referred, it will be seen that the action was upon a contract,—generally in writing,—which was by its terms lawful and legitimate, and not only capable of proof against the debtor, but legally enforceable according to its terms, if valid in fact as well as in appearance. In other words, the lender had so "contrived" that he could actually enforce the payment of unlawful interest against an unwilling debtor, and thus defeat the purpose of the statute, unless the debtor was allowed to prove, not a collateral verbal promise of his own, having no validity or force whatever, but a concrete fact outside of the agreement, and tending to show that the ostensible agreement upon which the action was founded was a sham, or that the consideration or declared object of the contract was not its real consideration or object. In such cases the courts were confronted with a dilemma in which a choice of evils was necessary. They had either to make an inroad upon or an exception to a most salutary rule of evidence, or they must lend themselves to the enforcement of contracts, the purpose and effect of which was to frustrate the statute. In this situation there was, of course, but one thing to do, or rather there was but one precedent to follow, for the difficulty was one that had been encountered by the courts long before the usury statutes, and had been solved by making the necessary exception to the rule of evidence. But this exception was made no broader than was necessary in order to avoid the greater evil of enforcing a contract founded upon an illegal or insufficient consideration, or entered into for the accomplishment of an unlawful object. There was no occasion to extend the exception to a case like this, in which the verbal promise sought to be proved could never have had the slightest force or validity, and which, if made, gave the lender no advantage, and subjected the debtor to no liability. This distinction is clearly and forcibly stated by Chief Justice Parker in delivering the opinion of the supreme court of Massachusetts in the case of Butterfield v. Kidder, 8 Pick. 512,—a case which involved the precise point under consideration here. His opinion is short, and we cannot do better than quote it in full. He says: "The verbal promise to pay eight per cent. when the note was made, by which there was a promise to pay the money lent and lawful interest only, ought not to vitiate the note, for it was wholly without consideration, and cannot be taken as part of the contract, which was in writing, and must be considered as evidence of the intention of the parties. Supposing the agreement to pay and receive more than six per cent., the plaintiff could recover nothing but what is promised by the note. The additional promise was therefore wholly nugatory, and cannot affect the note. If it be said that by this contrivance the statute may be avoided, the answer is that, if that verbal promise should be carried into effect by paying unlawful interest, the taking would be an offense, and the party would become liable for the penalty. But by this contract now in suit there is not reserved or secured more than six per cent., and therefore the contract is not void."

It cannot be denied, however, that in some cases this distinction, and the principle upon which it is founded, have been overlooked. An instance of this is presented by the South Carolina case of Willard v. Reeder, 2 McCord, 369, which, like the Massachusetts case last cited, involved the precise point under discussion. Another case involving the same point, and decided the same way, is Lear v. Yarnell (decided by the Kentucky court of appeals) 3 A. K. Marsh. 419. Disbrow v. Crawford (a case decided by the supreme court of New Jersey) 18 N. J. Law, 325, is to the same effect, and so is the case of Gilmore v. Woolock (decided by the supreme court of Wisconsin) 13 Wis. 589. With these exceptions, none of the cases cited by counsel sustain them upon the point under discussion; and, as to these cases, we can only say that the views upon which they were decided do not command our assent. In the South Carolina case no authority is cited, and no reason given, to sustain the conclusion of the court, except one that begs the whole question. The court assumes that an infraction of the statute is consummated by the mere giving of an oral promise of no force or efficiency whatever, while, if our view and that of the supreme court of Massachusetts is correct, there results from such a promise no infraction of the law. In the Kentucky case, also, no authority is cited, and the court reasons in a circle to the same conclusion reached by the South Carolina court. In the New Jersey and Wisconsin cases the decision is rested upon the supposed authority of a number of decisions cited in the respective opinions, but a reference to those decisions will show that they lend a very slight support to the proposition under discussion. The first case cited by the New Jersey court is Fussil v. Brookes, 12 E. C. L. 594, 2 Car. & P. 318. The report is of the proceedings on the trial at nisi prius before Abbott, C. J. The defendant proved the actual payment of interest in excess of the lawful rate, but the court held that this did not avoid the bond without proof that the payment was in pursuance of an agreement made at or before the execution of the bond, but, if the jury believed that it was made at or before the execution of the bond, then the bond was void. The verdict was for the plaintiff. This case, it will be observed, is in precise accord with the decision of the Massachusetts court, and establishes the proposition that, where a parol promise to pay more than legal interest is relied upon to sustain a plea of usury, two things must occur: There must be the fact of actual payment of usurious interest, and there must have been a promise in pursuance of which the interest has been paid. Clearly, this case does not support the proposition to which it is cited, and the same may be said of six out of the seven other cases cited in the same connection. In one only (Merrills v. Law, 9 Cow. 65) was the question involved, and the decision of the supreme court, which was afterwards reversed by the court of errors (6 Wend. 268), was mainly upon a question of practice. Each of the other cases involved one of the devices above referred to. In the case in 8 N. J. Law, 233 (Clark v. Badgley), for instance, the lender sold the borrower a half interest in a clock as a part of the same transaction, and was to keep and repurchase the clock at about half the selling price. In the Wisconsin case, also, there is the same indiscriminate citation of cases which do not support the decision, along with two or three which do support it,—a sure indication that the court had entirely missed the distinction so clearly made in Butterfield v. Kidder, supra.

We have carefully examined all the other cases cited by the appellants, and find that, so far as they involve the plea of usury, they were, without exception, devices by which the borrower had been compelled to enter into an apparently valid contract in writing to pay usurious interest under the guise of an annuity, rent charge, purchase price of land, or something of the kind, or to sign a note or bill for more than the amount of the loan or debt. They are all, in other words, easily distinguishable from this case. In the case of Stein v. Swensen, 46 Minn. 360, 49 N. W. 55, for instance,—and we refer to this case because it comes nearer the point than any of the others,—the borrower clearly proved the fact that at the time of the loans and renewals he had been compelled to pay various sums in excess of legal interest, and in that connection was allowed to offer parol evidence of the understanding upon which such payments had been made. The case was in principle like Fussil v. Brookes, supra. In the cases of Buffendeau v. Brooks, 28 Cal. 642, and Agricultural Works v. Estes (Cal.) 32 Pac. 940, parol evidence was admitted for the purpose of showing that written contracts, apparently valid, had been entered into for unlawful purposes.

From this review of the authorities, it very clearly appears that the exception to the general rule of the statute (Code Civ. Proc. § 1856) does include evidence of a parol agreement which is part of a written agreement, when the effect of the parol agreement is to invalidate the written agreement. But the proposition that a parol promise to do an unlawful thing will invalidate the written promise of the same party to do what is entirely lawful has little authority, and less reason, to support it. It is, of course, very different when the written promise of one party is made in consideration of an oral agreement of the other party to do an unlawful act, as in Buffendeau v. Brooks, supra. In such case the illegality of the consideration may undoubtedly be proved as a defense to an action on the written contract, because it necessarily invalidates it. This is the case to which the second exception to the rule applies.

But even if we were satisfied with the doctrine contended for by appellants, as applied to the usury laws, there would still be a difficulty in applying it to the provisions of our constitution relating to the mortgage tax. We should be compelled to disregard their strict terms in favor of a large and liberal construction in furtherance of the policy of protecting borrowers against the greedy exactions of lenders. Before discarding a salutary rule of evidence, designed to prevent frauds and perjuries, in pursuit of any object, however laudable, it is worth while to consider whether such object is possible of attainment. If we should hold as appellants ask us to hold, there is no doubt that we should open to dispute and litigation an immense number of transactions which are otherwise secure against attack. There is as little doubt that such litigation would invite more or less falsehood and perjury, and result in some instances in the grossest injustice. All these things would come inevitably, but no single borrower would be protected or aided in the slightest degree against the exactions of lenders. As to existing parol contracts to pay the mortgage tax, if any such there be, they are simply void, and the borrower needs no protection from the courts. As to future transactions, no grasping money lender, accustomed to the business and aware of the constitutional provisions in question, will ever take a contract, written or verbal, for the payment of the mortgage tax, not only because such a contract is void, but for the all-sufficient reason that he has no need to do so in order to exact all that the borrower can be induced to submit to. He can take all that the traffic will bear in the shape of interest, the rate of which is unlimited either by the law or the constitution. By its own inherent defect in failing to limit the rate of interest, the supposed policy of the constitution is rendered incapable of enforcement by any action of the courts. All that they could accomplish by upholding the doctrine for which appellants contend would be to subject unwary lenders, in isolated cases, to a heavy penalty for accepting a promise of no obligation upon the borrower, and worse than useless to the lender,—an arrangement much more likely to originate in the craft of the borrower than in the greed of the lender. It is scarcely worth while to stretch the terms of the constitution, or broaden the exceptions to a salutary rule of evidence, in order to attain an object so inadequate. We think the superior court did not err in the ruling complained of, or in overruling the demurrer to the complaint. Judgment affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.

GAROUTTE, J. I am compelled to dissent from the views and conclusion of the court declared in this case. If I clearly grasp the grounds upon which the court has based its conclusion, they are, in the main, that this oral agreement offered to be proven was collateral to the principal contract, and also made without consideration. To my mind, neither of these positions has any support whatever. The oral agreement was neither collateral, nor was it without consideration. The consideration for it was the loan of the money, and this agreement to pay the taxes was based upon that consideration as fully and completely as the agreement to pay the interest on the loan, or to repay the loan itself. The agreement was not collateral. It was as much a part of the original contract entered into between these parties as any other covenant contained therein. It was so alleged to be in the answer, and so offered to be proven at the trial. Again, this case, in all essentials, is an exact photograph of the case of Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310, except that the agreement to pay the taxes was there made in writing, —a writing distinct from the mortgage. That writing was collateral to the contract and without consideration, if this oral agreement is collateral and without consideration, yet this court declared that such writing rendered the agreement in the mortgage to pay interest void. The error of the court seems to lie in assuming that the writing is conclusive evidence of the terms of the contract, and such appears to be the view of Chief Justice Parker in Butterfield v. Kidder, 8 Pick. 512, as well as we are able to ascertain those views from the very meager opinion of the court in that case; and that case is relied upon as the sole authority to support the judgment here declared. It was so decided under the peculiar and special provisions of the Revised Statutes of Massachusetts, and the decision, without doubt, must be read in the light of such statutes, for the principle there declared stands alone as an adjudication. In Dunscomb v. Bunker, 2 Metc. (Mass.) 8, reference is made to Butterfield v. Kidder, and it is there stated that the rule is different in New York; citing Merrills v. Law, 9 Cow. 65,—a case which is squarely opposed to the principal opinion of this court.

The elementary doctrine that parol testimony is not admissible, either to add to or subtract from, or in any way contradict or vary, the terms of a written instrument, is conceded and recognized by all courts, and, in conjunction with certain exceptions to the rule, is substantially stated in section 1856 of the Code of Civil Procedure, to wit: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * * (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made * * * to explain an extrinsic ambiguity, or to establish illegality or fraud." It is here proposed to show that a certain agreement of mortgage is void as to the interest specified therein, by showing by parol that one term of the agreement which in itself was unlawful was intentionally omitted therefrom. This provision of the statute in effect says that the terms of the agreement, as evidenced by the writing, are not conclusive as showing all its terms, and that other and additional terms may be shown by parol when the validity of the agreement is attacked. The validity of the agreement is here attacked, and the exception to the general principle forms the true rule. It appears to be the very case where the statute authorizes us to look beyond the contents of the writing for the purpose of ascertaining the actual terms of the agreement. The intent and purpose of the provision of the constitution was to protect borrowers, in their necessities, from the exactions of money loaners, and the provision is based upon the same lines, and owes its enactment to the same reasons, that caused the passage of the usury statutes found in nearly every state of the Union. It is charged that this agreement was entered into in this manner for the purpose of evading a provision of the constitution, and it would be anomalous if the offending party could so hedge himself about by writings as to prevent a court from reaching such iniquity. Lord Coke said: "To them that lend money my caveat is that neither directly nor indirectly, by art or cunning invention, they take above six in the hundred, for they that seeke by sleight to creepe out of these statutes will deceive themselves, and repent in the end." We are unable to discern any difference in principle between the present case and those cases arising under usurious contracts. In that class of cases the doctrine is settled beyond all question that contemporaneous oral agreements are admissible for the purpose of showing the usurious character of the contract, and thereby destroying its validity. In Willard v. Reeder, 2 McCord, 369, the syllabus states the point in the decision as follows: "Where a person borrowed money, and gave his note for the amount, with lawful interest, and at the same time made a verbal promise to pay five per cent. more interest, making twelve per cent., the court held, upon an action being brought on the note, that it was usurious and void, although it was left to the borrower's honor only whether he would pay more than legal interest." In the opinion of the court the following language is found: "But it is said this promise did not constitute an agreement, because it was merely honorary, and imposed no obligation on the defendant. This course of reasoning would lead to the ridiculous result that a party could not incur the forfeitures and penalty attached to the usury because the act by which it was consummated imposed no obligation. Agreements against law have the form, but not the binding efficacy, of contracts, and consequently, all the obligation they impose must, of necessity, be only honorary." In Stein v. Swensen, 46 Minn. 364, 49 N. W. 55, the same principle is again declared, and Gilfillan, C. J., said: "As there is no device or shift on the part of the lender to evade the statute, in or behind which the law will not look in order to ascertain the real nature of the transaction, as no act, however formal, no instrument, however solemnly executed, will stand in the way of the court getting at the truth, in order to determine whether there has been an attempt to evade the law, it was competent to prove the oral agreement indicated by the question." In 7 Am. & Eng. Enc. Law, p. 91, the exception to the general rule as to the admission of oral testimony bearing on written instruments, is stated as follows: "Provided, that any of the following matters may be proved: Fraud, intimidation, illegality, want of due execution, * * * or any other matter which, if proved, would produce any effect upon the validity of any document, or any part of it, or which would entitle any person to any judgment, decree, or order relating thereto." Wharton, in his work on Evidence (volume 2, § 935), says: "On the same reasoning it may be true that the contract embodied by the writing is illegal, and therefore void. If void, it is not a contract. To exclude evidence because it is a contract is to assume the very point in liti gation. Nor can any form of instrument of indebtedness preclude a debtor from setting up usury."

There is no sound reason to be urged why the present case does not come squarely within the principle declared by these authorities. If the oral evidence offered in this case was properly rejected, it was wrong to admit it against the practicers of usury, and thus the practical application of those statutes would be defeated by the simplest of devices. The penalties attached to a violation of this provision of our constitution are severe, and it is not likely that parties seeking to violate it would publish their wrong to the world by inserting this void stipulation in the original instrument designed for record. Neither is it probable that they would commit their purpose to writing at all. It would most naturally be done in secret, and in parol, for the borrower's parol agreement to pay the taxes upon the mortgage would be just as valuable to the money lender, and probably more valuable, than if the stipulation were incorporated in the mortgage itself. The agreement, however made, would be void in law, and its value would depend solely upon the honor of the borrower. Again, the provision of the constitution is very broad. It uses the words "every contract." It therefore clearly includes oral contracts for the loan of money not evidenced by writing of any character. Such loans would constitute solvent credits, and it cannot for a moment be contended that, while the contracts of loan may be oral, yet an agreement to pay taxes by the borrower upon such loan could not also be oral. It is thus apparent that, under certain contracts coming within the purview of the provision of the constitution, the idea of oral agreements to pay the taxes was naturally and necessarily present in the minds of the framers of the instrument.

Counsel in his argument, and the opinion of the court, to some extent, has strongly animadverted upon the depressing results to the general prosperity of the state, and to the special hardships which will fall upon the borrowers of money, if the construction which we have given this provision of the constitution shall be declared the law. In answer to such an argument, we can only say that, by reason of counsel's warmth and earnestness in the advocacy of his client's cause, we hope and believe his fears in this regard are highly exaggerated; but, whatever may be the result, we have no power to add to or subtract from the language of this section of the constitution. We must construe it as it stands enacted, and the question as to the wisdom and policy of this provision is not a matter for our consideration. This court is not the forum to administer relief for evil in the law, if evil there be. For all the purposes of this court, it is sufficient that it is a provision of the organic law of the land, and as such it is our duty to uphold and sustain it whenever assailed. As was said by Beatty, C. J., in discussing another provision of the constitution, in Sheehy v. Shinn (Cal.) 37 Pac. 393: "The provision of the constitution was aimed at the substance of these abuses, and not at the form. * * * To give effect to the constitution, it is as much the duty of the court to see that it is not evaded as that it is not directly violated." If we hold that this provision may be so easily evaded as is here contemplated, its repeal, for all practical purposes, will take effect from the date of such holding. Lord Mansfield said: "Where the real truth is the loan of money, the wit of man cannot find a shift to take it out of the statute." By this decision it requires but little wit to find a shift to avoid this provision of the constitution.

It is proposed to show in this case that this oral agreement to pay the tax upon the mortgage was a part and parcel of the principal contract, and that it was omitted from the contract evidenced by the writing for the very purpose of evading the provision of the constitution. We think the evidence admissible. To countenance any other practice would render the object of the provision entirely abortive. A provision of the constitution cannot be trifled with in that way, and the result of every such attempt, when the latter is brought to the attention of the court, must be that the money lender will be overwhelmed in his own folly.

HARRISON, J. I concur in the foregoing opinion of Mr. Justice GAROUTTE.

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104 Cal. 140

FAULKNER v. RONDONI et al. (No. 18,-255.)

(Supreme Court of California. Sept. 21, 1894.)

WATER FOR IRRIGATION—PRESCRIPTIVE RIGHTS—IMPEACHMENT OF WITNESS—CONFLICTING STATEMENTS.

1. The fact that the owner of land on a fork of a stream used all the water in such fork does not show such an invasion of the rights of a prior appropriator of water from the stream below the two forks as to give to the former a prescriptive right to use all the water in the fork, the lower owner having always received enough water for his purposes through the supply coming from the other fork of the stream.

2. In an action to determine the right to the water of a stream, defendant's witness was asked on cross-examination if he had not stated that plaintiff's right was inferior to defendant's. The witness denied having so stated, nor had he, on his direct examination, testified as to defendant's right. *Held*, that it could not be proven, to impeach him, that he had so stated, as such declaration, not being evidence against plaintiff, was not relevant to the issues.

3. Though it is a question of fact as to the amount of water actually diverted by a person claiming a right thereto by prescription, yet, as it is a matter of common knowledge that persons build their ditches with a view to the quantity of water needed, slight testimony is sufficient to show that the full capacity of the ditch was used.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by James Faulkner against Antonio Rondoni and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

A. J. Ridge and A. Burrors, for appellants. C. W. Kitts, for respondent.

SEARLS, C. This is an action to quiet title to a certain ditch and water right, to recover damages for the diversion of water therefrom, and for an injunction restraining defendants from such diversion. Plaintiff had a decree establishing his title to the ditch extending from his ranch, therein described, to a certain stream, known as "South Wolf Creek," and his prior right at all times to divert from said South Wolf creek, and to conduct the same through said ditch, water to the extent of 31 inches, measured under a 6-inch pressure; that the rights of defendants in and to the waters of said stream and its tributaries are inferior and subordinate to those of plaintiff; enjoining the defendants from interfering with said water to the extent of plaintiff's right, and awarding damages against defendants for $100, together with costs of suit; and further decreeing defendants to be entitled to use, for the purposes of irrigation upon the Paro and Rondoni ranches, so much of the waters of said South Wolf creek and its branches as remains in excess of the amount decreed to plaintiff. The cause was tried by the court without a jury, and written findings filed. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

It was admitted at the trial that plaintiff and his grantors have been the owners of and in the possession of that certain land or ranch described in the complaint since 1865, and that plaintiff has been such owner and so in possession since 1877. In 1867 Nathan Wheeler, the predecessor in interest of plaintiff, constructed a ditch and flume extending from said ranch to Wolf creek (sometimes called "Dry Creek"), tapping said creek about 400 feet below the forks thereof, by means of which he diverted the waters of said creek, and conducted the same to said ranch, where they were used for irrigation and domestic purposes; and he and his successors in interest, including the plaintiff, have ever since used said water for said purposes. Wolf creek and its tributaries are natural water courses, and during a portion of the year afford a large volume of water; but during certain seasons of the year, and especially in the months of July, August, and September, the water in said creek becomes scarce, and at times there are not 31 inches of water in said creek, at the head of plaintiff's ditch. Originally, no dam was necessary to divert the water into plaintiff's ditch; but with the lapse of time the channel of the creek, from natural causes, or from mining or other causes, has been cut down and lowered so that a dam is now necessary to divert the water. Defendants are the owners, as tenants in common, of the ranch described in their joint answer, situate upon said Wolf creek, at and near the head of plaintiff's ditch, the title to which comes to them from the Central Pacific Railroad Company through a deed executed by said company to Alexander Paro, September 2, 1873. Said ranch is designated as the "Paro Ranch." The defendant Antonio Rondoni is the owner of a ranch situated upon the forks of Wolf creek, above the Paro ranch, the title to which he derives by sundry mesne conveyances, from said Central Pacific Railroad Company, under a deed dated April 8, 1871. Both the Paro ranch and the Rondoni ranch are under cultivation, and defendants have facilities for diverting, and have been accustomed to divert, water from the forks of said Wolf creek to irrigate their growing crops on their said ranches. The evidence shows that on the 7th day of September, 1872, Alexander Paro, the predecessor of defendants in the Paro ranch, conveyed to Nathan Wheeler, under whom plaintiff claims, by deed of bargain and sale, the water ditch, with the water rights and water thereunto belonging and therewith connected, together with the right to keep said ditch in repair, and to enter upon the lands of the grantor for that purpose. As before stated, the ditch of plaintiff had its head upon, and in part crossed, the Paro ranch. Whether or not there had been any controversy as to the right to the water or to the right of way for the ditch prior to the conveyance does not appear. Defendants, in their answer, set out a prescriptive right in themselves to the use of all the water of both forks of South Wolf creek, upon the Paro ranch; and defendant Rondoni pleads a like right to the waters of the south fork or east fork of said creek, for use upon the Rondoni ranch situate on said fork. The case, so far as the facts are concerned, must turn (1) upon priority of appropriation; (2) upon the prescriptive rights, if any, of the several parties.

Near the close of appellants' brief, it is urged that "the entire judgment disregards the riparian rights of the defendants." There were good reasons for so doing. The complaint, after stating the date of the appropriation by plaintiff's predecessor, avers "that, at the time of the construction of said ditch and the appropriation of said water, the land over which said ditch ran, and over which said South Wolf creek or Dry creek ran, were open, unsurveyed, unappropriated government lands of the United States." The answers failed to deny this allegation, and the court found in consonance with it.

It was not necessary to find upon a fact admitted by the pleadings, but, had the court found against the admission, it would, if material, have been ground for reversal. The evidence showed the lands of defendants to be riparian to South Wolf creek or its tributaries, but, if they have any riparian rights to the water of said creek, they are subordinate and subject to the rights of appropriators who diverted such water prior to the divestment of the government title, and who have continued to use such water pursuant to such appropriation for a useful purpose. We do not know judicially that the land in question is within the limits of a railroad grant, or that, if within such limits, it is land which the railroad company could take under the grant, or, in the absence of proof, that such railroad company ever had any title thereto. The court found in favor of plaintiff as a prior appropriator, and upon his claim of a prescriptive right to 31 inches of water, and against the prescriptive rights of defendants, as against plaintiff, set up in their answers. The evidence was, it is thought, amply sufficient to support these findings. There are in the very nature of the claims set up to the use of water, in cases of this character, certain elements of uncertainty which cannot be eliminated. Mountain streams, which furnish large quantities of water during a portion of the year, and which is appropriated by many persons, during the dry season, or in years of drought, dwindle to mere rills, or cease to flow. Witnesses who have observed the annual user of the water by given individuals for many years are prone to forget as to the nonuser, when the quantity is small, from the simple fact that the use impresses the mind, while its absence is not noticed by the casual observer. These, and some other elements of uncertainty which might be mentioned, render the task of determining the exact facts in a given case extremely difficult. A careful review of the evidence and admitted facts in the present case leads to the conclusion that upon all the salient points the court below deduced the facts from the testimony with a large degree of accuracy.

Appellants contend that the finding that plaintiff's ditch would carry 31 inches of water is unsupported by the evidence. In support of this contention, we are referred to the testimony of C. E. Uren, a civil engineer, who testified in substance that a short distance below the measuring box there was an old flume, which had a capacity of only 13½ to 15 inches under a 6-inch pressure. He stated that the capacity of the ditch above the flume was 35 inches. The witness speaks of the grade of the flume, but the record is silent as to what that grade was, thus omitting an important factor essential to a calculation of the capacity of the ditch. On the other hand, plaintiff and Alcorn, a witness on his behalf, testified that the ditch would carry 31 inches, and that the flume would carry as much as the ditch. There was also evidence (1) that plaintiff used a portion of the water to irrigate above this flume; (2) that, at the time when Uren probably measured the flume, it was split, and not in repair, and that another board was put on to raise it two inches higher. Alcorn, who was entirely familiar with the ditch and had charge of it for a time, says he measured the flume, and "it was 8 inches bottom, and 6 inches sides." That this was the size of the flume when in its normal condition, and that a portion of the side was removed from some cause when Uren measured it, may well be inferred from the evidence.

The objection that there was no evidence to show that the plaintiff or his grantors have continuously, from 1867 to 1891, diverted into their ditch so much of the water as the same would carry, etc., cannot be maintained. The statement specifies that there was evidence to show that, since 1866–67, Wheeler and his successors in interest, including the plaintiff, have each year used the water through the ditch for irrigation and domestic purposes upon plaintiff's ranch. Several of the witnesses alluded to the water being scarce at plaintiff's dam by saying there was not enough to fill his ditch; and plaintiff, as a witness in his own behalf, said in substance that he had sufficient water to irrigate his ranch until 1891, and that it required his ditch full to irrigate his crop. If these assertions of the witness were correct, it must follow that his ditch was accustomed to carry water to the extent of its capacity, when it was to be had. No point was made on this question at the trial; hence, we need not expect to find the evidence full on that head. Men usually construct ditches of this character with a view to the quantity of water needed or to be had, and not for amusement; and when constructed and used, while the quantity of water actually diverted is a question of fact, the user of the quantity their ditches will carry is so natural, and so nearly in accord with our common knowledge, that slight testimony is sufficient to establish the fact.

Passing a number of objections to the findings, which are merely technical and unimportant, or, as in case of one of them, directly in the face of the facts, as stipulated in open court, and we come to the question most elaborately discussed by appellants in their brief, viz. that relating to the findings of the court against the prescriptive rights of defendants, claimed to have been acquired by them by an adverse user of the water for a period in excess of five years. The right which is acquired in and to the waters of a stream by a prior appropriation thereof may be lost, either wholly or in part, by the adverse possession and user of another; and when such adverse claimant has had the continued, notorious, uninterrupted, and adverse enjoyment of the water, or of a portion thereof, during the period prescribed by the statute of limitations for entry upon lands (which in this state is five years), the law will presume a grant of the right so held and enjoyed by him. Water Co. v. Crary, 25 Cal. 504; American Co. v. Bradford, 27 Cal. 361; Cave v. Crafts, 53 Cal. 135; Cox v. Clough, 70 Cal. 345, 11 Pac. 732. The right acquired by prescription is measured by the extent of the continuous enjoyment. The right claimed must be adverse; that is to say, "it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted." Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645; American Co. v. Bradford, supra. "In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." Water Co. v. Hancock, supra; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623. The glaring defect in appellants' case, under which they claim a prescriptive right, is involved in the proposition last quoted. Their argument is ingenious, if not sound. It may be paraphrased thus: Defendants for over 10 years have irrigated their ranch held by them as tenants in common, during each year, with water from the two forks of South Wolf creek. Defendant Rondoni has continuously, for 10 years, irrigated the ranch owned by him on the south fork of said stream, and, when necessary so to do, has used all the water of said south or east fork for that purpose; and, as to the last assertion, there is no conflict in the evidence. This must be admitted as literally true, but the conclusion drawn by appellants does not follow. The testimony shows that plaintiff's ditch has its head below the junction of the two forks of the stream; that during a portion of the year there is sufficient water in the stream for all the parties; that the north fork is the principal or larger branch, and furnishes most of the water; that prior to 1891 plaintiff had plenty of water, or, when it became short, defendants, upon being notified, turned it down. It came, no doubt, mainly from the north fork, but this could make no difference to the plaintiff. It was 31 inches of water to which he was entitled, and he was not injured, and could not complain that it came from one branch, and not from the other. There was no invasion of his rights, and he had no ground for an action, as long as he received the quantity of water to which he was entitled, and according to his testimony he did receive it until 1891. It follows that if, under such circumstances, Rondoni used all the water of the south fork, it was not, up to 1891, an invasion of the rights of the plaintiff, and hence afforded no foundation upon which to build a prescriptive right.

At the trial, counsel for appellants, upon the cross-examination of B. Alcorn, a witness who has testified for plaintiff, asked said witness if he had not stated to defendant Rondoni and Antonio Mirandi, at the house of Wheeler, during the summer of 1890, when the latter was sick, that he (the witness) knew all about the water, and could tell them as well as anybody else, and that Faulkner (the plaintiff) had the right to the water that came below the forks of the creek, but had no right to the water above the forks of the creek, and that Faulkner had no right to interfere with them as to the water above the forks of the creek. The witness, in answer, denied that he had so stated. Defendants thereafter called, as a witness on their behalf, defendant Rondoni, and offered to prove by him the truth of the alleged statement of Alcorn, as involved in the affirmative of the question put to him, to which counsel for the plaintiff objected as being immaterial, irrelevant, and incompetent, and not pertinent to any issue raised by the pleadings, etc. The objection was sustained, an exception reserved, and the ruling is now assigned as error. Antonio Mirandi was also called as a witness, a like offer of proof made, like objections offered, a like ruling had, and exception taken, and a like error is assigned. It was said by Wallace, C. J., in People v. Devine, 44 Cal. 458: "A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried." People v. Webb, 70 Cal. 120, 11 Pac. 509; People v. Devine, supra; People v. Dye, 75 Cal. 112, 16 Pac. 537; People v. Furtado, 57 Cal. 346. Furst v. Railroad Co., 72 N. Y. 542, was an action against a street-car company for injury to a child by being run over. The conductor was called as a witness for defendant, but testified nothing as to the driver. On cross-examination he was asked, in substance, if he had not said to the father of plaintiff that it was the fault of the driver; that, had he looked, it would not have happened, etc. Replying in the negative, testimony was admitted to contradict him, and it was held error. In the present case the witness Alcorn had not testified as to any matter relating to the right to the water above the forks of South Wolf creek. His declaration out of court, made to third parties, and not in the presence of plaintiff, could not bind the latter, and was totally inadmissible for that purpose. It was not in contradiction of anything to which he had testified, was outside of legitimate cross-examination, and hence, as it did not come within any exception provided in such cases, the answer of the witness was final. 1 Greenl. Ev. § 449; People v. Tiley, 84 Cal. 651, 24 Pac.

290; People v. Bell, 53 Cal. 119. There was no error in the rulings of the court excluding the proffered testimony.

The findings are sufficient to uphold the judgment. The other errors assigned are unimportant. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

104 Cal. 133

CONROY v. DUNLAP. (No. 18,282.)

(Supreme Court of California. Sept. 21, 1894.)

INSOLVENCY — SET-OFF BY DEBTOR OF INSOLVENT —WHEN ALLOWED.

Under the insolvency act of 1880 (section 43), which provides that no set-off shall be allowed, in favor of a debtor of an insolvent, on account of a claim against the insolvent transferred to the debtor "after the filing of the petition," a debtor may set off a claim purchased before the filing of the petition by the insolvent, though he knew of the latter's insolvency.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by W. C. Conroy, as assignee in insolvency of O. W. Hollenbeck, against William Dunlap. There was a judgment for plaintiff, and defendant appeals. Reversed.

F. P. Tuttle and John M. Fulweiler, for appellant. Ben P. Tabor, for respondent.

BELCHER, C. O. W. Hollenbeck was engaged in the business of banking in Placer county, and on October 31, 1892, the doors of his banking house were closed, and payments suspended, he being insolvent. At that time the defendant was indebted to him in the sum of $321.80 for money loaned, and he was indebted to one Mrs. S. J. Dunlap in the sum of $339.98 for money deposited in his bank by her. On November 1, 1892, Mrs. Dunlap, for a valuable consideration, assigned and transferred in writing her said demand against Hollenbeck to the defendant. On November 10, 1892, Hollenbeck filed in the superior court of Placer county his petition and schedule in voluntary insolvency, and was thereupon adjudged to be an insolvent debtor. Thereafter the plaintiff was duly elected and appointed assignee of the estate of the insolvent, and qualified as such, and the clerk of the court, by an instrument under his hand and the seal of the court, assigned and conveyed to him all the property, real and personal, of the debtor. The plaintiff, as such assignee, brought this action to recover from the defendant the said sum of $321.80, alleging that on the 10th day of November, 1892, the defendant was indebted to Hollenbeck in that sum for money loaned, and that no part of the same had been paid. The defendant, by his answer, denied that he was indebted to Hollenbeck on the 10th day of November, 1892, or at any time after the 1st day of that month, in the sum named, or in any sum; denied that he had not paid his said indebtedness; and averred that on November 1, 1892, he was indebted to Hollenbeck, and Hollenbeck was indebted to Mrs. Dunlap, and Mrs. Dunlap assigned and transferred her said demand to him, as before stated, and that thereby he became, and now is, a creditor of Hollenbeck and of his estate for the balance of said sum, to wit, $18.18.

The case was tried, and the court found the facts to be substantially as above stated, and as conclusions of law: "(1) That the defendant is not entitled to the set-off claimed, and that the same should be disallowed." (2) That the plaintiff is entitled to judgment for the sum of $321.80, gold coin of the United States, and to legal interest thereon from the 10th day of November, 1892, and to costs of suit." Judgment was accordingly so entered, from which, and from an order denying a new trial, the defendant appeals.

The appellant contends that the conclusions of law were not justified by the facts, and were erroneous; and whether this be so or not must be determined from a consideration of the provisions of the insolvent act of 1880. Section 21 of that act provides that the assignee may sue in his own name to recover any debt due the insolvent, "and no set-off or counter-claim shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency." And section 43 provides: "In all cases of mutual debts and mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counter-claim shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off or counter-claim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him, for the purpose of making such set-off or counter-claim." It is evident that the claim here sought to be set off is such a one as may constitute a counter-claim under section 438, Code Civ. Proc., and that it was purchased by and transferred to the defendant before the filing of Hollenbeck's petition in insolvency, and was a debt owing to defendant by Hollenbeck at the time of the adjudication in insolvency. And it is claimed for appellant that, under the maxim, "Expressio unius est exclusio alterius," section 43, supra, should be so construed as to allow claims purchased before the filing of the petition by the insolvent to be offset, since claims purchased after that date are, in express terms, excluded. There have been no decisions of this court, so far as we are advised, bearing upon the question in hand, but the same question has several times arisen and been passed upon by the federal courts in cases involving the construction of section 20 of the bankrupt act of 1867, which reads as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased or transferred to him after the filing of the petition." The cases referred to are: In re City Bank of Savings, Loan & Discount, Fed. Cas. No. 2,742; Hitchcock v. Rollo, Fed. Cas. No. 6,535; Sawyer v. Hoag, 17 Wall. 610; Hovey v. Insurance Co., Fed. Cas. No. 6,743; Lloyd v. Turner, 5 Sawy. 453, Fed. Cas. No. 8,436.

The case of In re City Bank of Savings, Loan & Discount was the first in point of time, and was decided by the United States district court of California, Hoffman, J. In that case it was held that under the twentieth section of the bankrupt act such a set-off as is here claimed might be made, and the court, after reviewing the English cases bearing on the question, said: "The rule established by these cases seems to have been adopted by congress in framing the provisions of the bankrupt act with regard to offsets. A debtor of the bankrupt is allowed to set off a debt due to him from the bankrupt, provided it has been purchased by or transferred to him before the filing of the petition." Hitchcock v. Rollo was next decided by the United States district court of Illinois, Drummond, J. In that case it was held that a claim against an insolvent, purchased by his debtor before the filing of a petition in bankruptcy, with knowledge of the insolvency, could not be used as a set-off, but it was admitted that it might be so used if purchased without such knowledge. And the court, speaking of the case of In re City Bank of Savings, Loan & Discount, said: "It was held in that case that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off against the debt the claim thus assigned. * * * If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it to be the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit one creditor in this way to obtain the payment of his claim in full, to the sacrifice of the claims of other creditors." Sawyer v. Hoag was an action brought by the assignee of a bankrupt corporation to recover money alleged to be due the company, and in which the defendant sought to have certain claims against the company, which he had purchased before the filing of the petition in bankruptcy, set off against his indebtedness. The court, by Mr. Justice Miller, said: "The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription." And it was held that the money due was for unpaid shares of stock in the company. The court further said: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." And again: "The debt which the appellant owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." And upon this ground it was held that the defendant was not entitled to the set-off. Hovey v. Insurance Co. was a case in the United States circuit court of Ohio, in which Swing, J., delivered the opinion. It was held that "a debt of one insolvent purchased by his debtor immediately prior to the filing of a petition in bankruptcy, and purchased in order to set the same off against his indebtedness, is protected by the bankrupt act, it only forbidding the set-off of claims purchased after petition filed." The court reviewed very fully the authorities, and, speaking of Sawyer v. Hoag, said: "If the supreme court had given to the twentieth section the construction contended for, there would have been no necessity of determining the character of the indebtedness of Sawyer, for it was an admitted fact that he knew of the insolvency of the company when he purchased the certificate." And again: "Having determined this most important question, that the debt was a part of the stock of the company, and therefore a trust fund for the benefit of the general creditors of the corporation, they decide, as against such a fund, the set-off could not be allowed, and their construction of the twentieth section must be taken as applying to a case of the character they found the one before them to be. So that, rather than being an authority in favor of the construction claimed by plaintiff, it would seem to be one strongly—inferentially, at least—against it." After the foregoing decisions were made, congress, on June 22, 1874, amended section 20 of the bankrupt act by adding at the end thereof the following words: "Or in cases of compulsory bankruptcy, after the act of bankruptcy, upon or in respect of which the adjudication shall be made, with a view of making such set-off." Lloyd v. Turner was a case in the United States district court of California, and was decided in 1879 by Hoffman, J. It was held that "a claim against the bankrupt, purchased before the filing of the petition, but with full knowledge of the insolvency, and with intent to use the claim as a set-off, is available for that purpose to the purchaser in a case of voluntary bankruptcy." The learned judge reviewed the earlier cases, and considered that the conclusion reached derived much support from the case of Sawyer v. Hoag, and also from the amendment made by congress to section 20 in 1874. He said: "That amendment provides that in cases of compulsory bankruptcy no offset shall be allowed of a claim purchased or transferred after the act of bankruptcy in respect of which the adjudication shall be made, and with a view of making such set-off. In voluntary cases the original language of the act has been suffered to stand, and the set-off is prohibited only when purchased or transferred after the filing of the petition."

It is not made clear by the record in this case that either the defendant or Mrs. Dunlap had knowledge of the insolvency of Hollenbeck at the time of the assignment and transfer in question. But, assuming that they did have such knowledge, still, in our opinion, the set-off claimed was authorized by the provisions of the insolvent act, when properly construed, and should have been allowed by the court below. We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendant.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendant.

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104 Cal. 221

DAUGHERTY v. DAUGHERTY et al. (No. 18,294.)

(Supreme Court of California. Sept. 26, 1894.)

FRAUDULENT CONVEYANCE—EVIDENCE.

Where the evidence showed that a conveyance was voluntary, and was made when the grantor was in debt, and embraced all his property subject to execution, that it was kept secret, and the grantor retained possession until his death, and there was uncontradicted evidence of an admission by the grantor that he had conveyed to defraud creditors, a finding that there was no fraud is erroneous.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; C. V. Gottschalk, Judge.

Action by Mary E. Daugherty, administratrix of the estate of George W. Daugherty, deceased, against Mary Daugherty and Cephas Daugherty, to set aside a conveyance by the deceased to the defendant, Mary Daugherty, and to compel a reconveyance to plaintiff. Judgment for defendants, and plaintiff appeals. Reversed.

R. C. Rust and Wm. J. McGee, for appellant. D. B. Spagnoli (Armstrong & Bruner, of counsel), for respondents.

SEARLS, C. George W. Daugherty, a married man, was the owner of a residence and a tract of land known as "Lots Numbers 11, 12, and 13, in Block Number 8," in the town of Jackson, county of Amador, state of California, and was indebted in sundry sums of money, amounting to say $400, of which sums $205 was secured by a mortgage on the lots last mentioned. On or about May 12, 1890, said George W. Daugherty filed a declaration of homestead upon his residence property, and conveyed to his mother, Mary Daugherty, one of the respondents herein, by a voluntary deed of conveyance, in consideration of love and affection, the lots above mentioned. Besides the homestead and the lots thus conveyed, said Daugherty, grantor, had no other property. Mary Daugherty, the mother and respondent, either paid off the mortgage on the lots conveyed to her, or advanced to her son and grantor the money necessary therefor, viz. $210, and the mortgage was satisfied. George W. Daugherty continued in possession of the property so conveyed, and collected to his own use the rents therefrom, amounting to $12 per month, until his death, which occurred April 5, 1891. The appellant herein, who is his widow, was duly appointed administratrix of his estate, qualified as such, procured the homestead to be set apart for her and her infant child, and allowed claims against the estate aggregating some $206, of which claims $100 at least was due prior to the voluntary conveyance aforesaid; and, there being no assets for the payment of said claims, the appellant, at the request of creditors, under section 1589, Code Civ. Proc., instituted this action to set aside, as fraudulent and void, the deed of conveyance, and to compel a reconveyance of the property by the mother, Mary Daugherty, etc. The complaint charges (1) that the conveyance was voluntary, and without valuable consideration; (2) actual fraud on the part of deceased and his mother, with a view to defraud the creditors of deceased. The answer admitted the conveyance, denied all fraud, etc. Cephas Daugherty is the husband of the other defendant, and is made a party defendant. The cause was tried by the court without a jury, and written findings filed, negativing all charges of fraud, upon which judgment was entered in favor of defendants for costs. Plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

Under section 3442 of our Civil Code, the question of fraudulent intent here is one of fact, and not of law, "nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." McFadden v. Mitchell, 54 Cal. 628; Bull v. Bray, 89 Cal. 286, 26 Pac. 873; Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557. The question then is, did the testimony warrant the findings of the court? I am driven to the conclusion that it did not. It established, without any conflict whatever, the following facts: (1) That the conveyance was voluntary. (2) That, at the date of the conveyance, decedent was indebted. (3) That he conveyed all of his property subject to execution. (4) That the conveyance was kept secret, and that neither his creditors or his father, who is a defendant here, knew of it until his death. (5) That he continued to use the property as his own up to the time of his death. (6) That one of his creditors, who held a small claim against him, was crowding him for payment. (7) There is also the testimony of four witnesses to the effect that deceased declared to them at different times and places, in substance, "that he owed some money below, and was afraid his creditors would hop on him," and was going to deed the property to his mother, and that his creditors were pushing him, and he expected to be attached, and that "he had deeded his property to prevent his creditors from attaching it, * * * and that he would fight them to the bitter end." There was no contradiction of any of this testimony, except by showing declarations of deceased to the effect that he had had trouble with his wife, had separated from her, and wanted to fix it so that she would not get the property. This constitutes a synopsis of the testimony on the question of fraudulent intent, and upon it the finding should have been in favor of the plaintiff, and the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

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104 Cal. 208

WALKERLY et al. v. GREENE, Judge. (No. 15,712.)

(Supreme Court of California. Sept. 25, 1894.)

Bill of Exceptions — Grounds for Striking Out — Settlement — Mandamus to Judge — Findings as to Will—Intention of Testator.

1. A bill of exceptions should not be struck out for omitting to set out the evidence or other matter necessary to explain it, as required by Code Civ. Proc. § 648, unless it appears that the omission was made with intent to perpetrate a gross and deliberate fraud.

2. A petition for mandamus to compel a judge to settle a bill of exceptions which he has ordered stricken out for fraudulent omission of material facts should allege in substance that such bill contained everything that the petitioner believed it should contain.

3. Where a will is set out in the findings, a bill of exceptions attacking further findings as to what testator "intended" and "meant" cannot be objected to on the ground that the evidence upon which the findings were based was not set out in the bill, since the will is the best evidence of testator's intention.

In bank.

Application for mandamus by John Walkerly and others, legatees of William Walkerly, deceased, against W. E. Greene, judge of the superior court, to compel a settlement of a bill of exceptions on an appeal from a decree of distribution. Writ granted.

B. B. Newman, for petitioners. H. C. Firebaugh, for respondent.

BEATTY, C. J. This is an original proceeding by mandamus to compel settlement of a bill of exceptions. Petitioners are some of the residuary legatees of William Walkerly, deceased, whose will was admitted to probate in Alameda county in 1887. In 1892 his executors filed their final account, and a petition for distribution of the estate. In August of that year the final account was settled, but the matter of distribution was continued from time to time until November 27, 1893, at which date a decree of distribution was entered, which also embraced the settlement of several accounts filed by the executors supplemental to their final account. On November 28th—the day following the entry of this decree—the petitioners appealed therefrom to this court, and in due time perfected their appeal. By stipulation of parties their time to prepare a bill of exceptions to the decree was extended beyond the 16th of December, and on that day they served on all the other interested parties copies of a document entitled in the cause, and bearing the following caption: "Bill of Exceptions. On appeal from the decree settling the (so-called) final account of the executors and distribution of the estate, made, signed, and filed in the above-entitled action, matter, and proceeding in said superior court on November 27, 1893, and which was appealed from to the supreme court on the 28th day of November, 1893, by the contestants, Mary S. Doughty and ten other nieces and nephews of William Walkerly, deceased, and beneficiaries under his last will." To this proposed bill of exceptions the attorney for the executors proposed amendments, but at the same time he took and reserved the objection that it was not entitled to settlement, because it was a sham and a fraud, purposely omitting nearly everything that it ought to contain, and false in the matters set forth. The attorney for the other interested parties, without offering any amendments to the proposed bill, contented himself with giving notice of a motion to strike it out upon similar grounds, viz. that it was false and insufficient, and not proposed in good faith. Upon this motion and these objections the proposed bill, the amendments, and the notice of the petitioners that they refused to accept said amendments were submitted to the respondent, one of the judges of the superior court of Alameda county, who, on March 26, 1894, sustained the motion to strike out, and dismissed the application of the petitioners for a settlement of the bill, whereupon they filed their petition here for a writ of mandate.

Upon the filing of this petition an alternative writ was directed to the respondent, the judge of said court, who on the return day showed cause by answer and demurrer, in which the executors and some of the legatees unnecessarily joined. The demurrer to the petition is general and special, for want of facts and for uncertainty, and the principal point urged in support of these objections is that it nowhere appears in the petition that the petitioners ever presented to the respondent a fair or proper draft of a bill such as the statute requires them to prepare. This objection is certainly well founded. The petition, though inordinately long, is mainly composed of matters wholly irrelevant, and contains no allegation in form or substance that the draft of the bill proposed by the petitioners (which, it was alleged, embraced numerous exceptions to the findings of fact upon which the decree was based) stated fairly, or at all, the evidence necessary to explain the objections to such findings. The statute (Code Civ. Proc. § 648) plainly requires that the bill, when it sets forth exceptions to a verdict or other decision upon the ground of insufficiency of the evidence to justify it, must state the objection, with so much of the evidence or other matter as is necessary to explain it, and no more, but of course this ideal bill of exceptions, if it ever should be realized in practice, would probably owe its perfection to the united efforts of the parties and the court through the means provided by law for amending and correcting the statement first proposed, and these provisions would be superfluous if we were to hold that a party is not entitled to a settlement of his bill unless he puts into it everything it should contain, and nothing else, in the first instance. If a review of the decisions of the superior court could be had only upon such conditions, this court would seldom have occasion to consider the merits of litigated controversies, but would undoubtedly find abundant occupation in trying questions similar to these here involved. The statute, however, does not mean that the party desiring a bill of exceptions must propose a perfect bill in the first draft, or forfeit his right to a review of the decision from which he has appealed. The provisions of section 648, Code Civ. Proc., are mainly intended as a guide to the judge in settling the bill, though they also impose a duty upon the parties. It is undoubtedly the duty of the moving party to proceed in good faith, and to do his proper share of the work involved in the settlement of the bill. He has no right to put off upon the opposite party or the judge the labor of reducing to writing, and incorporating by way of amendment, statements of evidence and other matters which he knows a proper and fair bill of exceptions ought to contain. Nor has he any right to include statements or matters that are untrue or irrelevant. A corresponding duty rests upon the opposite party, who has no right to propose amendments which he knows ought not to be allowed. But although these reciprocal duties of the parties are undoubted, it is not easy to decide in a particular case whether or not they have been consciously and deliberately violated; and it is only in a gross case of palpable and deliberate fraud that the severe penalty of striking out the bill, and thus denying the party a hearing upon the merits of his case, can be properly imposed. In Hearst v. Dennison, 72 Cal. 228, 13 Pac. 628, we held that the judge of the superior court was justified in refusing to settle a bill of exceptions when the draft of the proposed bill was a mere "pretense and fraud," when it was "so grossly untrue, or so foreign to the real history of the case, as to come within no reasonable meaning of 'a statement of the case,' as used in the Code." In Sansome v. Myers, 77 Cal. 356, 19 Pac. 577, this doctrine was perhaps carried even further with respect to a bill of exceptions in a criminal case. But that decision, which was made in overruling a demurrer to the answer of the respondent, was somewhat modified by the subsequent decision of the same cause upon the facts reported by the referee who tried the issues. See 80 Cal. 483, 22 Pac. 212. In effect, the right of a judge to strike out or refuse to settle a bill of exceptions was limited to a case of gross and manifest fraud on the part of the one proposing it. Such a case will not often present itself, but cases do arise every day in which there is not only a disagreement of the parties with each other, but an equally radical disagreement between the court and the parties as to what the statement of the case ought to contain. As to what it ought not to contain this court has painful experience of the fact that even settled bills of exceptions are frequently overladen with statements and repetitions of evidence and other matters which serve no purpose except to multiply costs and render more difficult the examination of the vital points of the controversy.

From this general statement of our views, it follows that we cannot hold that a petition for a writ of mandate in a case of this character is fatally defective when it fails to show that the proposed bill of exceptions was absolutely such as a settled statement ought to be, but we do think the petition ought to allege in substance that the proposed bill contained everything that the petitioner honestly believed it should contain. And if the defects of this petition had not escaped our attention at the time, we should not have issued the alternative writ; but, having issued it, and the respondent having, by his answer, presented with great fulness all the facts and grounds upon which his refusal to settle the bill was based, we do not deem it necessary or proper now to sustain the demurrer and quash the writ merely in order, by the filing of an amended petition and the issuance of a new writ, to get finally to an issue which is as completely joined as it ever could be joined in the most orderly procedure. On the contrary, we think that under the circumstances the proper course to pursue is to treat the answer as a waiver of the demurrer; and this brings us to the question whether there is any material issue made by the pleadings, or, in other words, whether the matters set out in the answer do not cure the defect in the petition. The petition is, as we have said, inordinately long, and the answer is correspondingly voluminous, made so by the careful denial of most of the immaterial allegations of the petition. It also has attached as exhibits copies of the proposed bill of exceptions of the amendments proposed by the executors, of the motion of certain legatees to strike out the proposed bill, and of the order of the respondent sustaining said motion. In response to this answer the petitioners file another formidable document in the nature of a replication, closing with a prayer that the matter may be referred to a commissioner to take and report evidence as to the material issues, etc., and that upon the coming in of his report this motion be set down upon the calendar of the court for hearing and further argument, etc., etc. This prayer suggests a long series of proceedings upon which we should enter with extreme reluctance, even if it were strictly necessary. But we do not deem it necessary. It appears to us that there is a much shorter road to the end of a controversy which, on the line suggested, might, and probably would, protract itself indefinitely, to the detriment of all parties interested in the Walkerly estate, not to mention the business of the court and the interests of other suitors.

Taking the admitted allegations of the petition and the allegations of the answer which support the petition, we think facts enough appear to justify us in holding that the refusal of the respondent to settle this bill of exceptions is not justified. The bill, as prepared, is certainly not a model, and we can well conceive that the task of settling it is one which would severely tax the patience of a busy officer; but we do not think it bears evidence of bad faith and purposed unfairness. Its faults appear, on the contrary, to be due to deficient knowledge of the true office and essential nature of a bill of exceptions, which exhibits itself much more conspicuously in the useless and redundant matter incorporated in the draft than in the comparatively slight omissions of evidence that ought to have been set out. The decree appealed from was a decree of distribution and settlement of accounts supplemental to the final account of the executors. Besides the recitals of fact contained in the decree proper, it referred to, and was partly based upon, certain "findings of fact," which were filed with the decree. The petitioners objected to a number of these findings upon the ground that they were not sustained by the evidence, but when we come to look at the findings so objected to we find that they were not in reality, except in two or three instances, findings of fact, but rather conclusions of fact from other facts specifically found, or conclusions of law. As to these objections, no evidence was needed, or could be admitted, to explain them; and as to the two or three findings strictly of fact, which were questioned, the evidence to support them, if it existed, could have been supplied by a very short amendment, which could have been written out and inserted in far less time than it must have taken to prepare the order striking out the proposed bill. To be more specific upon this point, we will state that the will and codicil of William Walkerly, as admitted to probate in 1887, are found and recited in full in the findings and decree. It is then found by a number of successive findings that the testator "intended" and "meant" a variety of things, and it is these findings as to the intention and meaning of the testator which are the principal object of attack in the bill of exceptions as proposed. The respondent says in his answer that the evidence upon which these findings are based was not set out in the proposed bill. But what evidence could there have been of what the testator meant and intended except the terms of the will and codicil? Of course there may have been some questions as to identity of the property disposed of, or the number or identity of legatees, or other latent ambiguities in the will as to which extraneous evidence was admissible, and possibly there may have been something in the circumstances surrounding the testator at the time the will was made of which evidence was admissible for the purpose of construction; but the findings of intention which the petitioners have attacked have no possible dependence upon extraneous evidence. They depend wholly upon the terms of the will, and the recitals it contains, and the exceptions to them are in fact nothing but arguments founded upon the terms of the will.

In the careful examination of the proposed bill which we have made we find but three questions raised as to real findings of fact: (1) As to the character and value of the services of the attorney for certain legatees; (2) as to the character and value of the services of the attorney for the executors; (3) as to the extraordinary services of the executors. As to these findings it is claimed by petitioners in their proposed bill that the evidence did not sustain them, and it sets out no evidence on the subject. The respondent says that the evidence amply sustained these findings, and that it was purposely and fraudulently omitted. Possibly it may have been, but from all the facts disclosed we are disposed to take a more charitable view of the matter, and to hold that this omission ought not to deprive the petitioners of a hearing upon the more important questions involved in the appeal. The amount of these items is comparatively trifling, and the amendments proposed by the executors will supply the evidence with no trouble to anyone except the petitioners when they come to engross the bill.

The other specifications, with a single exception, are of errors of law in the conclusions of the court, and neither need nor admit of explanation by evidence. The exception referred to relates to the ruling of the court denying a continuance. The statement of this matter is said to be false. If so, an allowance of the proposed amendment, which is very brief, would have cured it. Upon the whole, we think the bill should have been settled. The objection that it was out of time, because the parties had only stipulated an extension of time to prepare a bill of exceptions, and not a statement of the case, is untenable. Equally untenable is the objection to the name or description which the petitioners gave to the bill. We have quoted its caption in the beginning of this opinion, and we think it is entirely sufficient to show what the paper was, and to connect it with the notice of appeal. Let a peremptory writ issue.

We concur: FITZGERALD, J.; HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; DE HAVEN, J.

4 Cal. Unrep. 819

In re WALKERLY'S ESTATE. (No. 15,794.)

(Supreme Court of California. Sept. 25, 1894.)

DISMISSAL OF APPEAL—GROUNDS.

1. An appeal will not be dismissed because of the failure to file a printed transcript of the record in time, where an application is pending to settle the bill of exceptions.

2. As no appeal is instituted by the service of a notice of appeal after the time to appeal has expired, an order will not be made dismissing such an attempted appeal.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Accounting by the executors of the will of William Walkerly. Motion to dismiss two appeals. Motion denied.

B. B. Newman, for appellant. Rogers & Paterson, for the widow. H. C. Firebaugh, for respondent. F. G. Whitney, for certain beneficiaries.

BEATTY, C. J. These are motions to dismiss two appeals,—one from a decree or order settling the accounts of the executors supplemental to their final account and distributing the estate, which was made and entered November 27, 1893; the other an attempted appeal from an order settling the final account of the executors, which was made and entered in August, 1892. The motion to dismiss the first-mentioned appeal is based upon the alleged failure of the appellants to file a printed transcript of the record in time, and is overruled because it appears that an application to settle a bill of exceptions to the said order is pending. See Walkerly v. Greene (No. 15,712, just decided) 37 Pac. 890. The other motion to dismiss is also overruled, but solely on the ground that there is no such appeal; the notice having been given long after the time to appeal had expired.

We concur: VAN FLEET, J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

104 Cal. 184

MERRITT et al. v. HILL et al. (No. 18,120.)

(Supreme Court of California. Sept. 25, 1894.)

TRESPASS BY CATTLE—SUFFICIENCY OF COMPLAINT.

A complaint in an action for trespass in Trinity county, alleging that "defendant's cattle and horses ran and trespassed upon said land," and destroyed the grass growing thereon, does not state a cause of action, it not alleging that the trespass was instigated by defendant, nor that defendant had notice thereof.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; T. E. Jones, Judge.

Action of trespass by Merritt and Gwinn against Hill and Lauffer. A demurrer to the complaint was sustained, and plaintiffs appeal.

McKune & George, for appellants. Coonan & Sevier, for respondents.

VANCLIEF, C. The substance of the complaint in this action is that, while plaintiffs were owners and in possession of about eight sections of land in Trinity county (not alleged to have been inclosed), "defendants' cattle and horses ran and trespassed upon said lands, ate up, injured, and destroyed the grass, hay, and verdure being and growing thereon," to the damage of plaintiffs in the sum of $1,000. It is not alleged that the trespass was instigated by defendants, nor that defendants had notice thereof. A demurrer to the complaint on the ground that it does not state a cause of action was sustained by the court, and, plaintiffs having declined to amend their complaint, judgment passed for the defendants. Plaintiffs bring this appeal from the judgment on the judgment roll, and contend that "at common law the rule was that every man must, at his peril, keep his cattle on his own land; and if he fails he is liable for their trespass on the land of others, whether fenced or unfenced;" citing 3 Bl. Comm. 211; Cooley, Torts, 337; Pol. Code, § 4468.

In 1850 the legislature of this state enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all courts of this state;" and section 4468 of the Political Code is to the same effect. Yet it has been held in several cases that the common-law rule as to trespassing animals, claimed by appellants to be applicable to this case, is inconsistent with certain general legislative acts which have always been in force in this state, except as repealed by local laws applicable to some particular counties, of which Trinity is admitted not to be one; and therefore that the common-law rule invoked by appellants has never been in force in this state. Waters v. Moss, 12 Cal. 538; Comerford v. Dupuy, 17 Cal. 308; Logan v. Gedney, 38 Cal. 581. And the authority of these cases was recognized in Hahn v. Garratt, 69 Cal. 147, 10 Pac. 329, the decision of which, however, was governed by a local law, applicable to Santa Clara county alone. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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104 Cal. 94

HOPPE et al. v. HOPPE et al. (No. 18,225.)

FOUNTAIN v. HOPPE (HOPPE et al., Interveners).

(Supreme Court of California. Sept. 13, 1894.)

HOMESTEAD—SURVIVING WIFE—POWER TO MORTGAGE—RIGHTS OF MINOR CHILDREN—MORTGAGE BY COTENANT—FORECLOSURE—PARTIES.

1. Code Civ. Proc. § 1465, provides that the homestead set apart after the death of one of the parents is "for the use of the surviving husband or wife and the minor chidlren." *Held* that, where the order of the court set the homestead apart to the wife for the "use of the family," she could not destroy its quality as a homestead until the children arrived at majority.

2. An action for the partition of a homestead set apart for the "use of the surviving wife and minor children" (Code Civ. Proc. § 1465) will not lie until the children have reached their majority.

3. One cotenant cannot intervene in an action to foreclose a mortgage on his cotenant's interest.

4. Though a surviving wife may mortgage her interest in the homestead, a purchaser at the foreclosure sale has no right to the possession of any part of the homestead during the minority of any of the children.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Actions by Herman W. Hoppe and others against Julia Hoppe and W. A. Fountain, and by W. A. Fountain against Julia Hoppe, in which Herman Hoppe and others intervened. The actions were consolidated, and from the judgment Herman Hoppe and others and Julia Hoppe appeal. Reversed.

Armstrong & Platnauer and Henry C. Ross, Jr., for appellants. Clinton L. White, for respondent.

HARRISON, J. The first of these actions (Herman W. Hoppe et al. v. Julia Hoppe and W. A. Fountain) was to obtain a partition of the lands described in the complaint between the plaintiffs and Julia Hoppe, Fountain being a party defendant because he claimed to be a mortgagee of the whole of the premises under a mortgage executed by the defendant Julia Hoppe. The second of these actions was afterwards brought by Fountain against Julia Hoppe to foreclose said mortgage, and the plaintiffs in the first action intervened in the second, and by order of the court the two actions were consolidated. Fountain demurred to the complaint in partition, and also to the complaint in intervention, and to the answer of Julia Hoppe in the foreclosure case; and these demurrers were each sustained, and judgment dismissing the action for partition and the complaint in intervention, and foreclosing the mortgage, was entered. The interveners and Julia Hoppe separately appeal from the judgment upon the judgment roll and a bill of exceptions setting out the order consolidating the actions, and excepting to the rulings upon demurrer. The facts set out in the several pleadings demurred to are substantially the same, and show the following facts: F. W. Hoppe died August 10, 1881, leaving the appellant Julia, his widow, and nine children, of whom these interveners were minors, the others being of full age. At the time of his death he was possessed of a tract of land upon which he and his family resided, containing about 160 acres, situated in Sacramento county, the same being community property. The widow was appointed administratrix, and on October 1, 1881, filed an inventory and appraisement of the estate, wherein said land was appraised at $4,000. She also filed a petition praying for an order setting aside said land, with the dwelling house thereon, "for the use of the family of deceased," and alleged that the family consisted of herself and nine children, all of whom were named therein; but their ages were not given, nor was it alleged that any of them were minors. Upon this petition, on the 7th day of October, 1881, the court made an order, of which the following is a copy: "In the Matter of the Estate of F. W. Hoppe, Deceased. Julia Hoppe, the administratix of the estate of F. W. Hoppe, deceased, having on the 21st day of September, 1881, made application to the court by petition for an order setting apart, for the use and benefit of the family of said deceased, the real estate mentioned in said petition, together with the improvements thereon, as a homestead. And it duly appearing, to the satisfaction of the court, from the papers on file in the matter of said estate, and other evidence, that said deceased was a resident of Sacramento county at his death, and left estate therein; that letters of administration were duly issued to said Julia Hoppe on the 5th day of September, 1881, and said administratrix duly returned an inventory and appraisement of said estate; that the family of said deceased consist of said Julia Hoppe, his widow, and Emma, Frank, Edward, Othelie, Clara, Robert, Herman, Louis, and Lena Hoppe, his children, and that said applicant, Julia Hoppe, is entitled to have the said premises set apart to her for a homestead; and that the same does not exceed in value five thousand dollars,—it is hereby ordered, adjudged, and decreed that all that certain piece or quantity of land lying and being in the county of Sacramento and state of California, and particularly described as follows, * * * be and the same is hereby set apart to the widow of said F. W. Hoppe, deceased, as a homestead, and shall not be subject to administration." The complaint in intervention further alleged that in the application for letters of administration the names of the interveners were stated, together with their respective ages; that no homestead had been selected, declared, or recorded by F. W. Hoppe and his wife, or either of them, prior to his death; that at the time said homestead was set apart they were minors, the eldest being then 14 years old, and the youngest 5; that the court did not fix a day for the hearing of said petition; that no notice was given in any manner of the hearing; that they had no notice of the hearing; that they had no guardian, general or special; and that they were not represented at the hearing by attorney appointed by the court, or by any person. On December 20, 1888, Julia Hoppe executed a mortgage upon the whole of the homestead to respondent, Fountain, to secure the sum of $5,000, and it was this mortgage which was foreclosed; and, in regard to the mortgage, it was alleged that Fountain took it with full knowledge of all the facts.

1. The decree setting apart the homestead vested the title thereto in the minor children, as well as in the mother. No homestead had been selected, designated, or recorded in the lifetime of the husband; and the application for the homestead, together with the order setting it apart, were made under the provisions of section 1465, Code Civ. Proc. By the terms of that section the homestead thus set apart is "for the use of the surviving husband or wife and the minor children;" and, by the provisions of section 1468, when property is thus set apart to the use of the family "the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one." "The term 'family' throughout the chapter, is used as synonymous with and as representing the surviving wife or husband and children, if any." Phelan v. Smith, 100 Cal. 170, 34 Pac. 667. Whether, therefore, the order setting it apart is to be construed in connection with the application, or whether the mother is to be regarded as having taken the title in trust for the minor children, is immaterial. In either case the homestead was set apart "for the use of the family," and "belongs" to the widow and minor children, and is to remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead, until after all of the children shall have arrived at majority.

2. The court properly sustained the demurrer to the action in partition. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached its majority. Hence, it is not competent for either of the other cotenants to have a partition until that period has been reached. Phelan v. Smith, supra; Trotter v. Trotter, 31 Ark. 145; Hoffman v. Neuhaus, 30 Tex. 633; Keyes v. Hill, 30 Vt. 759; Roberts v. Ware, 80 Mo. 363. We do not mean to say that no case can arise where a court would not authorize the partition or sale of a homestead. Circumstances might exist where it would be the duty of the court, for the benefit of the minor, to decree a partition, or order the interest of the minor to be sold. But this qualification need not be discussed.

3. As the owner of an undivided interest in the land, it was competent for the mother to mortgage or convey such interest. She could not, however, confer upon her grantee or mortgagee any greater rights in the premises than she herself held. As she could not destroy the homestead quality of the premises, or deprive the minor children of their right to occupy the homestead, any grantee of her interest must take it subject to the same limitations. A purchaser at the foreclosure sale can obtain no greater rights than would her immediate grantee, and the court in the foreclosure proceedings would have no right, by reason of any covenant in the mortgage or allegation in the complaint, to make any order or direct any act which would affect the rights of any of her cotenants. For the purpose of informing the court of the extent of her interest and the nature of the estate which she had mortgaged, it was proper for her to allege in her answer the manner in which her title had been derived, and to show that the premises had been set apart as a homestead, and that their homestead quality had not yet ceased. Upon these facts being brought to the attention of the court, the decree it might make would be adapted to the rights of the respective parties to the action. As

the purchaser under the decree would not have a right of entry upon the premises as a cotenant until the termination of the homestead, that limitation should be included in the decree under which the sale should be made. The demurrer to the separate answer of Mrs. Hoppe should therefore have been overruled.

4. The court properly sustained the demurrer to the complaint in intervention. The title of the interveners was in no respect subject to the mortgage, and the rule is well settled that parties holding such title should not be joined in a suit for the foreclosure of the mortgage. Ord v. Bartlett, 83 Cal. 428, 23 Pac. 705; Cody v. Bean, 93 Cal. 579, 29 Pac. 223. And their presence as interveners is as equally unauthorized as though they had been made defendants. As the mortgage of their cotenant could not impair their rights, there was no occasion for them to intervene to protect their rights. The only object to be accomplished by the foreclosure is to transfer to the purchaser under the decree the same title that was conveyed by the mortgagor, and upon receiving the sheriff's deed such purchaser will be placed in the same attitude to the other cotenants as was the mortgagor. In the foreclosure of a mortgage made by one cotenant of his interest in lands, the court will not, while the proceedings are pending or after judgment, interfere with the rights of the other cotenants, or attempt to disturb their possession; and any allegations in the complaint of a covenant in such mortgage for the appointment of a receiver, or any prayer in the complaint for a receiver, will be disregarded by the court, for the reason that it is not competent for one cotenant, either directly or through the aid of the court, to do any act which will impair the rights of his fellow cotenants. The judgment is reversed, and the court below is directed to overrule the demurrer of the respondent to the answer of the defendant.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.

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104 Cal. 217

CRADDOCK v. O'BRIEN. (No. 18,276.)

(Supreme Court of California. Sept. 26, 1894.)

COMPENSATION OF ATTORNEY — CONSTRUCTION OF CONTRACT — COLLECTION OF CLAIMS UNDER DRAINAGE ACT—ABANDONMENT OF EMPLOYMENT.

1. Defendant employed plaintiff to collect certain judgments against a drainage district for land taken and material furnished, plaintiff to receive a certain amount if successful. At the time the judgments had been declared void, the act organizing the drainage district being unconstitutional, the legislature passed an act providing for the payment of claims arising under the drainage act. The board of examiners, acting under the latter act, on the presentation of defendant's claim by another attorney, employed without plaintiff's consent, allowed the claim for the same amount as the judgments, though they, being void, were not admitted as evidence of the claim. *Held*, that the "judgments" and the claim allowed were in effect the same, and plaintiff was entitled to the agreed fee.

2. Where a person, after having employed one attorney to collect a claim, without the latter's knowledge employs another to collect it, the burden of proof is on him to show that the first attorney had either expressly or by lack of effort abandoned its collection.

Commissioners' decision. Department 1. Appeal from superior court, Yuba county; Phil. W. Keyser, Judge.

Action by J. H. Craddock against James O'Brien. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Wm. G. Murphy, for appellant. J. H. Craddock and W. H. Carlin, for respondent.

HAYNES, C. The defendant, in 1885, was the owner of certain judgments rendered by the superior court of Yuba county against "Drainage District Number One of the State of California" (which was organized under the act of April 23, 1880, entitled "An act to promote drainage"), and made an agreement with the plaintiff, Craddock, whereby plaintiff undertook to collect them, and for which service, if successful, defendant agreed he should receive $1,000. This agreement, however, included another judgment in which defendant was not interested. Plaintiff also received for collection other claims of like character, all being judgments against said "drainage district" rendered in "condemnation proceedings" instituted by said district under the Code provisions entitled "Of Eminent Domain;" but in the case of People v. Parks, 58 Cal. 625, it had been held that the act under which the district was organized was unconstitutional, and that the district had no legal existence. The work, however, which the district was organized to accomplish appears to have been done, so far as it affected the property of O'Brien and the others in whose favor judgments had been rendered, and the legislature, realizing that these parties should be compensated, in 1885 passed an act making an appropriation for the payment of claims which had arisen under the first act, and which, it was supposed, would authorize the payment of these judgments. Plaintiff thereupon commenced a proceeding in mandamus against the state comptroller upon one of the claims in his hands, to test the right of these claimants under the act of 1885, and that case (Callahan v. Dunn) was appealed to this court by the comptroller, and is reported in 78 Cal. 366, 20 Pac. 737, where it was held that the plaintiff was not within the third section of the act of 1885, as presented by his complaint, the cause having gone off in the court below upon demurrer to the complaint. Having failed in this proceeding, the plaintiff continued his efforts to secure the payment of these claims, principally by conferences with the attorney general with a view to arriving at an understanding as to the mode or form of presenting them which would satisfy the law officer of the state. The case of Callahan v. Dunn was decided in this court March 12, 1889. The attorney general was absent much of the time thereafter on business, and upon his return in November of that year a proposition to resubmit all the claims represented by plaintiff to the board of examiners, as suggested by plaintiff, was agreed upon. In the meantime defendant, O'Brien, employed one Maslin to collect his claims, such employment being without the knowledge or consent of plaintiff, and payment of one of his claims was procured on October 3, 1889, and of the other on January 27, 1890. This case was tried before the court without a jury, and findings and judgment passed in favor of plaintiff for the proportion of $1,000 which the two claims of O'Brien bore to the three claims included in the agreement; and defendant appeals from the judgment and an order denying his motion for a new trial.

No question is made on the appeal from the judgment, but it is contended that the findings are not justified by the evidence, the points being stated in appellant's brief as follows: "The main question that presents itself in this case, and upon which appellant mostly relies, is whether the claims presented by Maslin, to pay which the said warrants were drawn, were legally the same claims which respondent had assumed to collect; and whether respondent had exercised due diligence and ability in the collection of the claims intrusted to him for collection by appellant." We think neither of these questions can be answered favorably to appellant. It is true that at the time of respondent's employment these claims existed in the form of judgments, but these judgments were known to be void, having been so declared by the supreme court. All the injury, however, which O'Brien was entitled to compensation for had been inflicted prior to that time; and although the board of examiners, acting under the law of 1885, and following the decision of Callahan v. Dunn, supra, refused to recognize the judgments as evidence of the amount of compensation to which appellant was entitled, or of the injury done, whatever its character, did allow his claims for the same amounts specified in the judgments, and for injuries which were included in the judgments. In Callahan v. Dunn, 78 Cal., at page 368, 20 Pac. 737, a doubt was expressed whether the language of the act of 1885, "for work done and materials furnished," included compensation for land taken; but it was said that, though a judgment was alleged to have been rendered, the money had not been paid, and that consequently the title did not vest in the district. The question whether "land taken" was within the act of 1885 not having been decided by this court, the board of examiners, in the exercise of its judicial powers, was authorized to construe the act for itself, and evidently did so, at least as to the claim known as that of O'Brien and Walters, inasmuch as in the supplemental affidavit of appellant in support of said last-mentioned claim he states that the value of the timber taken was not less than $2,000, and "that the land destroyed and taken by the directors caused a damage to him of not less than $2,000," though the claim he presented was for $2,566.75, which he alleges was the amount agreed upon with the directors, and that the proceedings for condemnation were had at the suggestion of the directors, as their rights would be better secured thereby. These facts, we think, clearly show that the claims represented by these judgments and those audited and allowed by the board of examiners were in all essential particulars the same, and were not other or different claims from those which plaintiff was employed to collect either as to character or amount. That respondent exercised reasonable diligence and ability in the prosecution of these claims will not admit of serious question. The questions presented in Callahan v. Dunn were not so clear as to charge counsel with any lack of ability, while the time that elapsed after that decision before he secured the allowance of the other claims was not such as, under the circumstances, could be charged as a lack of diligence. Besides, appellant employed another to collect the same claims without notice to respondent, and must assume the burden of showing that respondent himself had abandoned the prosecution, either expressly or by such lack of effort as would reasonably show an abandonment. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(104 Cal. 258)

BANKS v. YOLO COUNTY. (No. 18,354.)

(Supreme Court of California. Sept. 29, 1894.)

BOARD OF EDUCATION—COMPENSATION—REPEAL OF ACT.

Pol. Code, § 1770, as amended by Act March 15, 1889, allowing five dollars per day to each member of the board of education for certain services, is not repealed by Act March 16, 1889, amending certain sections of the county government act, the later act not referring to compensation of members of said board.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by George Banks against Yolo county for salary as secretary of the board of education. Judgment for plaintiff, and defendant appeals. Affirmed.

C. M. Head, for appellant. R. L. Simpson, for respondent.

PER CURIAM. We do not think that section 1770 of the Political Code, as amended by an act approved March 15, 1889, which allows five dollars per day to each member of the board of education, including the secretary, for certain services, was repealed by sections 180 and 211 of an act approved the following day, March 16th, amending certain sections of the county government act (St. 1889, pp. 191, 192, 270, 300). There is no clause in the latter act expressly repealing any part of the former act; indeed, it has no repealing clause at all. If, therefore, it repeals the former act, it must do so by implication. But "repeals by implication are not favored, and the repugnancy between two statutes should be very clear to warrant a court holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." Cooley, Const. Lim. (6th Ed.) 182. In the case at bar the two acts, passed so near each other in point of time, must be so construed, if possible, as to give effect to both; and we see no irreconcilable conflict. The act of March 15th refers to a special subject,—compensation of members of the board of education,—while said subject is not referred to in the act of March 16th, which is in its nature general. Moreover, the parts of the said act of March 16th, which are invoked as repealing the part of the said act of March 15th here in question, are only re-enactments of the law as it theretofore stood; and some consideration is to be given to the rule declared in section 325 of the Political Code, that: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the provisions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." See Dillon v. Saloude, 68 Cal. 270, 271, 9 Pac. 162. Respondent's cause of action is not barred by the clauses of the statute of limitations invoked by appellant. It is founded on "a liability created by statute," and comes within the three-years limitation. Code Civ. Proc. § 338; Higby v. Calaveras Co., 18 Cal. 178. There are no other points necessary to be noticed. The judgment is affirmed.

(104 Cal. 168)

THOMPSON v. GORNER. (No. 15,262.)

(Supreme Court of California. Sept. 24, 1894.)

INTEREST—PROVISION FOR INCREASE AFTER DEFAULT—EFFECT—WAIVER.

1. Where a contract provides for interest at a certain rate, and that on default, in addition thereto, interest shall be paid at the rate of 1 per cent. per month, the acceptance, after default, of interest at the rate of 8 per cent., without demand for the 1 per cent. per month, is not a waiver of the latter interest accruing after the one entitled thereto has given notice that he will insist upon the same. Thompson v. Gorner (Cal.) 36 Pac. 434, reversed.

2. The provision in a promissory note that after default, in addition to the interest provided for, the maker will pay 1 per cent. per month extra, is not a penalty clause, but a contract, but the acceptance, after default, of interest without the extra 1 per cent., is a waiver thereof for the months for which such interest was accepted. Thompson v. Gorner (Cal.) 36 Pac. 434, affirmed.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Mary Thompson against Christ Gorner to foreclose a mortgage. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Edgar B. Haymond, for appellant. John Yule and Edward H. Stearns, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage given to secure a promissory note. The appeal involves only a small amount of interest on the principal of the note. The note was dated March 20, 1888, and matured two years after date. The interest clause, which gives rise to the present controversy, is as follows: "With interest thereon, in like gold coin, from the date hereof until paid at the rate of eight per cent. per annum, payable monthly in advance, and, if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month." The monthly interest was paid each month until the maturity of the note. After that—the principal not having been paid—the defendant continued to pay to plaintiff, who was the holder of the note, the monthly interest at 8 per cent. per annum; and said interest at said rate was received by plaintiff, and accepted by her as payment of said monthly interest, until February 20, 1892. On said last-named day defendant offered to pay a month's interest as usual,—at the said rate of 8 per cent. per annum,—but the plaintiff refused to receive it, and claimed interest at 1 per cent. per month as provided in the note. On March 18, 1892, defendant tendered to plaintiff the whole amount of principal due, and also the amount of interest due rated at 8 per cent. per annum. This the plaintiff refused to receive as full payment of the whole indebtedness on the note and mortgage, and on March 31, 1892, she commenced this action. The court below held, as conclusions of law, that the 1 per cent. per month was in the nature of a penalty; and also that plaintiff, having accepted the monthly interest at 8 per cent. per annum for nearly two years, waived any claim of right to exact 1 per cent. per month interest after the maturity of the note. When this appeal was in department it was held that the 1 per cent. clause in the note was not to be treated as a penalty, but as a contract to pay 1 per cent. per month interest upon a contingency shown to have happened, but that the acceptance by plaintiff of the interest at 8 per cent. per annum was a waiver of her claim to collect more interest for the months for which she had so accepted the interest at 8 per cent. We are satisfied with both of these conclusions, and adhere to them. But it was also held in department that plaintiff, by accepting the 8 per cent. for past months, waived her right to demand the 1 per cent. per month in the future. Plaintiff's points and authorities were very meager, covering only one page, and referring only to the question of penalty. In her petition for hearing in bank her counsel calls our attention to section 1698 of the Civil Code, which reads as follows: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Under the principle of this section the plaintiff was entitled to recover interest at 1 per cent. per month for the time during which she refused to accept, and did not accept, interest at 8 per cent. per annum. She did not contract in writing to change the interest as expressed by the written terms of the note, and her acceptance of the 8 per cent. was of no higher dignity than an express oral agreement. But it was an executed agreement only as to months for which she accepted the interest at 8 per cent.; as to the future, it was executory (Erenberg v. Peters, 66 Cal. 114, 4 Pac. 1091; Taylor v. Soldati, 68 Cal. 27, 8 Pac. 518; Simmons v. Hamilton, 56 Cal. 493), and void under said section of the Code (Johnson v. Polhemus, 99 Cal. 240, 33 Pac. 908). It does not clearly appear from the transcript, which by stipulation does not include all of the judgment roll, whether or not plaintiff claims as interest the difference between 8 per cent. and the 1 per cent. for the months during which she accepted the 8 per cent., but she is not entitled to said difference for said months. She is entitled, however, to interest at 1 per cent. per month from the time she first demanded it. She should have judgment for the amount of the principal, and interest thereon from and after the 20th day of February, 1892, at 1 per cent. per month. The judgment is reversed, with direction to the superior court to render judgment for the plaintiff for the amount due and unpaid upon the principal of the note, together with interest thereon from February 20, 1892, at 1 per cent. per month.

We concur: HARRISON, J.; FITZGERALD, J.; DE HAVEN, J.; VAN FLEET, J.

MACOMBER v. CONRADT et al. (No. 15,259.)

(Supreme Court of California. Sept. 21, 1894.)

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by C. A. Macomber against Julius Conradt and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

John H. Durst, for appellants. Henley, Swift & MacSherry and S. V. Castello, for respondent.

McFARLAND, J. The averments of the complaint show that the contract between respondent and appellants was one for the purchase and sale of mining stocks on margin, and the court found that the said averments were true. The appeal is based on the judgment roll alone, and there is no evidence before us. The judgment must therefore be affirmed on the authority of Cashman v. Root, 89 Cal. 373, 26 Pac. 883, and the recent case of Sheehy v. Shinn (Cal.) 37 Pac. 393. There is no conflict between said cases and Kutz v. Fleischer, 67 Cal. 93, 7 Pac. 195. The judgment is affirmed.

We concur: De HAVEN, J.; FITZGERALD, J.; HARRISON, J.

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104 Cal. 224

McCREA v. JOHNSON et al. (No. 15,580.)

(Supreme Court of California. Sept. 26, 1894.)

MECHANICS' LIENS—ASSIGNMENT.

An assignee of a mechanic's or material man's claim cannot file the notice of claim or serve the notice on the owners, so as to perfect the lien, as the privilege of asserting a mechanic's lien cannot be assigned.

Department 1. Appeal from superior court, city and county of San Francisco; W. H. Levy, Judge.

Action by G. P. McCrea against Kate Johnson and others to enforce mechanics' liens. There was a judgment for defendants, and plaintiff appeals. Affirmed.

G. P. McCrea and J. C. Bates, for appellant. W. H. Mahoney, for respondents.

GAROUTTE, J. The plaintiff is the assignee of the claims of certain laborers who performed work for a subcontractor in the erection of a certain building belonging to the respondent Kate Johnson. Her codefendants are the original contractors and the subcontractors. After the aforesaid assignment was made, the assignee proceeded under section 1184 of the Code of Civil Procedure, and served a notice upon said Johnson, stating that he was such assignee, and, among other things, requesting her to withhold from the contractor sufficient funds to meet his demands therein stated. Plaintiff subsequently filed his claim of lien, and brought this action to recover thereon.

Two questions only are involved in this appeal: (1) Has an assignee of the claim of a mechanic or a material man the right to file in the recorder's office the notice of claim of lien provided by the statute? (2) Has such assignee the right to serve upon the owner the notice provided by the terms of section 1184 of the Code of Civil Procedure? We are compelled to answer both interrogatories in the negative. It is squarely decided in Mills v. Land Co., 97 Cal. 254, 32 Pac. 169, that the right to create and assert a mechanic's or laborer's lien, under the mechanic's lien law, is a personal right, and nonassignable. It is sufficient to say that we are entirely satisfied with the principle there declared, and now reaffirm it as the law of this state. A large majority of the cases cited by the appellant as opposed to this view are not in point. They come directly in line with the views of this court as found expressed in the recent case of Duncan v. Hawn (opinion filed September 5, 1894) 37 Pac. 626. We are also satisfied that the principle which points the judgment in the Mills Case, when applied to appellant's right to give the notice to the owner contemplated by section 1184 of the Code of Civil Procedure, is fatal to his claims upon this appeal. The right to give this notice, and to secure certain benefits thereby, was a personal right of the laborer, which could not be assigned. It was no more assignable than the right to file a notice of claim of lien was assignable. Plaintiff's assignors transferred to him their claims and demands, and those claims and demands were against the subcontractor alone who employed them. At the date of such assignment, they had no claim or demand against the owner of the building of any kind or character, and, consequently, no legal rights against the owner passed to the plaintiff by the assignment. The effect of the notice provided by the section of the Code, when served by the proper parties and under certain conditions, is to create new rights and new liabilities; and, for the purposes of this case, it is entirely immaterial whether such service results in the creation of a lien upon the fund in the hands of the owner owing to the contractor, or whether a simple legal liability is created in favor of the laborer and against the owner. Under either of these conditions, the assignment of the demand cannot carry with it the right to give a notice which will accomplish such results. If a lien is created by the service of the notice, then the case is squarely within the principle declared in Mills v. Land Co.; and, if the service of the notice simply results in the creation of a legal liability against the owner of the building where none before existed, the same principle is equally applicable, and there can be no assignment of such a right. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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104 Cal. 230

BOUCHE v. LOUTTIT. (No. 18,300.)

(Supreme Court of California. Sept. 26, 1894.)

RELEASE OF GUARANTOR—FAILURE TO EXHAUST SECURITY.

1. Where defendant, to secure a mortgage note given by another, gave his nonnegotiable note under an agreement that, on the maturity of the mortgage note, the mortgage should be immediately foreclosed, and defendant should be liable only for the deficiency, the latter was released by a delay of four years in foreclosing the mortgage.

2. An action against the guarantor of any deficiency on a note after the security has been exhausted, brought before the security has been sold, is premature.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Nelson Bouche against James A. Louttit. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. J. Paulsell and Ed. R. Thompson, for appellant. Louttit, Woods & Levinsky, for respondent.

TEMPLE, C. This action is upon a nonnegotiable promissory note, executed June 1, 1881, by defendant, to one H. E. Williamson. Defendant was not indebted to Williamson, but the note was intended as collateral security for the obligation of D. and A. Bolte, who on that day borrowed from Williamson the sum of $1,100. The Bolte note was also secured by a mortgage on land in Calaveras county. The understanding between Louttit and Williamson was that, when the Bolte note became due, Williamson would proceed at once to collect the same by foreclosure of the mortgage, and that Louttit would be liable upon his note, given as collateral, only for the deficiency, if any. The Bolte note became due August 1, 1882; but no action was instituted and no steps taken to collect the same until 1886, when an action was commenced to foreclose. The amount of judgment for principal and interest and costs, and including costs of sale, amounted to $2,518.50. The amount realized from the sale, which was had July 23, 1887, was $1,800. This suit was commenced July 31, 1886. Upon these facts, the trial court held that plaintiff could not recover, and I think the conclusion must be sustained. The note was nonnegotiable, and therefore in the hands of the assignee any defense could be made which would have been good against the assignor. It also appears to have been assigned after it became due. The contract of Louttit was that of a guarantor of the deficiency after the mortgage security had been exhausted. It was the duty of the holder to proceed at once to realize upon the other security, and this he expressly agreed to do in the contract of guaranty. It needs no argument to show that a delay of nearly four years after the principal note became due is unreasonable. Furthermore, the action was prematurely brought. The guaranty was to pay the deficiency, and there was no deficiency until the sale of the mortgaged premises, and the sale took place after the suit was brought. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 227

McCORMICK v. BALDWIN. (No. 18,308.)

(Supreme Court of California. Sept. 26, 1894.)

MINING CLAIM—ABANDONMENT — RESUMPTION OF WORK.

Rev. St. U. S. § 2324, provides that, in case of nonperformance of a certain amount of labor yearly on a mining claim, it shall be open to relocation, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work on the claim. *Held*, that to "resume work," within the provision of the statute, means to begin work anew with a bona fide intention of prosecuting it.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Ejectment by Hamilton McCormick against George W. Baldwin, Jr., for mining lands. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Walling, for appellant. C. W. Kitts, for respondent.

McFARLAND, J. This is an action of ejectment. The premises described in the complaint consist of certain quartz-mining property called the "Gracie Consolidated Q. M. Claims." They include three distinct mining locations or claims adjoining each other, called the "Big Blue" (or "Gracie"), on the east; the "Guernsey," in the center; and the "East Orleans," on the west. The defendant asserts title to certain quartz-mining claims which conflict with and include portions of said Guernsey and East Orleans claimed by plaintiff. The verdict and judgment were for defendant, and, from the judgment and order denying a new trial, plaintiff appeals.

In the transcript and briefs many points touching mining law are made and suggested, but there is only one point which we deem it necessary to notice in detail, and that arises out of certain instructions of the court about the construction of the words "resume work," in section 2324, Rev. St. U. S.[1] The mining locations upon which appellant bases his right to the premises in controversy were made in the year 1885 and prior thereto. There is no pretense of evidence that he ever worked on the Guernsey or East Orleans, or that any work was ever done by him on the Big Blue prior to the year 1892. There is some evidence of some work done by appellant in a tunnel on the Big Blue in 1892, but from all the evidence in the case the jury must have found that if there was any work done on the Big Blue in 1892 it was entirely insufficient to hold the three claims under the United States statute, even though the work on the Big Blue could be applied to the other claims. But it was abundantly shown that the tunnel in the Big Blue in which appellant claimed to have worked in 1892 was of no use whatever in developing either of the other claims, and therefore could not be applied to the latter. Respondent made his locations, which included parts of the Guernsey and East Orleans, in February and April, 1893, and the Guernsey and East Orleans were then clearly subject to relocation, unless appellant, after the expiration of the year 1892, had resumed work within the meaning of the statute before respondent made his locations. Upon this subject the appellant testified that "on the 1st day of January, 1893, plaintiff performed about three hours' work on each of said three locations," and that on said day and the day following, January 2d, he dug a shaft on the Orleans about six feet deep. No more work was done by him afterwards. He contends that by these acts he had resumed work so as to invalidate any attempted hostile locations. Upon this subject the court gave several instructions, the substance of them being this: That a party cannot hold a mining claim for several years without doing in any year the work required, by simply going on it at the beginning of each year, and doing a few hours' work, with no bona fide intent to comply with the statutory requirement as to the amount of work to be done. In instruction No. 11 the word "and" is inadvertently used before the word "unless," but all the instructions taken together clearly showed to the jury what the court meant. The latter part of instruction No. 11 may be taken as a fair sample of the instructions objected to by appellant, and is as follows: "Unless, before the alleged location by the defendant of the ground in controversy, the plaintiff had done some work with the bona fide intention of doing the balance of the requisite work during the year 1893. It is against the policy of the law, and a fraud against the government and the law, to hold quartz claims by merely doing a few dollars' worth of work thereon at or near the beginning of the year next following the year on which claimant failed to do the necessary work, when such work is not commenced with the bona fide intention of being continued till the full amount is done. Such labor, so done, is a mere pretense and sham, and will not prevent the relocation for want of necessary work." This instruction, and the other instructions given by the court upon the subject, are, in our opinion, correct. To "resume work," within the meaning of said section 2324, is to actually begin work anew with a bona fide intention of prosecuting it as required by said section. Of course, it was for the jury to determine from all the evidence in the case whether or not the facts brought the case within the principle of the instructions. And under this view it is not necessary to examine the points made as to the validity of appellant's original locations, the validity of the old Stoddard claim of 1875, or the mesne conveyances thereof from Stoddard to Eastman, the contract between Eastman and Calvert, etc., or many other points made in the case. There was no substantial defect in the locations of respondent. We see nothing further in the case to be considered. The judgment and order appealed from are affirmed.

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[1] Rev. St. U. S. § 2324, provides: "On all claims located prior to the 10th day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the 10th day of June, 1874, and each year thereafter, for each 100 ft. in length along the vein until a patent has been issued therefor * * *; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, * * * provided that the original locators, their heirs, assigns or legal representatives, have not resumed work on the claim after failure and before such location."

We concur: DE HAVEN, J.; FITZGERALD, J.

104 Cal. 239

BLYTH et al. v. ROBINSON. (No. 14,543.)

(Supreme Court of California. Sept. 28, 1894.)

BOND AGAINST MECHANICS' LIENS—MATERIAL MAN AS SURETY—EFFECT—RIGHT TO ENFORCE LIEN.

1. A bond by a contractor, indemnifying an owner against liens on his building, is valid, though the plans and specifications forming part of the building contract were not filed with the county recorder.

2. Where the surety on a bond given by a contractor to an owner, to indemnify the latter against mechanics' liens on his building, supplies to the contractor material for such building, and files a mechanic's lien therefor, and in consideration of the satisfaction of the lien the owner gives him his note for an amount less than the claim, the owner may, in an action on the note, set up as a defense the liability of the surety on his bond.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Blyth and others against Robinson on a promissory note. Judgment was rendered for defendant, and plaintiffs appeal. Affirmed.

E. N. Wakeman, for appellants. A. P. Van Duzer, for respondent.

DE HAVEN, J. This appeal is taken by the plaintiffs from a judgment in favor of the defendant. The only question arising upon the record before us is this: Do the findings of the court, read in connection with the facts admitted by the pleadings, sustain the judgment? The facts shown by the record are these: The defendant entered into a written agreement with one Houser for the alteration and repair of a certain house belonging to the defendant. The contract price of this work was $4,600, the said Houser to do all the work, and furnish at his own expense all the materials used in the alteration and repair of such building, and deliver the same to the defendant free from all liens on account of labor or materials. The contract price was to be paid in installments, three during the progress of the work, and the last, of $1,300, 35 days after the building was completed. Accompanying said contract was a bond in the sum of $4,000, executed to defendant by the said contractor, Houser, as principal, and the plaintiffs as sureties, "guarantying the performance of all the conditions of said contract on the part of the said Houser, and, among other things, that said house should be delivered to the defendant free from all liens that might arise from or be filed against said building on account of material or labor furnished by said Houser, and used in or about said structure." The plans and specifications forming a part of the contract for the alteration and repair of defendant's building were not filed in the office of the county recorder. The plaintiffs are lumber dealers, and they sold and delivered to the contractor, Houser, lumber of the value of $1,036, to be used by him in the alteration and repair of defendant's building, and for which sum they duly filed their claim of lien against said building. Upon the completion of Houser's contract, there remained unpaid to him only the last installment provided for by the contract, $1,300, and there were filed against the defendant's building liens which, together with the lien of plaintiffs, amounted to the sum of $2,360, and the contractor was wholly insolvent. The defendant paid the other liens upon the suggestion of plaintiffs, and after he had done so was informed by them of their claim and lien for $1,036. In respect to this the court finds that "plaintiffs then offered defendant to take his promissory note for the sum of nine hundred ($900) dollars, and cancel said lien, which offer defendant accepted, and said lien for ten hundred and twenty-six ($1,026) dollars was accordingly canceled." This action was brought by plaintiffs to recover the amount due upon the note referred to in the finding just quoted. The defendant in his answer pleaded a want of consideration for the note, growing out of the foregoing facts, and further alleged that he had been damaged by reason of the failure of the contractor to pay and discharge the lien of plaintiffs, in the sum of $925, the amount sued for, and that under the terms of the bond above mentioned he was entitled to recover such damages by way of set-off or counterclaim to plaintiffs' action. As a conclusion of law from the foregoing facts, the superior court found in substance that the counterclaim of defendant was established, and that he was entitled to a judgment against plaintiffs for his costs.

1. The bond executed by plaintiffs, and by the terms of which they undertook to protect the defendant against all claims for liens which might arise or be filed against his building on account of material or labor used or employed by Houser in the performance of his contract with defendant, was valid, notwithstanding the plans and specifications forming a part of the building contract were not filed with the county recorder. Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. 662; Id., 99 Cal. 452, 34 Pac. 106. This being so, the judgment of the superior court was right. The note sued on was without any legal consideration to support it. The cases cited by the appellants to the effect that forbearance to sue, or the compromise of a doubtful claim, constitutes a sufficient consideration for a promise, are not in point. The findings do not show that the note was given for the purpose of compromising a doubtful claim, and, as to the forbearance of plaintiffs to foreclose their lien against the defendant's building, they were already under a legal obligation not to foreclose such lien, by the terms of the bond executed by them, and in canceling this lien they conferred no benefit upon defendant to which he was not already legally entitled, and themselves suffered no detriment they were not already legally bound to suffer; and this was not a sufficient consideration for the note obtained from the defendant (Civ. Code, § 1605), and, as the findings show that there was no other consideration, the decision of the superior court might well have been rested upon the ground that such note was without consideration.

2. But, if we assume, as did the court below, that the note is not without a legal consideration to support it, still it is clear the plaintiffs are not entitled to recover in this action. The note was given for the purpose of discharging one of the liens against which plaintiffs undertook to indemnify the defendant when they executed the bond as sureties for the contractor, and immediately upon the payment of such note a cause of action would have arisen, by virtue of the terms of such bond, in favor of defendant against the plaintiffs, for the amount so paid. Under such circumstances, and to avoid circuity of action, the defendant should be permitted to interpose plaintiffs' liability upon the bond as a defense to this action. The court did not find that defendant made any valid agreement to release plaintiffs from their obligation as sureties for the contractor, and no such legal effect was worked out by the mere fact that defendant executed the note sued on under the circumstances disclosed by the findings. The particular reason which moved him to execute his note in payment of plaintiffs' demand against the contractor does not appear, but it may be conjectured that he did so under the mistaken belief that the bond executed by plaintiffs was void because of the failure to file with the county recorder the plans and specifications referred to in the contract which it accompanied; but, whatever may have been his reason, it is sufficient to say that, so far as disclosed by this record, the giving of the note, although an unnecessary and unwise thing for defendant to do, did not destroy the obligation of the bond, and it is eminently just

that the plaintiffs should not be permitted to escape their liability upon such bond, and in so escaping be permitted to reimburse themselves from defendant for the loss which they may have sustained in their dealings with the principal on the bond. Judgment affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 813

FETTE v. LANE. (No. 18,264.)

(Supreme Court of California. Sept. 21, 1894.)

CONVERSION BY MORTGAGEE — RIGHTS OF PRIOR MORTGAGEE—EVIDENCE AND FINDINGS —NOTICE OF PRIOR MORTGAGE.

1. Plaintiff took a mortgage on certain crops as security for a loan, and subsequently defendant took a mortgage on the same crop for seed furnished, and to secure future advances. Plaintiff's mortgage was not recorded. *Held*, that a finding, on conflicting evidence, that defendant had notice of plaintiff's mortgage before making the advances on the second mortgage, would not be disturbed.

2. An unrecorded mortgage of personal property is valid against a subsequent mortgagee with notice.

3. Where defendant's second mortgage for seed furnished was made before he had notice of plaintiff's prior unrecorded mortgage on the same crops, defendant has a prior lien to the extent of the seed furnished, but cannot enforce against the plaintiff liens for advances furnished the mortgagor after notice of the first mortgage.

4. In an action by the first mortgagee of crops to recover the amount of his lien from a second mortgagee, who has sold them, one of the mortgagors may testify as to a statement by plaintiff that it was understood that the crops should be sent to defendant subject to plaintiff's lien, in order to rebut an allegation that plaintiff had surrendered his lien.

5. A finding that barley subject to mortgages to plaintiff and defendant was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff's demand of enough to secure his claim was not complied

with, and that the barley was sold by defendant, and the proceeds retained by him, shows a conversion of the barley.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by F. Fette against Frank E. Lane to recover on a note secured by mortgage on crops sold by defendant under a second mortgage. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. & John E. Budd and Thompson & Paulsell, for appellant. Nicol & Orr, for respondent.

HAYNES, C. This action was tried by the court. The findings, briefly stated, disclose the following facts: On March 31, 1892, O'Brien and Smith were indebted to plaintiff in the sum of $564, and on that day executed to him their promissory note for that sum, payable August 1, 1892, with interest, and on the same day executed to the plaintiff a "crop mortgage" to secure the same, upon a crop of barley then growing on lands therein described. Prior to that time O'Brien and Smith procured from defendant the seed for said crop, amounting to 330 sacks, under an agreement to return two sacks of barley for each sack of seed; and on May 21, 1892, O'Brien and Smith executed to defendant a crop mortgage on the same crop previously mortgaged to plaintiff to secure to defendant the return of said two sacks for each one so furnished, and for the payment of such sums of money as defendant might advance to them, not exceeding $100. This mortgage further provided that the mortgagors were to care for and protect the crop while growing, and, when fit for harvesting, to harvest, thresh, clean, and sack the same, and deliver it to the mortgagee, to be by him held and disposed of for the payment of the moneys thereby secured; and in default of either of said acts the mortgagee was authorized to enter and take possession and harvest, thresh and sack the same, and all expenses so incurred, including hauling, storing, and delivery, were to be secured by the mortgage, and first paid; and for all these purposes the mortgagee was constituted the attorney in fact of the mortgagors, with power to sell and dispose of the same at such times and for such sums as he might deem proper. This mortgage was duly recorded on the day of its execution, but the prior mortgage to plaintiff was not recorded. It was further found by the court that, after the execution of the mortgage to the defendant, but before any advances or expenditures were made thereunder, the defendant was informed of the prior mortgage to the plaintiff; that, subsequent to the execution of said mortgage to defendant, and prior to the harvesting of the crop, it was agreed between plaintiff and defendant that when the crop should be harvested and sacked the whole of it should be shipped to defendant at Stockton, and be by him stored in the name of the plaintiff, and held for the satisfaction of plaintiff's said claim; that with the consent of O'Brien and Smith the whole of the crop, amounting to 4,525 sacks, was shipped to defendant, who stored the same in his own name; that thereafter plaintiff demanded that defendant turn over to him so much thereof as was necessary to secure the note held by plaintiff, but defendant refused to do so, and thereafter sold at private sale the whole thereof, amounting to $3,468.77, and received and appropriated the whole thereof to his own use; that no proceedings were taken to foreclose said mortgage, nor any notice of sale given; that the money so received by defendant was largely in excess of the sums due under both said mortgages and all sums expended in harvesting the barley, and that no part of plaintiff's note against O'Brien and Smith had been paid. One or two other facts found by the court will be noticed in another connection. Upon these findings judgment was entered for plaintiff for the amount due on said note, and the defendant appeals therefrom, and from an order denying his motion for a new trial.

The questions principally discussed are as to the sufficiency of the evidence to justify the findings. It could serve no useful purpose to discuss the evidence in detail. A few points only can be noticed. The finding that defendant had knowledge of plaintiff's mortgage before he made any advances or expenditures on account of the mortgaged property is justified by the evidence. The evidence is clear that he had such knowledge, but as to the precise time when such knowledge was obtained the evidence is conflicting. The finding of the court, therefore, cannot be disturbed.

That defendant made large advances to O'Brien and Smith, which he was not required to make under the terms of his mortgage, and which were not secured by it, even if plaintiff's mortgage had never existed, is clear from defendant's testimony. He said: "Smith and O'Brien's account had exceeded the amount of my mortgage to such an extent that I thought I ought to be secure, and so attached the crop." The amount for which the attachment was issued appears from defendant's testimony to have been $1,236, and the evidence is sufficient to sustain the finding that he received from the sales of the barley a sum of money largely in excess of the amounts secured by both mortgages. No judgment was taken in the attachment proceeding, and, after the barley was all delivered to defendant, the attachment was dismissed. Plaintiff claimed, and the court found, that an agreement was made between plaintiff and defendant to the effect that defendant should receive all the barley, and store it in plaintiff's name, to the end that his claim should be paid, thus giving defendant the opportunity of applying the remainder to the payment of his claim, this arrangement being assented to by Smith and O'Brien. Appellant contends that this finding is not supported by the evidence, but that, on the contrary, plaintiff agreed to take the barley, and pay defendant $1,700, and further to guaranty the payment of the harvesting expenses. The evidence shows that there were negotiations looking to the arrangement last above stated, but the two propositions appear to have been under consideration at the same time. That plaintiff made the offer to pay the $1,700 is conceded by him, but plaintiff wanted the barley stored at Sperry's warehouse; that, if it was not stored there, he was afraid he should have to pay storage twice; and the conclusion seems to have been arrived at which is stated in the finding of the court. The plaintiff testified further that he left his note and mortgage with defendant for collection, and that defendant told him to come "in a couple of days," and get his money; while defendant testified that he never agreed to assume plaintiff's obligation against Smith and O'Brien, "only that when I was paid he should be paid." It would be idle for us to attempt to reconcile these conflicts, and, not being able to do so, we cannot disturb the findings.

Appellant's counsel say in their brief that "the amount secured to Lane [the defendant] by the mortgage, exclusive of the insurance money, was $3,474.96, and the amount of sales $3,468.77, so that the amount received from sales was insufficient to pay the amount secured to be paid exclusive of insurance." The sum above stated is the entire indebtedness of O'Brien and Smith to defendant, except the insurance, and includes $1,236, which appears from the testimony of defendant to have been the amount for which the attachment was issued. As the attachment could not issue without an affidavit that the amount claimed was not secured by a mortgage or other lien, the defendant cannot well insist that his whole claim is secured by his mortgage.

It is also insisted by appellant that, as plaintiff's mortgage was not recorded, it is void as against creditors and subsequent purchasers and incumbrancers in good faith and for value. Civ. Code, § 1217, provides: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case." Berson v. Nunan, 63 Cal. 552.

As to the barley furnished by defendant for seed, defendant's subsequent mortgage, taken without notice of the prior unrecorded mortgage, is entitled to the first lien. It is not necessary to consider how far, and as to what expenditures, made after knowledge of plaintiff's mortgage, defendant's mortgage may be held to constitute a prior lien, since the mortgaged property exceeds the amount secured to both plaintiff and defendant under their respective mortgages, and hence the question of priority is unimportant. Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed; but, if it were otherwise, the attachment having been discharged, no lien remained except those created by the mortgage. For the purposes of this decision it may be conceded that plaintiff expended nothing in harvesting the crop, and that defendant paid all the expenses, and that the expenses of harvesting and storing the crop were a prior lien under defendant's mortgage, for the result reached by the trial court would still be right, inasmuch as the other advances not required by the mortgage, and included in the attachment, are more than sufficient to satisfy plaintiff's lien.

As to the manner in which the barley was sold, we think the plaintiff does not stand in a position to question it. If enough had not been realized to satisfy plaintiff's lien after satisfying such part of defendant's lien as was prior to his, the question might be material. Both liens having been satisfied, the only parties interested in that question are Smith and O'Brien, and they are not in court. A discussion of the question is, therefore, not only unnecessary, but improper.

Smith, one of the mortgagors, called by plaintiff, was asked whether he, O'Brien, Fette, and Lane had an understanding as to how and to whom the grain should be shipped? The witness answered: "Yes, sir. We had an understanding. Mr. Fette told me he had an understanding with Mr. Lane." Defendant objected to what Fette told the witness unless Lane was present. Counsel for plaintiff then stated they did not offer it to bind Mr. Lane, but to meet an allegation of a surrender of plaintiff's lien. The court overruled the objection, and the witness said: "We didn't have an understanding with Mr. Lane,—at least I didn't,—how to ship it. All the understanding I had was, Mr. Fette told me that he had an understanding with Mr. Lane to ship the barley to Mr. Lane in Mr. Fette's name." We think the evidence was competent for the purpose for which it was introduced, and that the court properly refused a motion to strike it out. It was not evidence against Lane to show that he had assented or agreed that the barley should be shipped or stored in plaintiff's name, but was competent to show that Fette still claimed a right under his mortgage, and had not, as was alleged, abandoned his lien.

It is also contended that there was no conversion by defendant. But the finding that the barley was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff demanded a delivery of so much thereof as would secure his claim, that such demand was not complied with, and that defendant sold the barley and retained the proceeds, comes so near to showing a conversion that Chitty could not have discovered the difference. Counsel's contention, if based on their construction of the evidence, as was doubtless intended, might lead to a different conclusion.

After a careful review of the evidence and the arguments of counsel it must be said that, wherein there is any doubt of the correctness of any of the findings, the testimony is so conflicting that they must be permitted to stand. Nor can we even say that upon the evidence we would have made different findings. We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C., BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 282

BEQUETTE v. PATTERSON. (No. 18,254.)

(Supreme Court of California. Oct. 1, 1894.)

HIGHWAYS—PRESCRIPTION—PUBLIC LANDS—REMOVAL OF OBSTRUCTIONS.

1. In trespass for the removal of a fence built by plaintiff, evidence showing that the space across which it was built was originally a race track, but was connected at different points with public roads, and had been used continuously for 14 years as a public highway, justifies a finding that it was a public highway.

2. Act Cong. 1866 granted a right of way for highways over public lands not reserved for public use, and patents to such lands are taken subject to the easement of such highway.

3. An illegal obstruction may be removed from a highway, at the direction of the board of supervisors, by one who is not a road overseer.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Trespass by P. Bequette against William Patterson, road overseer, for the removal of a fence. Judgment for defendant, and plaintiff appeals. Affirmed.

Tuttle & Tuttle, for appellant. A. K. Robinson and Wallace & Wallace, for respondent.

HAYNES, C. Plaintiff, claiming to be the owner of certain land through which an alleged highway ran, closed up the road by fencing across it. The defendant removed the fence, and plaintiff brought an action of trespass to recover damages laid at $100, and for an injunction against threatened trespasses of a like character, if plaintiff should again erect the fence. The defendant answered, denying plaintiff's ownership of the land; alleging that he was road overseer of the district including this road, that the road in question was and is a public highway, that the fence was an obstruction and nuisance, and that he removed it under an order made by the board of supervisors; and denied that plaintiff had sustained damage. For a separate answer he alleged that plaintiff threatened to renew the obstruction, and prayed for an injunction. The cause was tried by the court, and upon the findings judgment was entered for the defendant. The appeal is from the judgment and an order denying a new trial. Appellant attacks the findings, and also specifies numerous errors of law occurring upon the trial.

We think the evidence is sufficient to justify the finding that the way in question is a public highway. That it was originally intended for and was used as a race track appears probable. It was not, however, a circular track, but was nearly straight, was adjacent to the town of Forest Hill, and connected at each end with public roads; and there is much evidence tending to show that for many years it had been used by teams, stages, and other travel. By one of the witnesses it was spoken of as a "back street." The way appears to have been known as the "Race Track" some 30 years ago, and, though travel over it has been at times interrupted, there seems to have been no interruption for the last 12 or 14 years, until the erection of the fence by the plaintiff, which was removed by the defendant. The court also found that the way had been legally and actually dedicated by Charles Harley before the plaintiff became the owner of the land. Whether this finding is sustained by the evidence it is not necessary to consider. A dedication of the way, either express or implied from long and uninterrupted use, having been found, the finding that plaintiff is not the owner of the parcel of land over which the road passes becomes immaterial, for if it is a public highway the ownership of the land could give him no right to obstruct it; and for a like reason it is immaterial whether the county owns the fee of the land covered by the way, or only an easement, since in either case it has the right to an unobstructed way.

It seems to be contended that, because the land over which the road lies was not patented by the United States until 1889, the right to use the way could not have been acquired by the public until after that time. The act of congress of 1866 granted the right of way for highways over public lands not reserved for public uses, and a patent from the United States is taken subject to the easement of such highway. McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393. This land was patented to Harley in 1889, and plaintiff could not acquire from him a better title, as against the road, than Harley had under his patent.

Appellant further contends that the defendant was not the road overseer of that district at the date of the alleged trespass, and that the finding that he was is not justified by the evidence, because his official bond was not approved until the day after the trespass. He had, however, taken the oath of office, the sureties on his bond had qualified, and he testified that in removing the fence he acted as roadmaster, and did it by direction of the board of supervisors. He was at least an officer de facto, but if he was not, as the board of supervisors have charge of the roads, and the obstruction was illegal, the defendant might lawfully remove it by their direction.

The sixth finding is not obnoxious to the objection that it is a mere conclusion of law. It finds that said road "now is, and was at all times mentioned in plaintiff's complaint, and for more than twenty years last past has been, a public road or highway, used and treated as such by the road officers of Placer county, and duly constructed as such in the manner required by law." The findings as a whole are inartificially drawn, and include some matters not essential to the support of the judgment; but, so far as essential they are sufficiently clear to be comprehended, and they support the judgment.

There are some exceptions to rulings upon evidence. That some immaterial evidence was admitted in reasonably clear, but we do not see that plaintiff was or could be prejudiced by the testimony so admitted, and the same may be said as to the exclusion of some evidence offered by the plaintiff. None of these rulings were upon a vital point in the case, nor of such character as would benefit the profession to discuss or decide. We advise that the judgment and order appealed from be affirmed.

We concur: VAN CLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 780

RAYMOND v. GLOVER et al. (No. 19,335.)

(Supreme Court of California. Oct. 3, 1894.)

Additional opinion. For former opinion, see 37 Pac. 772.

PER CURIAM. The opinion heretofore filed herein is modified by striking out the following paragraph: "Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of $1,300," —and inserting in lieu thereof the following: "Whatever, therefore, may be the rights of the bank, the plaintiff, as against Glover, is entitled to a lien upon the property to secure her debt of $1,300." The judgment rendered herein is set aside, and the following judgment is given: For the reasons given in the foregoing opinion the cause is remanded, with directions to find whether or not the bank took the note as security, without notice of the facts showing the equities in favor of the plaintiff. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds that the appellant took the note as security, without notice of the facts showing such equities, judgment should be rendered giving to the appellant a first lien upon the property for the amount of its claim, and to the plaintiff a second lien thereon to the extent of $1,300 and interest, as provided in the contract of sale.

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101 Cal. 232

PEOPLE ex rel. HARGRAVE v. MARKHAM, Governor. (No. 15,877.)

(Supreme Court of California. Sept. 27, 1894.)

ELECTION OF JUDGES—TERM OF OFFICE—CONSTITUTIONAL LAW.

St. 1893, p. 168, creating the county of Madera, and providing that the judge of the superior court elected at the special election called to complete the organization of the county should hold office till the first Monday in January, 1897, is in conflict with Const. art. 6, § 6, which provides that a judge of the superior court for each county shall be elected at the general state election, whose term shall commence on the first Monday of January next succeeding his election, in so far as it attempts to extend the term of the judge beyond the first Monday in January next after the special election.

In bank.

Mandamus by the people ex rel. Hargrave to compel H. H. Markham, governor, to include in his election proclamation a call for the election of a judge of the superior court of Madera county. Writ allowed.

Wm. T. Searles and W. H. Larew, for petitioner. Robert L. Hargrave, in pro per. W. H. H. Hart, Atty. Gen. (Francis A. Fee, of counsel), for respondent.

BEATTY, C. J. This is an agreed case by which the question is submitted to the court whether at the approaching general election a judge of the superior court of the county of Madera is to be chosen by popular vote. In form the proceeding is a petition for a writ of mandate to the governor commanding him to include in his forthcoming election proclamation a call for the election of said judge. No question is raised as to the power of the court to issue its mandate to the head of the executive department of the state government, but, on the contrary, it is conceded that if the question stated is answered in the affirmative the writ shall issue. The county of Madera was created by an act of the legislature approved March 11, 1893 (St. 1893, p. 168), out of territory theretofore included in the county of Fresno. The act provided, among other things, for the appointment of a board of commissioners to call, conduct, and verify the results of a special election of the officers necessary to complete the organization of the county. Among the officers to be so chosen, a judge of the superior court was expressly included. In pursuance of these provisions a special election was held in said county on the 16th of May, 1893, and on the 20th of the same month said board of commissioners declared the county to be duly organized. Among other officers chosen at said special election the Honorable W. M. Conley was elected to the office of judge of the superior court, and on the 23d day of May he received from the governor a commission empowering him to hold said office "for the term provided by law." The question to be decided here is, when does that term expire? or, in other words, when does a regular term of the office to be filled by choice of the electors at a regular election commence? By section 14 of the act creating the county it is provided that: "The judge of the superior court chosen under this act shall hold his office until the first Monday in January, eighteen hundred and ninety-seven, and until his successor is elected and qualified." If this provision is not in conflict with the constitution, it is plain that the first regular full term of the office does not commence until January, 1897, and, consequently, that no judge of said court is to be chosen before the general state election in November, 1896. Const. art. 6, § 6. But the relator contends that by this very section of the constitution the commencement of the first regular full term of every newly-created superior judgeship is fixed for the first Monday in January after the next ensuing general election, and, consequently, that the legislature exceeded its power in attempting to extend the term of the judge to be chosen at the special election in Madera county beyond the first Monday of January, 1895. We think this contention must be sustained. The legislature has the undoubted power to create new counties, and when a new county is created the office of superior judge of such county necessarily springs into existence. Const. art. 6, § 6. Additional judges may also be provided for in the old counties. Id. § 9. Whenever one of these new offices is created, there is, of course, a necessity that it should be provisionally filled in some manner until the commencement of a regular constitutional term; and, if the constitution is silent upon this point, the power of the legislature to make such provisional arrangement by statute cannot be questioned. But, if the constitution has fixed the commencement of the first regular term of such newly-created office, the legislature has no power to fill the office for a term extending beyond the date so fixed. We think the constitution has prescribed a rule which applies not only to the counties in existence at the date of its adoption, and to the office of superior judge therein, but to all counties organized thereafter, and to all additional judgeships, however created. "There shall be in each of the organized counties and cities and counties of the state a superior court, for each of which at least one judge shall be elected by the qualified electors of the county or city and county at the general state election. * * * The term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their election." Const. art. 6, § 6. The words, "at the general state election," as applied to newly-created judgeships, must have some definite meaning ascribed to them, and the only definite meaning they can have is the first general election after the creation of the office. If they do not mean the first election, they certainly do not mean the second or third; and if the legislature can extend the term of the judge provisionally elected or appointed beyond the first Monday in January after the first general election, they have the power to extend it indefinitely,—a power for which no one would be so bold as to contend.

It might perhaps have been plausibly argued when this question was a new one that the regular terms of all newly-created judgeships should correspond with those established by the constitution for the old counties, viz. that they should commence in 1885, 1891, 1897, and so on; but when the legislature was first called upon to give its construction to the constitution it rejected this view in favor of the one first above stated. By the act providing for an additional judge in San Bernardino county (St. 1887, p. 19) it recognized the first Monday in January, 1889, as the commencement of the first regular term of the office, and the validity of the act was sustained by this court in People v. Waterman, 86 Cal. 28, 24 Pac. 807. In all subsequent acts providing for additional judges in the older counties the same rule has been followed. San Diego, St. 1889, p. 5; San Luis Obispo, Id. p. 6; Los Angeles, Id. p. 130; Tulare, St. 1891, p. 61; Alameda, St. 1893, p. 3. As to the first three of these acts (of 1889) they of course fit either view as to the commencement of the regular terms, but the last two, and the act of 1887, fit only the view which we have approved. In organizing new counties the legislature has followed this view in the act creating Riverside. St. 1893, p. 3. The act creating Orange county (St. 1889, p. 6) conforms to either view, while the acts creating Glenn, Madera, and Kings counties (St. 1891, p. 98; St. 1893, pp. 168, 179) seem to have been based upon the theory suggested that the regular terms commence only in the years 1885, 1891, 1897, etc. The legislature, it will thus be seen, has in this matter been inconsistent with itself, and we think has, in the three acts last cited, transgressed the constitution, both in its letter and in its spirit. There is no one thing more apparent in the whole tenor of the constitution than the desire of its framers to establish regularity and uniformity throughout the whole frame and system of the government, and it is not to be supposed that they would leave as important a matter as the regular terms of the superior judges wholly unprovided for. On the contrary, it must be held, if any language of the constitution will warrant us in so doing, that a precise rule on this subject has been laid down, and this rule ought to be harmonized, as far as possible, with another leading idea of the framers of the constitution, viz. that the people, as a rule, should choose their public officers at the general elections, and that other modes of filling offices provisionally should be limited to cases of necessity.

Upon these considerations, and upon what we deem the soundest construction of the constitution, we hold, in accordance with the view which has generally found favor with the legislature, that a superior judge should be chosen in Madera county at the approaching regular election for a full constitutional term. Nothing decided in People v. Waterman, supra, is in conflict with this view, and, when the language of the opinion is considered with reference to the fact that the election there referred to was a general state election, it will be seen that it does not apply to this case. Let the peremptory writ issue.

We concur: HARRISON, J.; DE HAVEN, J.; VAN FLEET, J.; McFARLAND, J.

GAROUTTE, J., being absent, did not participate in the above decision.

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4 Cal. Unrep. 824

RICHARD v. HUPP. (No. 18,259.)

(Supreme Court of California. Sept. 29, 1894.)

EASEMENT—FLUME CONSTRUCTED OVER ANOTHER'S LAND—EVIDENCE OF ABANDONMENT.

1. Plaintiff constructed a flume 564 feet long in the bed of a stream to convey the water from his mine. The flume extended 400 feet on land below, owned by defendant. Eighteen years later, defendant built a dam across the stream, causing the water to flow back, but not further than the limit of his land. *Held*, in an action to abate the dam as a nuisance, there being evidence that the flume was built as an adjunct to plaintiff's quartz mill, that evidence that the mill was no longer in operation, and that its condition for many years had been such that it could not be used, was admissible to show an abandonment of any prescriptive easement which plaintiff may have had over defendant's land.

2. To establish a prescriptive right to an easement, the user must have been continuous, adverse, under claim of title, and with the knowledge and acquiescence of the owner of the servient estate.

3. The refusal of a motion to amend the complaint, made after the decision in the case was rendered, to conform with evidence that the erection of the dam by defendant obstructed the flow of debris and tailings from mines above plaintiff's land, was within the discretion of the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; E. A. Davis, Judge.

Action by Joseph Richard against John Hupp to abate a nuisance caused by the erection of a dam by defendant flooding plaintiff's mines. Judgment for defendant. Plaintiff appeals. Affirmed.

John Gale, for appellant. Warren Sexton and F. C. Lusk, for respondent.

SEARLS, C. This is an action to abate a nuisance averred to have been caused by the erection of a dam by defendant across a water course in Butte county, known as "Little Butte Creek," whereby the water of said creek is caused to flow back upon and submerge the quartz mining claim of plaintiff. The cause was tried by the court, without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of defendant for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. Plaintiff, who is appellant here, is, and he and his grantors have been, the owners of and in possession of a quartz mining claim situate and being in section 36, township 24 N., range 3 E., M. D. M. Plaintiff and his co-owners, in 1870 and 1871, constructed a flume running from said mine about 564 feet down the bed of Little Butte creek. Said flume was built in the bottom of a rock cut from two to five feet deep, and the top of the rock cut was from three to six feet below the natural bed of the creek. All of said flume, except 160 feet of the upper end thereof, is upon land owned by the defendant. The flume was used by plaintiff and his co-owners to convey water from their mine, and to some extent for placer mining. The mill of plaintiff has not been used since 1873, and the mill has gone to decay. In 1881, third parties, who had a bond from plaintiff, pumped out the mine, and took out some quartz, but, so far as appears, did not work it. The flume went to decay, and, as the court found, nothing is left of it but the ruins in the bed of the rock cut. Defendant is the owner in fee simple of the N. W. ¼ of section 1 in township 32 N., of range 3 E., M. D. M., under a pre-emption settlement and entry made in 1868, and a United States patent issued in 1871 to one Nelson, the grantor of said defendant. There is also evidence and a finding as to the ownership by the defendant of a mining claim on the creek between his patented land and the lower or south line of plaintiff's quartz claim, the ownership of which, however, is unimportant to the decision of the case. In 1888 defendant constructed a dam across the creek upon his patented land, about 600 feet below plaintiff's mining claim, and a short distance below certain falls in the creek, for the purpose of diverting the water of the stream for mining and irrigation. The dam so constructed by the defendant is about three feet higher than the crest of the falls, and sets the water back in the stream, but does not overflow or set the water back above defendant's own land, or upon or over the mining claim of plaintiff, or injure it in any manner. That the water so set back overflows a portion of the rock cut in which plaintiff's flume was constructed, but such portion is upon defendant's patented land; and that plaintiff is not the owner thereof, and has no easement in defendant's land, or right to use the same for the purpose of maintaining a flume thereon. The findings are quite full upon all the issues, and are only stated to the extent deemed necessary to an understanding and elucidation of the points made by appellant. At the trial, objection was made by appellant to testimony tending to show the condition of his mine; that it had not been worked since 1873; that the mill building had fallen down; the flume which carried water to the wheel had disappeared; that the wheel and machinery had gone to decay, etc.,—which objection was overruled, an exception taken, and the ruling is assigned as error.

The theory of appellant is that the testimony shows an injury inflicted by respondent upon the rights of appellant, which, if permitted to continue, might ripen into a right, and hence the interposition of equity was properly invoked, and that appellant's rights are not to be measured by the value of his property. This argument assumes an existing right in appellant, while a vital question under the pleadings related to the existence of such right. It must be conceded under the evidence that defendant's reservoir did not back the water above his own line or off his own land. If plaintiff had any easement or right of way over defendant's land for his flume it must have been by virtue of a prior appropriation, or by a continuous adverse user for a period commensurate with that fixed by the statute of limitations, viz. for five years. A right acquired by appropriation may be lost by voluntary abandonment. Evidence of nonuser during the period necessary to perfect a prescriptive right tends to show its nonexistence. There was evidence tending to show plaintiff's flume as an appurtenant to his mill and mining claim. Under these circumstances, it was proper to show that operations at the mill had been discontinued, and that its condition was, and for many years had been, such that it could not be used, not for the purpose of impeaching plaintiff's right to the mine, but to show an abandonment of the right of way, if any, over defendant's land, or such nonuser as would preclude the inference that a prescriptive title ever ripened into existence. A right acquired by prescription to an easement is measured by the extent of the continuous enjoyment, and must be adverse, that is to say, "It must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior (superior) right, and must have been uninterrupted." Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645; American Co. v. Bradford, 27 Cal. 361. "In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." Water Co. v. Hancock, supra; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623. It follows that if the flume ceased to be used, and if the property in connection with which it was used was in such condition that no user of the flume could be had, it was competent to prove such fact to show that a prescriptive right did not and could not vest in appellant to have and continue his flume upon the land of respondent.

The cause was brought to trial March 3, 1891, and submitted to the court for decision March 4, 1891. On the 14th day of March, 1891, the court filed its written decision directing findings in favor of defendant to be prepared and presented, which findings were filed April 6, 1891. After the decision was announced, and before the findings were filed, but at what precise date does not appear, counsel for plaintiff appeared in open court, and asked leave to amend his complaint so as to conform to the evidence, by averring, in substance, that for many years mining had been carried on upon Little Butte creek; and that in times of high water large quantities of tailings and mining debris have been washed down to and upon plaintiff's claims; and that, by the construction and maintenance of defendant's dam, such tailings were prevented from flowing down the creek as they would otherwise have done, and were caused to lodge upon and cover plaintiff's claim and flume, whereby he was injured and disturbed in the enjoyment of his property. The court refused to permit the plaintiff to so amend his complaint, to which ruling his counsel in due time excepted, and the ruling is now assigned as error. In the course of the trial, the witnesses, in describing the condition of the stream and the property of the plaintiff, incidentally, as it appears to us, described the conditions of the stream as to mining debris and certain dams above plaintiff's flume which had been carried out by floods and never replaced, by reason whereof the wheel of plaintiff and the flume had been to a greater or less degree submerged and clogged by the debris. The granting or refusing leave to amend under such circumstances and at such a time was a matter in the discretion of the court, with the exercise of which this court will not interfere except in case of abuse. No abuse of discretion is apparent in the present instance. It may well be that the court below saw that, if the amendment was allowed, justice would have demanded that the case be reopened, and a further trial of the new issues created thereby had. Be this as it may, no abuse of discretion is made to appear, and hence no error can be predicated on the refusal. The cases cited by appellant are either without application, or refer to instances in which the leave to amend was sought pending the trial. The case of Bradley v. Parker (decided by this court September 28, 1893) 34 Pac. 234, is on all fours with the case at bar, and what is said there need not be repeated.

Appellant contends that the findings are contradictory, indefinite, and inconsistent, and that there is no finding as to appellant's alleged title or right of possession to the flume described in the complaint. We think the findings, taken as a whole, are consistent, clear, and comprehensive. They may be in part epitomized as follow: (1) Plaintiff owns the mine. (2) He built the flume in 1870–71. (3) It is 564 feet long, and all of it except the upper 160 feet is on defendant's land. (4) The flume had not been used for 10 years. (5) Plaintiff is not the owner of that portion of the flume on defendant's land,—that is to say, the lower 404 feet thereof,—and has no easement over said land for the purpose of maintaining said flume, and no right to use said land for the purposes of said flume. (6) That the dam does not cause water to flow back on any of plaintiff's property. (7) The dam does not cause water to flow back on plaintiff's flume. (8) The dam does submerge a part of the flume or rock cut, but the part so submerged is the property of defendant, "and plaintiff has no right or interest in or to any part of it." (9) Defendant is the owner, in possession of, and entitled to the possession of all the lands in any wise affected by the waters accumulated, flooded, or submerged by said dam. (10) Plaintiff has not sustained any injury or damage. (11) Defendant's title to the land flooded was initiated in 1868, and he constructed the dam in 1888, for a useful purpose, viz. to divert water for mining and irrigating, and is using it for such purposes. There are other findings which are in accord with the foregoing. That the evidence supports these findings we cannot doubt, and that they support the judgment is equally clear. To analyze the evidence and discuss it at length would only lead to the conclusion that plaintiff, without authority or right in him so to do, constructed the lower end of his flume upon the land of plaintiff, and that the evidence was sufficient to authorize the court below to find (1) that the user was not of sufficient duration and sufficiently continuous for five years to give to the plaintiff a prescriptive right to have and maintain the same on defendant's land; or (2) if such prescriptive right was established by user, that the same was lost by abandonment. It follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 248

BURRIS v. PEOPLE'S DITCH CO. (No. 18,-294.)

(Supreme Court of California. Sept. 29, 1894.)

EASEMENT—RIGHTS OF OWNER—DITCH ON ANOTHER'S LAND—ALTERATION AND REPAIR — PLEADING—SUFFICIENCY OF ANSWER.

1. The owner of an irrigation ditch has, as against the owner of land through which it runs, the right, in making repairs, to deepen it from 1 to 17 inches for a distance of 140 feet, and to gradually lower the bed thereof 1 foot in a distance of 170 feet, where the object is to make the ditch of a uniform grade, and to remove from its bottom local irregularities, and the repairs do not increase the flow of water.

2. Where a complaint alleges a material widening and deepening of an irrigation ditch running through plaintiff's land, a denial of the allegation, followed by an averment that "on the contrary * * * said ditch is no wider, nor is it any deeper, * * * than when it was first constructed," raises the issue as to whether the ditch has been materially widened or deepened.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by David Burris against the People's Ditch Company. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Daggett & Adams, for appellant. Bradley & Farnsworth, for respondent.

HAYNES, C. The defendant is the owner of a canal or ditch used to convey water from Kings river for the purpose of irrigation. This ditch was constructed in 1875, is about 20 miles long, and in its course crosses two sections of land owned by the plaintiff. The complaint charges that in December, 1887, the defendant widened and deepened the ditch upon plaintiff's lands, and prays for a mandatory injunction to compel the defendant to restore the ditch to its former condition. The defendant answered, and the issues were tried by the court, and upon the findings made judgment was entered for the defendant. This appeal is by the plaintiff upon the judgment roll.

The court found that when said ditch was constructed across section 14 it had a width on the bottom of about 25 feet, was a little wider at the top, and was about 6 feet in depth from the surface of the ground, and from the top of the embankment about 10 feet; that on section 26 the ditch was about 30 feet wide on the bottom, was about 2 feet in depth below the surface of the ground, and from the top of the embankments its depth was about 4 feet, and that said ditch is no wider now than when first constructed, and is not any deeper, except as hereinafter stated; that in December, 1887, the defendant, against the protest of the plaintiff, entered upon said ditch to clean out the same, and increased the depth of it for a distance of 140 yards in section 14 of plaintiff's lands from 1 foot to 17 inches, and on section 26 deepened it from 1 foot at the upper end of a "170-yard stretch, tapering down to nothing at the lower end of said stretch;" that said portions of the ditch were deepened to reduce the ditch to an even and uniform grade, "said portions having theretofore been looked upon as humps in the bottom of the ditch," but that no more water is conveyed through the ditch than before. The court further found that plaintiff's lands were not thereby damaged, nor the burden increased, nor the plaintiff obstructed in the free use of any of his lands, or prevented from the comfortable enjoyment of any thereof, or that he suffered any pecuniary loss or damage.

Appellant contends that the findings show that he is entitled to the relief demanded, and asks for a reversal of the judgment, and that he have judgment on the findings. It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance. An easement of the character involved in this case is property, to the reasonable and profitable use and improvement of which, due regard being had to the rights of others, the owner is entitled. Bringing the ditch to a uniform grade by removing local inequalities, such as are stated in the findings, is not a deepening of the ditch. The prescriptive right, as to depth, is determined by the grade and general depth of the ditch, and not by local and unimportant irregularities in the bottom of it. The ditch was not widened, nor the quantity of water conveyed increased, nor the mode or purpose of its use changed. It is argued that, if defendant had the right to do what the court found was done, defendant would have the right to dig the ditch a hundred feet deeper; that in principle there is no difference between deepening it one inch and a hundred feet. There is, however, the difference between that which is material and that which is immaterial. Suppose plaintiff had acquired by prescription a private way for a few rods over his neighbor's land; that at the time he first used the way he found a tree growing in the middle of it, and instead of digging it up had cut it down so low that his wagon could pass over it, and had so used the way for five years. Would it be claimed that he might not afterwards dig up the stump? or, if he did, that his neighbor could obtain a mandatory injunction to require him to put the stump back where it grew? None of the cases cited by appellant sustain his contention. They either involve facts of a different nature, or are based upon a change of the character of the easement, or a material increase of the burden upon the servient estate. In Allen v. Water Co., 92 Cal. 138, 28 Pac. 215, principally relied upon by appellant, this court sustained the right of the plaintiff to an injunction upon the ground that the change from the open ditch to a pipe laid under ground was "a change in the character of the easement." In this case there was no change in the character of the easement, or the mode of its use or enjoyment, nor was any injury inflicted upon the plaintiff. The work done the defendant had the right to do, and the injunction was properly denied.

It is further contended that the finding that the ditch was not widened or deepened is in conflict with admissions in defendant's answer. The complaint charged a material widening and deepening, and the contention is that this allegation is not denied, and is therefore admitted. It is conceded that the denial is not in good form, and if it stood alone would be insufficient. But the pleader, after making a literal denial as to the width and depth alleged in the complaint, added: "But, on the contrary, defendant alleges that said ditch is no wider, nor is it any deeper, through the said lands of plaintiff than it was when it was first constructed." This allegation was sufficient to put in issue the said allegations of the complaint. Way v. Oglesby, 45 Cal. 655; Goddard v. Fulton, 21 Cal. 430, at page 436; Robinson v. Merrill, 87 Cal., at page 14, 25 Pac. 162. It may be said, generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial. We see no inconsistency in the findings. The inconsistency claimed rests upon the assertion that the removal of the "humps" was a "deepening" of the ditch, —a proposition that need not be further discussed. The judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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104 Cal. 179

OWEN v. MEADE. (No. 18,258.)

(Supreme Court of California. Sept. 25, 1894.)

ACTION FOR ATTORNEY'S SERVICES — PLEADING AND PROOF — ASSIGNMENT OF CLAIM — CORRECTION PENDING SUIT.

1. In an action for attorney's services, proof that the attorney's compensation was contingent on the result of litigation does not sustain an allegation that defendant agreed to pay a fixed sum for such services.

2. Where the complaint alleges that defendant agreed to pay a fixed sum for the services, evidence that such sum was a reasonable fee if its payment was made contingent on the result of the litigation is inadmissible.

3. Where an assignment of a claim failed to name the assignee, and, on the trial of an action thereon, plaintiff introduces parol evidence that he was the assignee, and that his name was omitted by mistake, and offers to have the assignment corrected by the assignor by inserting his name, the court should permit the correction.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by R. T. Owen against O. J. Meade for attorney's services. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Stanton L. Carter, for appellant. James Gallagher, for respondent.

DE HAVEN, J. The plaintiff sues as the assignee of one Grady, to recover the sum of $950, balance alleged to be due for professional services rendered by the said Grady in the prosecution of a certain action brought by the defendant against the county of Fresno. The complaint, which is unverified, alleges that the defendant expressly agreed to pay to said Grady for such services the sum of $1,000, and also alleges that the services so rendered by Grady were reasonably worth the sum of $1,000. The answer contains a general denial, and, in addition, sets out a separate defense, in which it is alleged "that the only services rendered by said W. D. Grady were done and performed under and upon a special contract and agreement with said Grady that he (said Grady) would do and perform the service to be rendered and performed under said agreement for the sum of $50," and that Grady was paid said sum before the alleged assignment to plaintiff. The action was tried by a jury, and the plaintiff recovered judgment in the superior court for the full amount demanded in the complaint; and from this judgment and order denying his motion for a new trial the defendant appeals.

1. Grady, the assignor of plaintiff, was a witness upon the trial, and testified, in substance, that he acted as the attorney for defendant in the action of Meade v. County of Fresno, under an agreement by which he was to receive for such services what is known among lawyers as a "contingent fee." In the action referred to, there was involved, among other matters, a question as to the right of the defendant here to recover interest, amounting to about $1,800, upon his original demand against Fresno county, and the witness Grady stated the following as the contract between himself and defendant in relation to the compensation he was to receive as attorney for the latter in that action: "I says, if I recover this interest, it will more than pay my fee, and save you that much money. The interest would be about $1,800. I will charge you a thousand dollars out of that, and, if I don't recover it, I shall charge you ten per cent. of what I do recover; and, if I recover nothing, I will charge you nothing." And, referring to the amount of labor performed by him in that case, the witness further stated: "I think I gave it more attention considering that my fee was to be contingent, a good one, and depended entirely upon what I recovered." The defendant moved to strike out this testimony in relation to the contingent fee, upon the ground that there was no such issue in the case, the complaint alleging that plaintiff's assignor was to receive $1,000 for his services, without any reference to the result of the action in which they were rendered. The motion was denied by the court, and the court also instructed the jury to the effect that if they found "that it was agreed by and between the defendant and Grady that, in case said Grady recovered the full amount of said claim [referring to the claim of defendant against Fresno county], with interest thereon, then the defendant would pay him $1,000 and further find said Grady did in every respect fulfill the terms of the agreement on his part, and did recover, and the defendant did receive the full amount of said claim, with interest, then you must find for plaintiff in the sum of $950." In refusing defendant's motion to strike out the testimony in relation to the contingent fee, and in giving the instruction just quoted, the court erred. There is a fatal variance between the contract testified to by the witness Grady, and hypothetically stated to the jury in the charge of the court, and the contract alleged in the complaint. The contract alleged is that of an unconditional promise upon the part of defendant to pay to the assignor of plaintiff the sum of $1,000 for his services as an attorney in the prosecution of the action referred to in the complaint; while the evidence which the court held was relevant and sufficient, if believed, to warrant the jury in finding that the defendant made the alleged contract, was to the effect that the promise of defendant to pay was not unconditional, but contingent. There is a wide and essential difference between the two contracts, and proof of one will not support a finding that the other was made. The plaintiff's allegation of an absolute promise was not sustained by proof of the contingent promise, and evidence in relation to such contingent promise was not relevant to the issues made by the pleadings. Lower v. Winters, 7 Cow. 263. In the case just cited, it was said: "The contract proved is also essentially different from that declared on. The declaration states the promise on the part of the defendant to have been absolute and unconditional. The promise proved was to give $100 for the improvements, if he obtained a contract from the landlord. If he failed in obtaining a contract, he was not bound by his promise to the plaintiff. That was the express condition upon which it was made. It is true, the plaintiff proved upon the trial that the defendant had obtained a contract from Pierpont; but the fact of proving it shows its materiality, and that it ought to have been averred. The plaintiff has recovered on a contract entirely different from that on which he declared. The objection was taken below, and should have been sustained." The case of Lower v. Winters was decided under the common-law system of practice; but, as was said by Rhoades, J., in delivering the opinion of this court in Stout v. Coffin, 28 Cal. 65: "The rule that the probata must correspond with the allegata is not abrogated by the practice act. * * * The consequences of a variance between the averments in a pleading and the proof are the same under our system of practice as at common law, except that they may be to a great extent obviated by amendments to the pleadings, which are allowed with great liberality." As an instance of the strictness with which the rule requiring the proof to correspond with the allegations is enforced, the following cases may be cited:

Tomlinson v. Monroe, 41 Cal. 94; Johnson v. Moss, 45 Cal. 515; Clark v. Insurance Co., 36 Cal. 168; Mondran v. Goux, 51 Cal. 151.

2. The court also erred in permitting the witness Terry to give evidence in relation to the reasonableness of the contingent fee testified to by the witness Grady. There was no issue in the case as to the reasonableness of such a fee, and the admission of this evidence was clearly prejudicial to the defendant. See, upon this point, Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963.

3. The written assignment of the claim sued on omitted to name the plaintiff as the assignee, or to name any assignee, and parol evidence was admitted showing that such omission was unintentional, and that Grady in fact made an oral agreement assigning such claim to plaintiff, and that the writing produced at the trial was intended to effect such assignment. This evidence was objected to by defendant, but, we think, was properly admitted; and when the plaintiff offered to have the writing amended then and there by his assignor, so as to conform to the intention of the parties thereto, if the court had permitted such correction it is not perceived that any substantial right of the defendant would have been thereby affected.

We deem it unnecessary to pass upon the other points urged by appellant. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

104 Cal. 269

VAN LOO v. VAN AKEN et al. (No. 18,267.)

(Supreme Court of California. Sept. 29, 1894.)

MORTGAGES—CONSTRUCTION—RIGHT TO FORECLOSE.

Defendants executed a note to plaintiff, stipulating that, on default in interest, compound interest was to be payable, and executed a mortgage to secure the payment of the note "at maturity," with interest according to the terms of the note. *Held*, that the mortgagee, for default in the interest, could not foreclose before the maturity of the note.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Kingsley Van Loo against Louise Van Aken and T. Van Aken to foreclose a mortgage. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank H. Short, for appellant. S. J. Hinds, for respondents.

BEATTY, C. J. Action to foreclose a mortgage. A general demurrer to the complaint for want of facts was sustained by the superior court, and, plaintiff being unable to amend, judgment was entered for the defendants, from which the plaintiff appeals. The sole question to be determined is whether the complaint states a cause of action. It is alleged that on the 9th of December, 1890, the defendants executed and delivered to the plaintiff their promissory note in the following words and figures: "$5,000. Fresno, Cal., December 9, 1890. Five years after date, without grace, for value received, we promise to pay to Kingsley Van Loo, or order, in the city of Fresno, the sum of five thousand dollars, with interest thereon at the rate of eight per cent. per annum from date until paid. Both principal and interest payable in gold coin of the government of the United States. Said interest payable annually, and, if not so paid, the interest to draw interest the same as the principal; and, if this note is collected by suit, I agree and promise that the court having jurisdiction allow a reasonable attorney's fee, together with all legal expenses, to be made part of the judgment. Louise Van Aken. T. Van Aken." That at the same time the defendants executed a mortgage to secure the payment of said note according to its terms; that on March 31, 1893, the date of the commencement of the action, no part of the principal or interest of the note had been paid; that the mortgaged premises cannot be sold in portions without injury; that the defendants have violated their covenant to insure, and are insolvent, etc. It is claimed by appellant that on this state of facts, the sum of $800 being past due for interest, he had a right to commence his action to foreclose before the maturity of the note, notwithstanding the absence of any stipulation in the note or mortgage giving him that right. The decision of this court in Broadribb v. Tibbets, 58 Cal. 6, is directly opposed to this proposition; but appellant contends that the decision in that case is not law, and that it has been overruled in the later case of Yoakam v. White, 97 Cal. 286, 32 Pac. 238. It can scarcely be said that the latter case overrules the former, though it does disapprove it. In Broadribb v. Tibbets it was held that the mortgagee could not foreclose for interest in arrears, because there was no express agreement that he might do so, and certainly that decision was opposed to the current of authority and to the reasonable construction of our statute. Code Civ. Proc. §§ 726–728. But in this case there is something more than the mere absence of an express agreement that the mortgagee may foreclose upon default in the payment of interest. Not only does the note provide for compounding the interest if not paid as it falls due, which by itself is not a waiver of the right to enforce payment, but the language of the mortgage fairly warrants the conclusion that the intention of the parties was that it should not be foreclosed until the principal of the note was due. It is given not "to secure the payment of the note according to its terms," but "as security for the payment to the said mortgagee of the sum of five thousand dollars in gold coin of the United States of America, on the ninth day of December, A. D. 1895, with interest at the rate of eight per cent. per annum, according to the terms and conditions of a certain promissory note," etc. To say nothing of the fact that this contract was entered into at a time when the decision of Broadribb v. Tibbets declared the law of the state, and when, presumably, the parties looked to that decision for a construction of their agreement, it cannot be denied that, when a mortgagee is bargaining for the right to sell his debtor's land to satisfy his claim, any doubt that fairly arises upon the terms of the note and mortgage should be resolved against him. Here we think, that, with all the aid that they can derive from the statute, the note and mortgage leave it, at least, doubtful if it was not the intention of the parties that a compounding of the interest should be the only consequence of default in its payment, and that the mortgage should not be foreclosed prior to the 9th day of December, 1895. Therefore we hold that such was their intention. The other questions suggested in the brief of counsel for appellant have not been argued on either side, and we shall not undertake to decide them. Judgment affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; FITZGERALD, J.; McFARLAND, J.

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4 Cal. Unrep. 831

HARPER v. ANDERSON et al. (No. 18,262.)

(Supreme Court of California. Sept. 29, 1894.)

PARTNERSHIP—SUIT FOR ACCOUNTING—PARTIES—EXCLUSION OF EVIDENCE—PRESUMPTION ON APPEAL.

1. Where, in an action for a partnership accounting, books offered in evidence were objected to as not showng the transactions between the parties, the action of the trial court in rejecting the books will not be disturbed on appeal unless on the trial the party offering the books pointed out wherein they were relevant, and the record shows what he proposed to prove thereby.

2. One who buys out a retiring partner, and forms a partnership with the other member of the firm, is not a proper party to a suit by such member against the retiring partner for an accounting, the complaint alleging merely that he has funds of the new partnership in his hands, which were collected by the procurement of the retiring partner.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by J. H. Harper against C. M. Anderson and another for a partnership accounting. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

L. W. Elliott and A. H. Carpenter, for appellant. Nicoll & Orr, for respondents.

HAYNES, C. Plaintiff and defendant Anderson were copartners in the nursery business from May, 1888, to May, 1889, when defendant Anderson sold out to defendant Wheeler. The complaint charges that each of the defendants has collected and received moneys belonging to the firm of Harper & Anderson, of which one-half belongs to plaintiff, and prays for an accounting. Among other allegations, it is charged that defendant Wheeler has taken possession of the books, and for that reason plaintiff is unable to ascertain the amount collected or the amount due. The cause was tried by the court without a jury. At the close of plaintiff's evidence in chief a nonsuit was granted as to defendant Wheeler, and, upon the final submission of the case, findings were filed in favor of defendant Anderson, upon which judgment was entered. Plaintiff moved for a new trial on a statement, and now appeals from the judgment and an order denying a new trial.

The appeal from the judgment cannot be considered, because not taken in time.

The answer admitted the partnership between the plaintiff and Anderson, and its dissolution, but denied that the defendants had the books of the firm, or that any collections had been made of moneys belonging to the firm. There was no allegation that the business of the firm had been settled or adjusted, nor that there were no outstanding accounts at the time of the dissolution. The court, however, found that after the dissolution there was a settlement, and that Anderson paid plaintiff a certain sum of money, but that at the time of said settlement it was agreed that any sums of money which might thereafter be collected should belong to the plaintiff and Anderson, one-half to each. The evidence amply sustains the finding of these facts.

Certain books were produced upon the trial, but by whom does not appear. The plaintiff, when on the stand as a witness in his own behalf, was shown certain books, and testified as follows: "I recognize that book as my own book. I bought and paid for it. It was stolen out of my house. It is one belonging to Harper & Anderson, not Harper & Wheeler. This one we had at the nursery, and the other was down at Stockton. We were selling here. This book will show the amount of trees sold at the nursery. Both of these will show the number shipped down, and this book will show the number sold here. This, the number actually received. * * * I don't know how many trees were sold down here. The books will show." Plaintiff thereupon offered the books in evidence. The defendants objected on the ground that they showed the business between Harper and Wheeler, and were not the books referred to in the complaint. The objection was sustained, and plaintiff excepted. After additional statements by plaintiff in relation to the books, to the effect that one shows the sales at Stockton, and another the sales at Acampo, they were again offered in evidence, and again rejected; the last objection being placed upon the ground that "they show on their face that they do not show the transactions of Harper and Anderson." It must be presumed that the court made such inspection of the books as to satisfy it that the objection that they showed upon their face that they did not show the transactions of Harper and Anderson were true. If, notwithstanding their apparent irrelevancy, they in fact contained relevant and material evidence for the plaintiff, it was the duty of counsel to point it out, and offer to show the same by the books, and to insert in the record the fact so offered to be proven.

It is also urged that the court erred in granting the nonsuit as to Wheeler; that if he bought out Anderson he was bound to account to Harper for one-half of the collections; and that he testified that he had collected $2,200, no part of which had been paid to plaintiff. Wheeler testified that he took a bill of sale from Anderson, and we infer from one of the specifications of error that it was put in evidence, but it is not set out in the record, nor its substance stated, nor does it appear in any manner that he bought Anderson's interest in the accounts. There is also evidence tending to show that Wheeler purchased from Anderson at plaintiff's instance, and became plaintiff's partner in the business, and that the money so received was the money of the new firm, in which Anderson had no interest, and for which he was not liable. The complaint did not allege any indebtedness from Wheeler on account of the business of the new firm, nor even allege that he was in any way connected with the plaintiff in business; and the only liability alleged against him was for money belonging to Harper and Anderson, which it was charged he had collected by the procurement of Anderson. The nonsuit was therefore properly granted.

It is also urged that the court erred in admitting in evidence the bill of sale from Anderson to Harper. It is sufficient to say that the record does not set out the bill of sale, nor show that it was offered or received in evidence. The appeal from the judgment should be dismissed, and the order denying a new trial affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

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104 Cal. 264

LA POINT v. BOULWARE. (No. 18,279.)

(Supreme Court of California. Sept. 29, 1894.)

INSOLVENCY PROCEEDINGS — TIME OF COMMENCEMENT—PREFERENCES—VALIDITY.

1. Under Insolvent Act, § 61, providing that "the filing of the petition by or against a debtor, upon which an order of adjudication in insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency under this act," the petition must be sufficient in law to support an adjudication, in order that a transfer made within 30 days previous to the filing thereof shall be void under section 55.

2. The sustaining of a general demurrer to a petition in insolvency shows that the petition was not such that its filing would be deemed the commencement of proceedings in insolvency under Insolvent Act, § 61.

3. A transfer made by a debtor within 30 days before the filing of an insufficient petition in insolvency is not made void by the filing of a sufficient amended petition more than 30 days after the transfer.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Moses La Point, as assignee of T. M. Boulware, insolvent, against C. N. Boulware, to recover personal property alleged to have been transferred to defendant within 30 days before the commencement of insolvency proceedings. Judgment for plaintiff, and defendant appeals. Reversed.

Reardan & White, for appellant. John Gall, for respondent.

HAYNES, C. This action was brought by the assignee in insolvency of T. M. Boulware against the defendant, C. N. Boulware, to recover certain personal property alleged to have been transferred to the defendant by the insolvent in payment of a debt within 30 days before the commencement of insolvency proceedings. The sufficiency of the complaint in this action is assailed by appellant. The complaint here, however, cannot be distinguished from the complaint in La Point v. Blanchard (No. 18,241, filed March 12, 1894) 36 Pac. 98, which was held sufficient.

Appellant also contends that the petition under which T. M. Boulware was adjudged an insolvent was not filed within 30 days after the sale of the horses and wood to the defendant, and that therefore the sale in question does not come within the statute. The sale was made on or about the 1st day of September. A petition was filed by creditors on the 10th. On September 27th the court entered an order denying the petition. That order, we think, ended that petition. But on the 29th, and within the time allowed by the court therefor, an amended petition was filed. The so-called "amended petition" must be taken to be a new petition. The alleged insolvent appeared, and filed a general demurrer to the amended petition, and, as that petition was less than 30 days after the transaction, it was in time. But that demurrer was also sustained, and leave given to amend, and the amended petition, under which T. M. Boulware was adjudged an insolvent, was filed on the 28th of November. The findings show the foregoing facts. Appellant cites section 61 of the insolvent act, which reads as follows: "The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the court shall be deemed to be the commencement of proceedings in insolvency under this act." It is contended that, if a petition is filed which is insufficient to justify an order adjudging the defendant an insolvent, a new or amended petition which is sufficient cannot take effect by relation as of the date of the original petition, but only from the date of the filing of the sufficient one. Section 405, Code Civ. Proc., provides: "Civil actions in the courts of this state are commenced by filing a complaint." The difference in language used in these two sections is suggestive. In the one last quoted, "filing a complaint" is the commencement of the action. If section 61 of the insolvent act were made to correspond to the above provision of the Code of Civil Procedure, it would read: "The filing of a petition against a debtor shall be deemed to be the commencement of proceedings in insolvency under this act." In this section, however, we have, instead of "a" petition, "the" petition "upon which an order of adjudication in insolvency may be made by the court." We think this language requires, as the commencement of the proceeding, the filing of a sufficient petition,—one upon which a valid adjudication of insolvency may be made. This would seem to be the natural construction and the plain import of the words. But, if reasons for such provision are required, they are at hand. Article 9, § 56, of this act imposes heavy penalties for a large number of acts done "after the commencement of proceedings in insolvency," which are not penal if done before. It would seem a hard construction that the filing of a petition upon which no adjudication could be made should be held to be the commencement of proceedings, and so subject the defendant to penalties, though no facts were alleged, or might ever be alleged, which would sustain an adjudication of insolvency. One of these penal offenses is "payment,"—an act which, under other circumstances, it is his duty to perform. Nor is the defendant in such proceedings the only person affected. Take this case. The defendant in this action (appellant here) indorsed a note for the insolvent, and, in consideration of the property sought to be recovered in this suit, assumed its payment. Under section 3432, Civ. Code, the transaction is expressly authorized. That section provides: "A debtor may pay one creditor in preference to another, or may give one creditor security for the payment of his demand in preference to another." And under the insolvent act such transactions are not disturbed unless they occur within one month before proceedings in insolvency are commenced. In such case the defendant here, who did only that which he had a right to do, and whose act cannot be assailed unless within the precise time limited by the insolvency act, should not be affected by the filing of an insufficient petition against the party with whom he lawfully dealt. If the filing of a petition against an alleged insolvent, upon which no adjudication of insolvency can be made, can have the effect of converting a lawful act into an unlawful one, and tie the hands of a business man, and prevent him from dealing with his property or paying his debts, it would open a wide door for persecution and the gratification of malice; a door that is effectually closed by the requirement that only the filing of a sufficient petition—one which, upon the facts alleged therein being established by proof, will sustain an order adjudging the defendant an insolvent debtor—shall be deemed the commencement of proceedings under the act.

Respondent calls attention to section 8 of the act, under which he contends the petitioners can amend their petition by leave of the court. The language of the section in that regard is as follows: "The petitioners may from time to time amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending." Respondent also calls attention to the language of section 55, which, so far as material, is as follows: "If any person, being insolvent or in contemplation of insolvency, within one month before the filing of a petition by or against him," etc. Counsel italicizes the words "a petition." The remainder of the section shows that an adjudication of insolvency and the appointment of an assignee are required before the penalty can be visited upon the person to whom the property is transferred, and therefore contemplates a sufficient petition. But this section should be so construed as to harmonize with the other provisions of the act. Section 61 makes the filing of a sufficient petition the commencement of the proceedings, and section 56 punishes certain acts done "after the commencement of proceedings in insolvency," while the construction of section 55, contended for, would make the filing of any petition, though it should not be "the commencement of proceedings," to be an act wholly changing the essential character of a transaction from a lawful to an unlawful one.

Respondent further contends that sustaining a demurrer does not necessarily show that an adjudication could not have been had under the petition demurred to. This would be so if the record here were silent as to the grounds of the demurrer. But in this case the record shows that the demurrer was a general one, which implies that the petition was attacked upon the ground that it failed to state facts which would sustain an adjudication that the debtor was an insolvent under the provisions of the act.

We therefore conclude that the proceedings were not commenced within one month after the sale of the property in question to appellant, and that the judgment and order appealed from should be reversed, and the court below directed to dismiss the action at the cost of the plaintiff.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to dismiss the action at the cost of the plaintiff.

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4 Cal. Unrep. 834

BENNETT et al. v. MORRIS et al. (No. 18,323.)

(Supreme Court of California. Sept. 29, 1894.)

Diversion of Water — Action between Mine Owners—Evidence—Examination of Witness—Record of Deed—Absence of Stamps.

1. The question whether a pleading is ambiguous and uncertain cannot be raised by a general demurrer.

2. The fact that the record of a deed executed in 1872 does not show that any United States revenue stamps were placed thereon does not render such record incompetent evidence.

3. In an action for damages for the diversion of water, where a witness has testified only as to the condition of ditches and flumes, and the work required to clear them, and not as to the amount of the damage, the action of the trial court in striking out an answer of the witness, "Yes, sir, I have," given in response to a question by defendant's counsel as to whether the witness has stated all the damages, is within its discretion.

4. In an action for the diversion of water from a mine, a witness who testifies that he knows the claims and ditches involved; that he has been over the ditches and at the mines of both plaintiff and defendant; that he has resided in the vicinity 12 or 13 years, and is a miner by occupation, having been engaged mostly in hydraulic mining,—is qualified to give his opinion as to whether it is practicable for plaintiff to run his mine if defendant continues to run his in the same way as before.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by W. P. Bennett and others against George Morris and others to restrain the diversion of water, and for damages caused by such diversion. Judgment was rendered for plaintiffs, and defendants appeal. Affirmed.

Jas. F. Farraher and R. S. Taylor, for appellants. Gillis & Tapscott, for respondents.

BELCHER, C. This is an action to restrain the diversion of water, and for damages. By the judgment the plaintiffs were awarded an injunction and damages in the sum of $250. The defendants appeal from the judgment and an order denying their motion for a new trial. In support of the appeal it is claimed that several errors of law were committed which call for a reversal. These alleged errors will be noticed in their order.

1. The demurrer to the first cause of action set up in the complaint was general, and it was not error to overrule it. The words objected to, as showing that no cause of action was stated, must be read in connection with the balance of the count; and, when so read, the most that can be said is that they make the pleading ambiguous and uncertain. But that is an objection that cannot be raised by a general demurrer.

2. The plaintiffs offered and were permitted to read in evidence the record of the deed from Timothy Haley to Andrew Bahr, dated October 18, 1872, and also the conveyance indorsed thereon from Bahr to George McNeal, dated February 14, 1873. The Haley deed appears to have been signed by the grantor's mark, and witnessed as required by section 14 of the Civil Code, and it was proved that diligent search had been made for the original papers, and that they could not be found; that the copies found in the record were substantially correct; and that under the said deeds the grantee, McNeal, entered into possession of the property, and held such possession until he transferred it to other parties in June, 1878. For the purposes for which the plaintiffs sought to use these deeds, it was therefore immaterial whether they were properly recorded or not. And it was also immaterial that it did not appear that any United States revenue stamp was placed thereon. Duffy v. Hobson, 40 Cal. 240; Thomasson v. Wood, 42 Cal. 416.

3. The point is made in appellants' brief that the court erred in admitting in evidence the deed from George McNeal to E. L. Shumway and brother, but no argument is made in support of this position. The point is clearly untenable. McNeal testified to buying the property from Bahr, and that he remained in possession of it and used the ditch and water every mining season up to 1878, when he deeded the property to the Shumways; and Edwin L. Shumway testified that he and his brother got the property from McNeal, and remained in possession of it jointly for 12 years, when they conveyed it to the plaintiffs. The deed was therefore clearly admissible, in connection with the other proofs offered, to show that the plaintiffs and their predecessors in interest had been in possession of the property in question, and claimed to own it, for more than 20 years before the action was commenced.

4. The plaintiffs' witness Knackstedt was asked on cross-examination by counsel for defendants if he had stated all the damages that had been done to plaintiffs' claim, and answered, "Yes, sir, I have." The answer was stricken out on motion, and in this we see no prejudicial error. The witness did not attempt, in his direct or cross examination, to estimate the amount of damage done. He testified as to the condition of the ditches and flumes at different times, and the work required to clean them out; and, as to all the facts stated by him, counsel were in no way restricted in their cross-examination. The court evidently considered the question and answer objected to as improper, under the circumstances, and its action was clearly within the limits of its discretion.

5. During the direct examination of plaintiffs' witness McLaughlin, he was asked whether it was practicable for the plaintiffs to run their mine if the defendants continued to run theirs in the manner they had been running it during the last mining season. The question was objected to on the ground

that the witness had not shown himself competent or qualified to answer it. The objection was properly overruled. The witness had testified that he knew the parties to the action, and the claims and ditches involved; that he was over the ditches in 1892, and had been at the mines of both plaintiffs and defendants; that he had resided in the vicinity for 12 or 13 years, and was a miner by occupation, having been engaged mostly in hydraulic mining. This was a sufficient showing that the witness was qualified to give the opinion asked for.

6. The plaintiffs' witness Edward L. Shumway was asked on his direct examination what it would cost to clean out their lower ditch; that is, clean out the débris that is there now. The question was objected to upon the ground that plaintiffs had not shown that this débris was run into the ditch by any act of defendants, or that they were responsible therefor. The objection was overruled, and, as we think, properly. It was clearly shown that the débris which filled up the "lower ditch" came down from defendants' mine, and there was no pretense that it came from any other source.

7. The only other questions discussed by counsel relate to the sufficiency of the evidence to justify the findings, and the form of the judgment. It would subserve no useful purpose to state the evidence. It covers about 60 pages of the transcript, and is in some respects conflicting. A careful reading of it, however, shows that it is amply sufficient to justify each of the findings complained of.

The judgment does not require any modification. It properly restrains the defendants from using any of the waters of the stream, except at such times and in such manner as they can do so without materially deteriorating the quality of the water for mining purposes on plaintiffs' claim, or diminishing the quantity of water flowing into plaintiffs' ditches to less than 1,000 inches, measured under a 4-inch pressure; and, so long as defendants comply with those conditions, plaintiffs will have nothing to complain of. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 254

O'ROURKE v. VENNEKOHL et al. (No. 15,542.)

(Supreme Court of California. Sept. 29, 1894.)

INSTRUCTIONS—CREDIBILITY OF WITNESS—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where, on the question of the effect of a false statement by a witness, the court charges that "a witness false in one part of his testimony is to be distrusted in others," a judgment will not be reversed because of a refusal to present the question more in detail, though the instruction asked for would, if given, have been proper.

2. In an action for personal injuries the refusal to grant a new trial because of newly-discovered evidence will not be disturbed on appeal where the new evidence is that of but one witness, who, like several who testified at the trial, witnessed the accident.

Department 1. Appeal from superior court, San Francisco county; Charles W. Slack, Judge.

Action by Margaret O'Rourke against Bernard Vennekohl and others for personal injuries. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

T. C. Van Ness, for appellants. Stafford & Stafford, for respondent.

VAN FLEET, J. Action for damages for personal injuries. Verdict and judgment were for plaintiff, and from the judgment and order denying a motion for new trial the defendants appeal.

1. The court refused the following instruction requested by defendants: "If you shall find that the plaintiff has willfully misstated any fact concerning which she has been interrogated, then her testimony in other respects should be distrusted, and the jury may in such case disregard the whole of her evidence. So, also, if you shall find that any witness examined upon behalf of the plaintiff has willfully misstated any fact concerning which he has been interrogated, then the testimony of such witness in other respects should be distrusted, and the jury may in such case disregard the whole of the evidence of such witness. Where a witness gives willfully false testimony, the jury should treat all his testimony with distrust and suspicion, and reject all, unless convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth,"—but instead charged the jury on this point that "a witness false in one part of his testimony is to be distrusted in others." While we think the instruction as requested was proper, and should have been given, nevertheless we are unable to hold that there was error in the action of the court. In refusing the instruction as asked, the court charged the jury upon the point in the language of the statute, and this, it has been repeatedly held, was sufficient. People v. Treadwell, 69 Cal. 226, 238, 10 Pac. 502, and cases there cited.

2. After a careful examination of the record, we are unable to say that the court erred in denying the motion for a new trial. The motion was based upon the ground of newly-discovered evidence. The granting of a new trial upon this ground is largely matter of discretion, an exercise of which will not be disturbed by this court except in case of abuse clearly disclosed by the record. It should not be granted in any

case where the party has not shown due diligence in discovering and producing the evidence, nor where the evidence is purely cumulative, nor unless the newly-discovered evidence is such as to render a different result upon a retrial probable. Testing the showing made in this case by these rules, we certainly cannot say that there was any abuse of discretion in denying the motion. The new evidence was largely, if not entirely, cumulative, and conceding that appellants' view of the law be correct, that a new trial should not be refused merely because the evidence is cumulative, in a case where the cumulation is sufficiently strong to render a different result probable, we cannot say that the record presents such a case. The new evidence is that of but one witness, who, like several who testified at the trial, witnessed the accident. What the probable result of his evdence, if produced before the jury, would be, when viewed in connection with all the other evidence in the case, was a question which the lower court, with all the witnesses and facts of the case before it, was much more competent to determine than this court can possibly be. We find no error in the record, and the judgment and order denying the motion for a new trial are affirmed.

We concur: HARRISON, J.; DE HAVEN, J.

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104 Cal. 262; 4 Cal. Unrep. 838

MERLEY et al. v. BOULON et al. (No. 15,630.)

(Supreme Court of California. Sept. 29, 1894.)

NOTICE OF APPEAL.

A notice of appeal stating that the appeal is from an "order" denying a motion for a new trial, and from an "order" denying a motion to set aside the judgment, a description of which is given, and "from the whole thereof," is insufficient as to notice of appeal from the "judgment."

Department 2. Appeal from superior court, San Francisco county; J. C. Hebbard, Judge.

Action by one Merley and others against one Boulon and others. There was a judgment for defendants, and plaintiffs appeal. Dismissed.

Smith & Murasky, for appellants. Pillsbury, Blanding & Hayne, for respondents.

DE HAVEN, J. The notice of appeal herein is addressed to the attorneys for respondents, and is in the following words: "You will please take notice that the plaintiff substituted in the above-entitled action hereby appeals to the supreme court of the state of California from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action, which said judgment was therein entered in the said superior court on the 16th day of December, 1891, in favor of the defendants in said action and against plaintiffs, and from the whole thereof." The appeal from the orders named in this notice was dismissed by this court, February 6, 1893; and the appellant now claims that the notice above set out is sufficient as a notice of appeal from the judgment therein described, and he insists upon his right to be heard upon such appeal. This contention cannot be sustained. The notice of appeal is certainly very awkwardly constructed, but is not ambiguous, and it cannot possibly be construed as an appeal from the judgment therein mentioned. It says nothing about an appeal from the judgment, but gives notice only that the plaintiff "appeals to the supreme court * * * from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action;" and then follows a description of the judgment to which the said motion of plaintiff related; and the notice then concludes with the words "and from the whole thereof." These latter words refer to the orders previously mentioned, and indicate that the appeal is from the whole and not a part of said orders.

While notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription, still this rule is not liberal enough to justify us in holding that the above notice of appeal is or was intended as an appeal from a judgment. In order to constitute such a notice, the paper relied on for that purpose should at least state that the appeal is taken from a judgment; and this, considering the fact that it is not difficult to find words to properly express such an intention, is not a harsh rule. It follows from these views that the cause is not properly on our calendar, the only appeal in the case having already been disposed of; and for this reason the submission thereof is set aside, and the cause stricken from the calendar. So ordered.

We concur: McFARLAND, J.; FITZGERALD, J.

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5 Cal. Unrep. 774

FLECKENSTEIN v. PLACER COUNTY. (No. 18,298.)

(Supreme Court of California. Sept. 29, 1894.)

COUNTY GOVERNMENT ACT—FEES OF CONSTABLES—CONSTITUTIONALITY OF PROVISIONS.

1. St. 1893, p. 452, § 184, subd. 17, which declares that subdivision 14 of the act (fixing the fees of constables) shall apply to present incumbents, applies to a constable of Placer county holding office at the time of the passage of the act.

2. St. 1893, p. 452, § 184, subd. 14, providing that the fees allowed constables for services in criminal actions other than felonies shall not exceed $75 for any one quarter, is not in conflict with Const. art. 11, § 5, which makes it the

duty of the legislature to regulate the fees of officers in proportion to their duties.

3. Nor does such provision conflict with Const. art. 4, § 25, prohibiting local and special legislation affecting the fees of any officer.

Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by one Fleckenstein against the county of Placer to recover constable's fees. Judgment was rendered in favor of plaintiff for less than the amount claimed by him, and he appeals. Affirmed.

A. K. Robinson and F. P. Tuttle, for appellant. L. L. Chamberlain, for respondent.

DE HAVEN, J. This action was brought by the appellant, a constable within the county of Placer, to recover from that county fees for services rendered by him as constable in criminal cases other than felonies. The amount demanded in the complaint is the sum of $573.10, with interest from July 1, 1893. A judgment was rendered in the superior court in favor of plaintiff, but not for the full amount claimed. The plaintiff appeals. It is conceded by appellant that the judgment is in accordance with subdivision 14 of section 184 of the county government act approved March 24, 1893 (St. 1893, p. 452), and that the judgment must be affirmed if that provision of the act is constitutional, and applies to constables in office in the county of Placer at the date of its passage.

1. Subdivision 17 of section 184 of the act above mentioned declares that "the provisions of subdivision 14 of this section shall apply to present incumbents." This language clearly refers to those holding the office of constable in that county at the date of the passage of the act. It can mean nothing less, and its effect is not destroyed by the fact that the main body of the act of which section 184 is a part does not, except as in the act "otherwise provided," take effect until the first Monday after the 1st day in January, 1895. It is the intention of the act that subdivision 14 of section 184 should take effect immediately upon its approval.

2. Subdivision 14 of said section 184 is not unconstitutional. It provides that constables shall have the "fees allowed by the general fee bill of 1870, provided that the amount allowed by the board of supervisors for services in criminal actions and proceedings other than felonies shall not exceed seventy-five dollars for any one quarter." This provision is not in conflict with section 5 of article 11 of the constitution of this state, which makes it the duty of the legislature, among other things, to regulate the fees of officers "in proportion to their duties." Green v. County of Fresno, 95 Cal. 329, 30 Pac. 544. Nor is the law under consideration local and special, and for that reason forbidden by the constitution.[1] Longan v. County of Solano, 65 Cal. 122, 3 Pac. 463; Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081.

The other points urged by counsel as grounds for a reversal of the judgment do not require special discussion. Judgment affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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4 Cal. Unrep. 839

SCHAEFFER v. HOFMANN. (No. 15,382.)

(Supreme Court of California. Sept. 29, 1894.)

QUIETING TITLE—CONTEST BETWEEN VENDOR AND VENDEE—FORM OF DECREE—COSTS ON APPEAL.

1. In an action to quiet title to lands, where no mortgage lien is claimed, and where the answer pleads possession under a contract of sale, and offers payment of the amount due, a judgment declaring the amount due to be a mortgage on the land will be reversed as not warranted by the pleadings.

2. Plaintiff, by a verbal contract with defendant, agreed to convey certain lands to him within five years on the payment of a certain sum. Defendant went into possession, and made improvements. *Held*, in an action to quiet title, that equity would require plaintiff to convey on payment of the amount due within a specified time, in default of which his title would be quieted.

3. Costs on appeal from two improper judgments which, if enforced, would have cast heavy expense on the appellant, are properly chargeable to respondent.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Caspar Schaeffer against Conrad Hofmann to quiet title to land. There was a personal judgment for plaintiff for a specific sum, and a final judgment making such sum a mortgage lien on the land. Said Hofmann having died, Ida Hofmann, his administratrix, was substituted as defendant, and she appeals. Reversed.

F. E. Johnson, for appellant. H. M. Barstow, for respondent.

SEARLS, C. This action is brought to quiet the title of plaintiff, and to procure him to be restored to possession of a tract of land containing about 10 acres, situate in Pope valley, county of Napa. Defendant answered, denying the allegations of plaintiff as to his right to possession of the premises; admitted that he (the said defendant) was in possession; and by way of cross complaint set out that on the 5th day of September, 1884, plaintiff and defendant entered into a verbal agreement by which plaintiff agreed to sell to him the land upon the payment by defendant to him of $150, with interest at 8 per cent., within five years, to convey the same to defendant, etc.; defendant was to take possession of the land at once, and retain the same until payment and conveyance; that defendant entered into possession, cleared the land, fenced it, erected a house and planted a vineyard and orchard thereon, etc.;

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[1] Const. art. 4, § 25.

that defendant has always been ready and willing, and is now anxious, to pay the purchase money, and offers to pay the same into court, and asks that plaintiff be decreed to execute a deed, etc. Plaintiff answered the cross complaint, claiming, in substance, that the consideration to be paid by the defendant for the land was $650, with interest, $100 of which he admitted had been paid. The cause was tried by the court, and written findings waived. An interlocutory decree was entered, decreeing the defendant to be entitled to a deed of the land from plaintiff upon payment of the sum of money due as purchase money and interest, and referring the question of the amount due to the court commissioner to take testimony and report. The court commissioner reported the sum of $594.28 due plaintiff from defendant. Thereupon, on the 30th day of January, 1893, an ordinary common-law judgment was entered in favor of plaintiff, and against defendant, for said sum of $594.28. Thereafter, on the 13th day of February, 1893, a decree was duly filed, but which decree purports to have been signed January 30, 1893. By this decree, omitting the formal parts, it was decreed that the sum of $594.28 due plaintiff was secured by a lien upon the land, and constituted a valid mortgage thereon, and which mortgage was ordered foreclosed, and the property sold, etc., as in ordinary cases of foreclosure sale. Defendant departed this life, and the administratrix of his estate, having been substituted as a party defendant, appeals from both judgments.

The cause comes up on the judgment roll. It is conceded by both parties that the personal judgment was improperly entered, and hence should be reversed, annulled, and set aside. As to the final decree the position of appellant is (1) that the first judgment was final, and, although not warranted by the pleadings, was valid upon its face, and no other or further judgment could be entered while it remained in force; (2) that the final decree entered February 13, 1893, holding the demand of plaintiff to be a valid and subsisting mortgage, and foreclosing the same, was not warranted by the pleadings.

It may be remarked that plaintiff, in his complaint, asked that his title be quieted. The defendant averred a contract for the purchase of the property by him, and averred a willingness to pay. Plaintiff admitted this, and practically the only difference between them was as to the amount due as purchase money. Under these circumstances, we agree with what is said by appellant in the opening brief, viz.: "The court should have directed the respondent to execute the necessary conveyance upon receiving the purchase money within a limited time, and, if appellant's intestate should fail to make payment within that time, then the respondent's title be quieted, and we have possession. There would have been some equity in this kind of a judgment." We may add that there would have been complete equity in such a decree. Counsel for respondent replies: "I agree with appellant that the proper judgment to have been entered is one directing the payment by the appellant within a given period, say thirty days, of the amount found due from him, and, in default of such payment, that respondent's title be quieted."

Counsel for respondent claims that the judgment as rendered was more favorable to appellant than that to which her intestate was entitled, and hence that the costs of the appeal should be assessed against her. There were two improper judgments rendered against appellant's intestate. Upon the first of them an execution might have been levied upon, and enforced against, the property of the judgment debtor. Upon the other, the expenses of a sale would have been cast upon the property of the estate represented by the appellant; or, if she paid the demand, she would have been left without the muniment of title to which, on such payment, she was entitled. It was her right to avoid these disadvantages, and it could only be done by an appeal, the costs of which should not be visited upon appellant. Appellant in her reply brief urges that a new trial should be granted because of the improper allowance of some item of interest. It cannot be said from the judgment roll that there is any just ground for this contention.

The personal judgment of January 30, 1893, appealed from should be reversed, set aside, and annulled. The final decree of foreclosure, filed February 13, 1893, appealed from, should be reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of $594.28, with interest thereon from July 29, 1891, at 7 per cent. per annum, within 60 days from the entry of such decree, and, if the appellant shall fail for 60 days to make such payment, that then and in that event the title of respondent to said land and premises be quieted, and that he be restored to the possession thereof.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the personal judgment of January 30, 1893, appealed from, is reversed, set aside, and annulled. The final decree of foreclosure filed February 13, 1893, appealed from, is reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of $594.28, with interest thereon from July 29, 1891, at 7 per cent. per annum, within 60 days from the entry of such decree, and, if the appellant shall fail for 60 days to make such payment, that then and in that event the title of respondent to said land and premises be quieted, and that he be restored to the possession thereof.

(4 Cal. Unrep. 843)

MALVILLE v. KAPPELER. (No. 15,570.)

(Supreme Court of California. Oct. 2, 1894.)

SERVICES OF ATTORNEY—EMPLOYMENT BY EXECUTOR—INDIVIDUAL LIABILITY—EVIDENCE.

1. In an action to recover attorney's fees for services rendered in an action in which defendant was named as defendant both individually and as executrix, though not a necessary party thereto, it appeared that she made no claim in such prior action in her individual capacity, and she testified that she employed plaintiff merely as attorney for the estate, but this plaintiff denied. The property received by defendant in settlement of the prior action was applied to the benefit of the estate of which she was executrix, and plaintiff received an allowance from the estate for his services, under order of court. *Held*, that a finding that plaintiff was not employed by defendant in her individual capacity was proper.

2. In such an action the inventory filed by the executrix, who was the wife of the testator, would not determine whether certain premises were separate or community property, and was therefore inadmissible for that purpose.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by one Malville against one Kappeler. There was a judgment for defendant, and plaintiff appeals. Affirmed.

N. B. Malville, for appellant. L. J. Hardy, Jr., for respondent.

HARRISON, J. The appellant is not entitled to recover from the respondent for his services, unless they were rendered at her request. This issue is directly presented by the pleadings, and the testimony thereon was contradictory; the plaintiff testifying that he was retained by her as her attorney in the action in which the services were rendered, and the defendant testifying that she never employed him, except as the attorney for the estate of her husband, of which she was executrix, and that for these services he had been fully paid. The finding of the court is in accordance with the testimony of the defendant, and upon this appeal must be accepted as conclusive. It may be added that the testimony of the defendant is corroborated by the circumstances under which the services were rendered. The suit was to foreclose a mortgage upon property belonging to the estate of the deceased husband of the defendant, made by him in his lifetime, and the only interest of the defendant in the property was such as she had under the will. Although she was named as a defendant individually, as well as in her representative capacity, she was not a necessary party defendant in the foreclosure suit, and in the answer which was prepared by the plaintiff no claim was made on her behalf, except as the executrix of the will. All the property that was received in the settlement of the suit was received for and applied to the benefit of the estate of which the defendant was executrix. For the services thus rendered by the plaintiff he was allowed by the probate court the sum of $1,500, and the court below finds that this was for all the services rendered by him in the action.

The inventory in the estate would not, for the purposes of this action, determine whether the mortgaged premises were separate or community property, and, when offered for that purpose, was properly refused by the court. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(104 Cal. 286)

SANTA CRUZ ROCK PAVEMENT CO. v. BOWIE et al. (No. 15,616.)

(Supreme Court of California. Oct. 2, 1894.)

NEW TRIAL—SURPRISE—FORECLOSURE OF ASSESSMENT LIEN—RIGHT TO JURY.

1. The fact that a party is misled by erroneous advice of his counsel as to the admissibility of evidence is not "surprise" for which a new trial will be granted.

2. In an action in equity to foreclose the lien of an assessment for street improvements, defendant is not entitled to a jury trial, as the action is not on a contract made by him, or which imposes a personal liability on him.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by the Santa Cruz Rock Pavement Company against one Bowie and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. T. Rogers, for appellants. Parker & Eells, for respondent.

HARRISON, J. Assuming that, in an action to foreclose the lien of a street assessment, it is competent for the defendant to show that the work contracted for has not been done, or that the specifications for the work have been manifestly disregarded (McVerry v. Kidwell, 63 Cal. 246), such a defense must not only be alleged in the answer, but must also be supported by evidence at the trial. If the court refuses to hear any evidence in support thereof, or disregards it in its decision, exception should be taken to its rulings, in order to have the same considered upon a motion for a new trial. Upon the hearing of such motion, any errors in law occurring at the trial must be presented in a bill of exceptions or statement of the case (Code Civ. Proc. § 658), and cannot be considered if presented merely in ex parte affidavits containing the evidence which was presented at the trial, and the rulings thereon.

After the trial in the present action, the defendants gave notice of their intention to move for a new trial upon the grounds of surprise and errors in law occurring at the trial, stating that the motion as to the surprise would be made upon affidavits. In their notice of intention they also specified certain particulars in which they claimed that the court erred at the trial. Subsequently, affidavits were filed on their behalf, setting forth matters which would have constituted evidence in support of their defense of nonperformance of the contract according to its terms, but which, if admissible at all, should have been offered at the trial. There is no statement or bill of exceptions in the record, and it does not appear whether this evidence was offered at the trial, unless it is to be inferred from a statement in the affidavit of the defendant Bowie that he was not prepared, at the trial, to present the matters embodied in his affidavit, for the reason that he was surprised at a ruling of the court contrary to what his attorneys had previously advised him. Erroneous views of the law, or advice of an attorney contrary to the ruling of the court, is not, however, the "surprise" for which a new trial will be granted. Klockenbaum v. Pierson, 22 Cal. 160.

The court did not err in refusing the demand for a jury trial. The action is in equity for the foreclosure of the lien of an assessment, and is not upon any contract made by the defendant (Emery v. Bradford, 29 Cal. 75), or upon which there is any personal liability against the defendant (Taylor v. Palmer, 31 Cal. 241). In such an action, neither the constitution nor the statute requires the submission of the issues to a jury. Code Civ. Proc. § 592; Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234.

The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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104 Cal. 293

WAGNER v. WAGNER. (No. 18,179.)

(Supreme Court of California. Oct. 2, 1894.)

DIVORCE—WILLFUL NEGLECT—RES JUDICATA.

A judgment in favor of the husband in an action by the wife for a divorce, under Civ. Code, § 105, making willful neglect of the husband to provide his wife with common necessaries a ground for divorce if such neglect continues for one year, is not a bar to a subsequent action, based on his continued neglect to support her for a year, occurring after the entry of such judgment.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action for a divorce by Helena Wagner against John Wagner, upon grounds of desertion, neglect, and cruelty. Plaintiff prevailed in the court below, and defendant appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. J. H. McKune, for respondent.

HARRISON, J. The plaintiff, by this action, seeks a divorce from her husband, upon the grounds of desertion, neglect, and cruelty. Each of these grounds is alleged in the complaint as a separate count or cause of action. In the first count plaintiff alleges that the defendant deserted her June 8, 1881, and has without cause and against her will continued his desertion since that date. In the second count she alleges that since the 8th day of June, 1881, the defendant has willfully neglected to provide for her the common necessaries of life, although he has had the ability so to do. Upon the allegations of cruelty the court found in favor of the defendant, and this finding is not challenged by either party. The complaint is unverified, and the defendant pleaded a general denial; and, as affirmative defenses, that, at the commencement of the action, there was another suit pending between the parties upon the same cause of action; and, also that in another action between them, for the same cause of action, a judgment had been rendered in favor of the defendant prior to the commencement of the present action. The court found that the defendant deserted and abandoned the plaintiff on the 1st day of June, 1889; and that since that date he had continued his desertion and abandonment; and also that since said date the defendant had willfully neglected to provide for the plaintiff the common necessaries of life, although he had had the ability so to do. These findings are amply sustained by the evidence. Upon the issue of neglect the plaintiff testified as follows: "Defendant has done nothing towards my support in the last two years. I have not seen him except here in court, at the trial of the last case. Defendant, since June 8, 1881, has not contributed to my support anything. When my child was born, in December, 1881, he came out to see me; and I asked him to give me fifty cents to buy some medicine with, and he refused. He has never had a home since for me to go to. As he went away when my child was born, he asked me when I was coming back to live with him. I told him I would go when he had a home for me. He said that had nothing to do with it, and he has never advised me he had a home for me. * * * At a former trial defendant did, while on the stand, say, in answer to his attorney, that he wanted me to come back to him, but he did not say he had any place for me. He never had any place for me, and never offered to provide a home for me." It is true that the defendant testified at the present trial: "I offer now in good faith to take her back, and provide for her." But the court was at liberty to determine whether such statement was in reality made in good faith, and was not bound to accept his statement as conclusive.

Upon the special defenses set up in the answer, the court found that there was no action pending between the parties at the commencement of the present action; that the judgment relied upon by the defendant as a bar was rendered in an action commenced on the 1st day of June, 1889, for causes of action existing at that time; and that said judgment was a bar to all of the acts mentioned in the complaint herein occurring before the commencement of that action, but was not a bar as against any subsequent desertion and neglect. The facts constituting these special defenses are the following: In 1887 the plaintiff commenced an action for divorce against the defendant, in the county of Yolo, upon the grounds of desertion and neglect, in which she alleged that, during all the time since their marriage, he had willfully neglected and refused to provide her with the common necessaries of life, although he had the ability so to do; and that on the 8th day of June, 1881, he deserted her, and had ever since lived separate and apart from her. Issues were joined upon these averments, and on May 13, 1889, judgment was entered in his favor. June 1, 1889, the plaintiff commenced another action for divorce against the defendant, in the county of Sacramento, upon the same grounds, alleging in her complaint that the defendant willfully deserted her more than two years before the commencement of that action; and that, for more than five years prior to the commencement of the action, he had neglected to provide for her the common necessaries of life, although he was abundantly able to do so. Upon issues joined on these averments, the superior court of Sacramento county rendered a judgment in favor of the defendant, which was entered October 24, 1889. The present action was commenced January 21, 1891.

Civ. Code, § 105, makes the willful neglect of the husband to provide for his wife the common necessaries of life, when he has the ability so to do, a ground for divorce, if such neglect continues for one year. A judgment in favor of the husband, in an action by the wife for a divorce upon this ground, could not in the nature of things be a bar to her right to assert as a ground of divorce his continued neglect to support her for a year, occurring after the entry of such judgment. The support of his wife is a continuing obligation on the part of the husband, and his failure to meet this obligation is a continuing cause for a divorce, unless it appears to the court that there has been an unreasonable lapse of time before the action is commenced (Civ. Code, § 124); and the husband is not released from this obligation by a judgment in his favor in an action for a divorce upon this ground. If, after such judgment, he continues to disregard this obligation for the period required by the statute as a ground for a divorce, the former judgment cannot avail him as a defense. The law does not fix the amount of income which the husband must receive in order to impose upon him the obligation of supporting his wife, nor does it attempt to designate what are the common necessaries of life. These matters vary with the varying circumstances of the parties to the marriage, and it is left to the discretion of the judge in each case to determine whether the husband's income, as well as the relation between him and his wife, are such as to impose upon him the obligation of providing for her wants; but when a husband is in constant employment, for which he receives the ordinary wages of his labor, and refuses or neglects for years to make any provision for the wants of his wife, a court is justified in finding him guilty of willful neglect. Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906, has no application to the present case. That was an action brought by the wife under section 137, Civ. Code, to recover permanent support from her husband. Her right to maintain the action depended upon the fact of his desertion, without any regard to the time of its continuance. It was held that a former judgment in his favor, in an action for permanent support, based upon a specific act of desertion, was a bar to a second action based upon the same act of desertion.

Certain rulings of the court upon the admissibility of evidence are assigned as errors, but, as these rulings were with reference to evidence upon the issue of cruelty, they need not be considered. The testimony of Parish related to the defendant's neglect prior to the commencement of the former action. As the court found that this neglect was barred by the judgment in that case, it could have had no weight in determining its decision. As the order of the court must be affirmed upon the foregoing grounds, it is unnecessary to determine whether the former judgments in favor of the defendant are a bar to the plaintiff's right to a divorce upon the ground of his desertion. The order is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.; McFARLAND, J.

(4 Cal. Unrep. 845)

BANK OF OROVILLE v. LAWRENCE et al.

(LAWRENCE, Intervener. No. 18,257.)

(Supreme Court of California. Oct. 1, 1894.)

SPECIAL FINDINGS — CONTROLLING CHARACTER — PLEADING—UNCERTAINTY — DESIGNATION OF INSTRUMENT—LIEN OF MORTGAGE.

1. If a discrepancy exists between the general finding and the more specific findings of particular facts, the latter must control.

2. Where an instrument which is in legal effect a mortgage, and not a deed of trust, is set out in full in the complaint, the fact that it is there designated a "trust deed so being and operating as a mortgage" does not create an ambiguity in the pleading.

3. A mortgage given to secure advances up to a certain sum, if duly recorded, takes precedence of a subsequent attachment, to the extent of any balance due on such advances up to said sum.

Department 1. Appeal from superior court, Placer county; M. K. Harris, Judge.

Action by the Bank of Oroville against George H. Lawrence and Nellie L. Lawrence. W. J. Lawrence intervened. Plaintiff had judgment, and defendants and intervener appeal. Reversed.

John Gale, for appellants. Harris & Lloyd, for respondent. Reardan & White, for intervener.

VAN FLEET, J. This action was brought to foreclose an instrument in the nature of a mortgage given by defendants on certain real and personal property to secure the repayment of advances, which, by its terms, plaintiff was to make to the defendant George H. Lawrence, by paying his overdrafts to the amount of $1,800. The complaint alleges the making of advances in the aggregate of $4,449.76, the repayment of $3,278.86, and a balance due plaintiff of $1,218.90, with interest in the sum of $47.65. A demurrer by defendants was overruled, and they answered, admitting the making of the mortgage, but denying that there was any indebtedness due. There was an intervention by one W. J. Lawrence, claiming a prior lien on the mortgaged property by virtue of an attachment levied in a suit against the defendant George H. Lawrence. The court found in favor of plaintiff in the amount claimed, and in favor of the right of the intervener to a prior lien upon the personal property, but postponing his lien upon the realty to that of the plaintiff, and a decree was entered accordingly. The defendants appeal from the judgment, and the intervener from so much thereof as postpones his lien upon the real property. The appeals are based upon the findings alone.

From a mass of probative facts found, it appears in substance that the defendant George H. Lawrence, who was a butcher in the town of Oroville, desiring to buy a band of beef cattle which were for sale, and being without ready money to make the purchase, applied to the plaintiff bank. The price of the cattle was $1,600, and the bank agreed, in consideration of the making of the mortgage in suit, to furnish the money to pay for the cattle, and to advance Lawrence $200 besides, making in all the sum of $1,800; the arrangement being that the bank should take the bill of sale of the cattle in its own name, and hold it as additional security for its advances. The mortgage was accordingly executed, and on the same day that it was delivered, February 17, 1893, Lawrence drew his check on the bank for $1,800, which was honored by the bank, giving to the agent having charge of the cattle its draft for $1,600, and taking the bill of sale, and paying to Lawrence $200 in cash. For some reason, however, which does not clearly appear, the agent was unable to make delivery of the cattle, the sale fell through, and the $1,600 draft was returned to the bank on February 20th, without having been negotiated or cashed. On February 23d, Lawrence paid into the bank $100, and subsequently, to adopt the language of the finding, "on the 25th of said month of February the plaintiff, recognizing that defendant George H. Lawrence had received no benefit through the attempted purchase of said band of cattle, honored his overdrafts under the terms of said trust deed or mortgage to the extent of four hundred and sixty-five and eleven hundredths dollars ($465.11) and in like manner, on the 27th day of said month, advanced the further sum of three hundred and ninety-five dollars ($395), and in like manner, on the 1st day of the following month of March, the further sum of $32.15. That on the 3d day of said month of March the defendant deposited with plaintiff the further sum of one hundred and forty dollars ($140), thus leaving him indebted to the bank, upon a simple money basis, in the sum of eight hundred and fifty-two and twenty-six hundredths ($852.26), saying nothing of interest." On the 4th of March the parties were informed that the beef cattle for which they had negotiated could be purchased, and upon the promise of Lawrence that he would repay plaintiff the $852.26 already advanced, by the 6th of March, plaintiff advanced and paid the $1,600 for the cattle; taking the bill of sale in its own name, and the cattle into its possession, as originally agreed. Lawrence did not, however, pay the $852.26 as promised, and plaintiff then required him to pay in cash for the cattle at the rate of $30 per head, as he received them from plaintiff's possession, and on these terms the cattle were eventually delivered to and slaughtered by Lawrence. It is further found that on May 27th the plaintiff advanced and paid for Lawrence the sum of $95.80 to discharge certain attachment claims against the mortgaged property. The above facts, with others of an immaterial character, are all found in finding 5. It is then found, in finding 6, "that, in view of all the deposits and payments made by said George H. Lawrence, the balance of the account on the 29th day of May, 1893 (the date of the commencement of this action), stood in favor of plaintiff and against said defendant in the sum of one thousand two hundred and eighteen and ninety hundredths dollars ($1,218.90) principal, besides the sum of ($46.05) forty-six and five hundredths dollars interest, at the rate of one per cent. per month as provided in said trust deed, and that the same was long overdue and payable from said defendant George H. Lawrence to plaintiff, by virtue of the terms of said overdrafts or checks, and as well also by virtue of said demand for payment of date of March 7, 1893."

The main question presented is whether the findings support the judgment, and we think it manifest that they do not. Under the issues raised the ultimate facts to be found were as to the amount of the indebtedness, if any, and whether the same was due. It is true that the court, in finding 6, finds the balance of the account to be $1,218.90 in plaintiff's favor, with certain interest, and that by the terms of the overdrafts the same was due; but it is perfectly evident that this finding is merely a conclusion drawn from the antecedent specific facts found in finding 5, and it will be as readily seen that these facts do not sustain the conclusion, either as to the amount of the balance standing in plaintiff's favor, or as to the fact of its being due. These findings being inconsistent, we must look to the specific facts rather than the general conclusion to find support for the judgment, upon the well-settled principle that if a discrepancy exists betwen a general finding and the more specific findings of particular facts the latter must control. Looking at finding 5, it is apparent that the lower court was under a misapprehension of the effect of the transaction in including, as one of the advances made by plaintiff, the $1,600 draft or bill of exchange given February 17th. The sale of the cattle having fallen through at that time, and the draft having been returned to the bank and never paid, it did not constitute an advance under the mortgage, since the sum was never in fact withdrawn from the funds of the bank. This, then, left but the $200 paid to Lawrence as the amount actually advanced on February 17th. Subsequently other advances were made, which gave a balance on March 3d of $852.26 owing plaintiff; these advances being clearly within the terms of the mortgage, because less in amount than $1,800. On March 4th the plaintiff advanced and paid the $1,600 for the cattle. This advance, in excess of the security afforded by the mortgage, was made partly in consideration of the promise by Lawrence to pay back within two days the balance of $852.26 then standing against him. This, however, he did not do, and thereupon the plaintiff required Lawrence to pay for the cattle as he got them. Right here the finding is indefinite and obscure on the point as to whether Lawrence received any of the cattle without paying for them. It is possible he may have done so before the plaintiff made the requirement that he pay cash. If he did pay for them all at the rate of $30 per head, he must have paid back all and a little more than their purchase price, since there were 55 head in the lot. If the fact is that there remained any unpaid portion of the sum advanced for the cattle, it should be distinctly found, in order to strike a correct balance. As the findings leave the account, the most that can be found against the defendant is the item of $852.26, due March 3d, and the $95.80 advanced May 27th to discharge attachments, making $948.06. There is no way that we can discover, under the facts found, by which the balance arrived at by the court can be figured out. Nor is there any sufficient finding as to the balance due when the action was commenced. Here, again, the specific facts found do not support the conclusion stated in finding 6. As to the $852.26, the promise of Lawrence to repay that amount on March 6th was for a good consideration, and that sum became due at that date. But there is nothing whatever in the findings to show any understanding or agreement, as required in the mortgage, as to when the $1,600, or any part of it, or the item of $95.80 subsequently advanced, should be repaid; and as the $852.26 cannot be traced into the final balance struck, the judgment cannot be supported, because there is nothing to show that that balance was due when the action was commenced. There being no basis, in view of the uncertainty of the findings, for a modification of the judgment, the case will have to be sent back for a new trial.

There is no other point requiring extended notice. The demurrer of defendants to plaintiff's complaint was properly overruled. The instrument sued on, while having the form of a deed, and purporting in terms to convey the title to the property, shows upon its face that it was intended as, and in legal effect is, a mortgage, and not a deed of trust. Koch v. Briggs, 14 Cal. 256. Being set out in full in the complaint, the fact that the pleader designates it as a "trust deed so being and operating as a mortgage" does not create an ambiguity or uncertainty in the pleading, since its character is to be determined from its terms. The allegation "that all said advances made by way of payment of said overdrafts were by the terms thereof, and so became immediately due and payable," is not a conclusion of law, but is, while awkwardly expressed, a sufficient allegation of the ultimate fact. The statement published by the plaintiff corporation was substantially sufficient to bring it within the law, and the court did not err in so holding. Nor did the court err, under the facts found, in postponing the lien of the intervener to that of the plaintiff upon the real estate. While the plaintiff never acquired a lien upon the personalty by virtue of his mortgage, he did upon the realty; and, the attachment of the intervener having been levied subsequently to the recordation of the mortgage, the lien of the latter took priority, to the extent of any balance found due plaintiff up to $1,800, since the fair construction to be put upon the terms of the mortgage is that it was a continuing security for any balance of advances or overdrafts not exceeding $1,800. Judgment reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

104 Cal. 279

BLACK v. SHARKEY. (No. 18,202.)

(Supreme Court of California. Oct. 1, 1894.)

DELIVERY OF DEED—EVIDENCE OF INTENTION.

1. Though there is no allegation of fraud, accident, or mistake in the answer, parol evidence is admissible to show that the deed on which plaintiff relies, and which named him as grantee, was not in reality delivered, though it was handed to him by the grantor.

2. In an action of ejectment, it appeared that, 13 years previously, plaintiff's uncle handed him a deed of the land, which stated a money consideration, but that the uncle remained in exclusive possession and paid the taxes for 10 years, until his death, as did his administrator up to the time of trial, and that plaintiff, as county assessor, for four years, took his uncle's affidavit that he owned the property, and did not include it in his own inventory of assets under the insolvent act, but stated in conversation that his uncle turned over the land to him for a time to avoid trouble. While he had the deed, plaintiff gave the patent to the land to his uncle, telling him at the time that he had destroyed the deed, and advised him not to give defendant a deed of the land, and later expressed regret when his uncle's will, in defendant's favor, was declared void, saying that the land ought to go to defendant. Plaintiff testified that he failed to assert ownership because the deed was lost for a number of years, and he did not wish to make a claim without ability to produce a deed, and that he recorded the deed when he found it, but did not notify defendant for several months, though he knew that the administrator had commenced proceedings to sell the land. *Held*, that a finding that the instrument was not intended to operate as a deed was proper.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action of ejectment by Thomas Black against Miles Sharkey. Judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

P. O. Hundley and Goodwin & Goodwin, for appellant. C. E. McLaughlin, for respondent.

VANCLIEF, C. Action of ejectment in which the judgment was in favor of the defendant, and plaintiff appeals. The complaint is in the most general form, alleging plaintiff's ownership and right of possession, and an ouster and withholding of possession by defendant; and the answer is a specific denial of all allegations of the complaint, except as to the withholding of possession. James Sharkey, uncle of defendant, was the owner of the demanded premises on May 13, 1878; and plaintiff claims title under him by a deed of conveyance of that date, which purports to be an absolute bargain and sale deed, in consideration of $600, the payment of which is acknowledged in the deed. The evidence satisfactorily shows that the deed was signed, acknowledged, and placed in the custody or possession of plaintiff by James Sharkey at or about the time of its date, where it remained until the commencement of this action,—a period of 13 years. James Sharkey continued to reside on the land described in the deed until December 15, 1888, when he died; and defendant, as administrator of James Sharkey, has been in possession ever since. The plaintiff never had actual possession of the land, and never received any rent or profit therefrom. On the trial the defendant contended that the deed was never delivered to plaintiff in the sense required by law to give it effect as a conveyance of the land, for the reason that neither party ever intended that it should have such effect; and the trial court sustained this view.

1. Counsel for appellant contend that, inasmuch as there is no allegation of fraud, accident, or mistake in the answer, no evidence dehors the deed was admissible to prove the intention with which the deed was placed in the custody or possession of plaintiff, and especially not admissible to prove that the parties did not intend that the deed should take effect according to its terms. While it is true that the possession of a deed by the grantee is prima facie evidence that such deed was delivered by the grantor with intent that it should take effect according to its terms, yet such possession is not conclusive evidence of a valid delivery; and "it may be shown by parol evidence that a deed in the possession of the grantee was not delivered." Devl. Deeds, §§ 294, 295, and authorities there cited. "And even if the deed is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered. While, therefore, it is not competent to control a deed by parol evidence where it has taken effect by delivery, it is always competent by such evidence to show that the deed, though in the grantee's hands, has never been delivered." Washb. Real Prop. p. 311. And it is also well settled that a deed which has always remained in the hands of the grantor may be shown to have been duly delivered. Says Mr. Devlin (section 269): "Actual manual delivery and change of possession are not required in order to constitute an effectual delivery; but whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case." In the case of Hastings v. Vaughn, 5 Cal. 316, it was said: "Delivery is a qestion of fact, depending more upon intention than upon the mode of fulfilling the intention." In Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, and 8 Pac. 46, it was said: "The act, solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall operate. * * * The intent with which it is delivered is all important. This restricts or enlarges the effect of the instrument." To the same effect is the case of Denis v. Velati, 96 Cal. 223, 31 Pac. 1. In all these cases

extrinsic parol evidence was admitted to prove the intent. As strong cases to the same effect in other states, see Stewart v. Stewart, 50 Wis. 445, 7 N. W. 369; Knolls v. Barnhart, 71 N. Y. 474. I think, therefore, that the court did not err in admitting extrinsic evidence tending to prove that the deed was neither delivered by defendant nor accepted by plaintiff with the intent that it should take effect as a conveyance of the land.

2. Counsel for appellant contend that, even if the evidence was admissible, it was insufficient to justify the finding of the court. It must be conceded, not only that the burden of proof was upon the defendant, but that, to sustain it, the proof on his part must have been strong and satisfactorily convincing; and it seems to have been so, though mostly circumstantial. (a) As above stated, the plaintiff was never in possession of the land, and never received any rents or profits during the 13 years between the date of the deed and the commencement of this action. (b) James Sharkey remained in the exclusive possession, claiming to be owner, until he died,—a period of 10 years,—and during this period paid all the taxes; and his administrator has been in possession and has paid all the taxes ever since. (c) During four years of the period that James Sharkey was in possession, the plaintiff was assessor of the county of Plumas, in which the land is situate, and, as such assessor, officially and personally assessed the land for each year of its term of office, to James Sharkey, as owner, and, prior to each assessment, administered to Sharkey the oath, required by law, that the list of property (including the land in question) assessed to him was correct; the written description of the land in each list being in the undisputed handwriting of the plaintiff. On the occasion of one of these assessments, Sharkey complained to him that his valuation of the land was too high, to which plaintiff answered that he did not think so. (d) On July 12, 1886, plaintiff filed in the superior court of Plumas county his voluntary petition as an insolvent debtor, and annexed thereto an inventory purporting to contain an accurate description of all his estate, both real and personal. This inventory was verified by his oath, as required by the insolvent act; but it contained no description of nor reference to the land in question. (e) O. McElroy testified, in substance, that, about 13 or 14 years before the trial, he had a conversation with plaintiff, in which plaintiff told him that Sharkey was getting old and childish, and imagined that he might have trouble about his land, and for that reason "turned the land over to plaintiff for a time;" but said nothing about a deed. (f) Defendant testified that in 1882, in his presence, plaintiff handed to James Sharkey the United States patent for the land, saying, "Here, Uncle Jimmy, is your patent;" that Sharkey asked plaintiff, "What ever became of that deed?" and plaintiff answered that "he destroyed it;" and it was admitted that the patent was in Sharkey's possession at the time of his death. Defendant further testified that in 1884 plaintiff told him "to take care of the old man, and, when the old man would die, he would leave me his property;" that in 1884 or 1885 James Sharkey proposed to deed the land to defendant, and they went to plaintiff's store to have plaintiff draw the deed, but he would not draw the deed, and advised James Sharkey not to make such a deed, for the reason that, if he did, defendant "could kick him out any time," but said nothing about his deed for the property, or his claim to be the owner of it; that in 1888, after the death of James Sharkey, plaintiff advised defendant to settle up the estate, and let it in his own name, and accompanied defendant to the county seat for the purpose of assisting him to that end. (g) It appears that James Sharkey had attempted to make a will giving his property to defendant, and, when plaintiff and defendant went to the county seat for the purpose of commencing proceedings to settle the estate, they called on Mr. McLaughlin, defendant's attorney herein, for advice. As to what was said by plaintiff on that occasion Mr. McLaughlin testified as follows: "On the 28th of December, 1888, Miles Sharkey and Thomas Black, the plaintiff and defendant in this action, came to my office, and presented to me a document purporting to be the last will and testament of James Sharkey. I told them it was not a will in law. When I told them it was not a will, Mr. Black said to me: 'It is too bad. Uncle Jimmy always intended that land should go to Miles. What will be the result if this is not a will?' I said, after the payment of the debts and costs of administration, it must be distributed among the heirs of James Sharkey. He said: 'That is too bad, too bad. I am sorry there was a mistake. The land should belong to Miles Sharkey.' When it came to filling in the petition for letters of administration, Miles Sharkey said nothing. When it came to a description of the real estate, Mr. Black said: 'Well, there is Uncle Jimmy's homestead in Sierra valley. I can't give you the numbers, but you will find them in the assessment roll of 1888.'" (h) There was the testimony of two other witnesses tending in a slight degree to impeach the character of the plaintiff for truth and veracity, but his own testimony, in connection with undisputed facts and circumstances, was more damaging. The only evidence on the part of the plaintiff in rebuttal, except his own testimony, was the testimony of James Collins as to plaintiff's character. By his own testimony, he neither denied nor attempted to explain the evidence for the defense showing his assessment of the land to plaintiff as owner, nor that showing that he did not include the land in his insolvency inventory, nor did he deny any part of the testimony of Mr. McLaughlin, but he simply denied all the material testimony

of the defendant. Upon being asked why he did not set up his ownership of the land at the time McLaughlin pronounced James Sharkey's will invalid, he answered: "There was several years that that deed was lost. If I had gone to work and said I owned that land by a deed, and could not produce it, it would have been like many other blunders. They would have laughed at me. Therefore I said nothing in regard to it because of the loss. It was not recorded. Very soon after, I found it, and got it recorded." He further testified that the deed had been lost seven years before he found it; that his little child found it in his woodshed; but that he did not notify the defendant or lay any claim to the land until three or four months after he found the deed, though he knew, before he found it, that proceedings for an administrator's sale of the land had been commenced and were pending in the probate court.

I think the judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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104 Cal. 344

BAXTER v. HART. (No. 19,425.)

(Supreme Court of California. Oct. 2, 1894.)

PARTIES PLAINTIFF—TRANSFER OF INTEREST—PLEADING—WAIVER OF DEFECT.

1. Where one of the parties jointly interested in a contract for threshing grain agrees that the other shall receive all of the benefits thereunder, the latter, being the real party in interest, is the only proper party plaintiff in an action thereon.

2. The objection that one of the joint obligees in a contract, in an action thereon by himself alone, failed to set out in his complaint, the agreement by which he acquired the other party's interest, cannot be raised for the first time on appeal, evidence of such agreement having been admitted below.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by J. L. Baxter against Moses Hart. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Patten & Graham and R. J. Ashe, for appellant. Robinson & Haralson, for respondent.

SEARLS, C. This action was brought to recover $391.93 for services performed by plaintiff in threshing wheat and barley for defendant. The complaint was not verified, and the answer was a general denial of its allegations. The cause was tried by the court, written findings filed, and judgment rendered thereon as prayed for in the complaint. The appeal is from the final judgment, was taken within 60 days after rendition of judgment, and is supported by a bill of exceptions. The testimony was conflicting. There was testimony tending to show the following state of facts: Plaintiff and one Flanigan owned a threshing machine, and were engaged as partners in threshing grain for farmers. Said Flanigan and defendant were also partners in the crop of grain threshed. Flanigan arranged with defendant for the threshing, and each of them was to pay separately for one-half of the threshing. Plaintiff and Flanigan then agreed that they would not thresh the crop as copartners, but that the pay coming from defendant should all go to plaintiff, and that Flanigan's grain should be threshed for him free to offset the other half. It did not appear that this arrangement between plaintiffs was known to defendant until after the grain was threshed. There was no plea of a nonjoinder of parties, and no objections to testimony.

The only question in the case is, does this testimony support the finding that defendant is indebted to plaintiff in the sum of $391.93 for the threshing of defendant's crop of wheat and barley, etc.? No reason is perceived why plaintiff and Flanigan could not, as between themselves, although copartners, agree that, as to a given venture or contract, plaintiff should have the entire benefit, as they might have assigned the demand arising therefrom one to the other after completion of such venture or contract. Had defendant presented a counterclaim against the firm held by him before notice of this arrangement, it would have been valid to defeat the claim; but, in the absence of such a cross demand, it is not perceived that he can be injured by a judgment for that which he was bound to pay. The case, then, stands thus: Plaintiff and Flanigan entered into a contract jointly with defendant, and then, by an agreement between themselves, stipulated that plaintiff should be the recipient of the entire benefit thereof. This constituted him the real party in interest as between himself and his copartner, and, as a result, he was the proper and only proper party plaintiff. In pleading the facts, however, the joint contract and the special agreement between plaintiff and Flanigan whereby the former became the owner of the claim should have been set out. It was omitted, and defendant might have objected at the trial to the introduction of the evidence of the joint contract and the agreement between plaintiff and his copartner. This was not done; and, the evidence having shown the right of plaintiff to recover, it is now, on appeal, too late to raise the objection for the first time. Had the objection been made at or before the trial, it could have been obviated by an amendment of the complaint. By not being taken, it was waived. The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 318

JACOBS v. ELLIOTT, County Clerk. (No. 18,265.)

(Supreme Court of California. Oct. 2, 1894.)

JURORS' FEES—ATTENDANCE ON COURT.

Under St. 1871–72, p. 188, § 1, amending Act 1870, § 28, and providing that jurors shall receive a certain sum per diem for "attendance" upon court, a juror is not entitled to fees for the time during which he is dismissed from attendance on the court before his final discharge.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

Mandamus by A. Jacobs against J. G. Elliott, county clerk. There was a judgment for defendant, and plaintiff appeals. Affirmed.

James F. Peck, for appellant. B. F. Fowler, for respondent.

SEARLS, C. This is a proceeding under a writ of mandate sued out by appellant to command respondent, as county clerk of the county of Merced, to issue to him, the said appellant, a certificate showing and certifying to his attendance in and upon the superior court in and for said county of Merced as a trial juror, and that he is entitled to pay for 51 days, and to like pay for one mile travel as such juror. The cause was submitted upon the petition, answer, and agreed statement, upon which the court below found in favor of respondent, and entered judgment discharging an alternative writ of mandate theretofore issued in the cause, and awarding costs against the appellant. The appeal is from the judgment discharging the writ.

The petitioner was in all respects competent to serve as a trial juror in the county of Merced, and was regularly drawn, summoned, and on the 23d day of March, 1891, appeared as a juror in the superior court in and for said county of Merced, and served as such juror for three days, viz. until and including March 25, 1891. On said last-mentioned day, petitioner and other jurors in attendance on said court as jurors were, by order of the court, duly entered, excused from attendance; and by subsequent like orders, of all of which petitioner was duly notified, he was excused from and did not attend as or serve as a juror until May 19, 1891, when he duly appeared and served for two days, at the end of which time he was finally discharged. The question to be determined is this: Was petitioner, under the law, entitled to pay for the 51 days intervening between his first appearance and his final discharge, or only for the 5 days of his actual service?

The superior courts of the several counties of the state are required in the month of January in each year to make an order designating the estimated number of trial jurors required for the transaction of the business of the court and the trial of causes therein for the ensuing year; and thereupon the supervisors are required to select a list of persons competent to serve, as required by the court, and place the same in the possession of the county clerk, who shall place the names upon separate pieces of paper, fold and place them in a box to be called the "trial jury box." "The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned." Code Civ. Proc. §§ 204–211. The following sections of the same Code provide that, when the business of the superior court requires the attendance of a trial jury, it shall require it to be drawn and summoned to attend the court at a time to be designated. These provisions of the Code are full and explicit as to the mode of selecting, drawing, and securing the attendance of jurors for the superior court, but make no provision for their compensation. Their pay is regulated in most if not all of the counties of the state by the act of 1872. St. 1871–72, p. 188. By the first section of that act, which amends section 28 of the act of 1870, it is provided as follows: "Grand and trial jurors shall receive two dollars per day for attendance upon a court of record," etc., provided that in certain counties, of which Merced is one, "grand and trial jurors shall receive three dollars per day." From the foregoing provisions it will be observed: (1) That persons become and "shall be known as regular jurors" by being selected and having their names deposited in the designated manner in the designated receptacle. (2) They become entitled to the fixed compensation only when their names are drawn therefrom, and they are summoned and attend upon a court of record. The compensation comes, not by virtue of the quasi office, but at so much per diem for attendance on the court. Jurors are subject to the orders of the court. It designates the time when their attendance shall commence, and its duration. It may excuse them for cause, and may discharge the whole panel at will. Having general authority to command the presence of the jury, and by virtue of sundry statutes as well as by that inherent authority which comes from the common law and attaches to courts of record, it is not doubted but that the superior court may, in furtherance of the public interest, dismiss from attendance upon it for a limited and specified time the jurors in attendance, without finally discharging them from their duties; and, as their compensation is only given for attendance, they are not entitled, when so excused, to the per diem fixed by the statute. As the clerk of the superior court did not refuse to the appellant the certificate for five days' attendance and the mileage to which it was conceded he was entitled, the judgment of the court below should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 373

PEOPLE v. NEARY. (No. 21,098.)

(Supreme Court of California. Oct. 4, 1894.)

HOMICIDE—TRIAL—EVIDENCE—BURDEN OF PROOF—REASONABLE DOUBT.

1. When arraigned, defendant is not entitled to have read to him a list of the witnesses examined.

2. In a trial for murder, where evidence has been given to show ill will between defendant and deceased and threats of the former against the latter, it is not error to call the attention of the jury to such evidence, where the evident purpose is to warn them against giving much importance to the same.

3. In a trial for murder, after stating that, where the killing by defendant is shown, the burden is upon him of proving circumstances which would mitigate the same, a charge that it was not necessary that defendant prove affirmatively that he did not intend such consequences, if there exists a reasonable doubt that he is guilty, is not erroneous where the court further charges that "the commission of homicide by defendant, if proved, does not cast on him the burden of proving circumstances of mitigation or excuse by a preponderance of evidence."

4. In a trial for the murder of a wife by her husband, it appeared that, a few minutes before the killing, their daughter left them in their house, eating at a table; that, on her return, defendant was trying to lift deceased from the floor, and that she died immediately; that defendant's explanation was that he and deceased had an altercation, and that a butcher knife which he threw on the table glanced therefrom, and struck the deceased; that the relation between husband and wife had been unpleasant; that the knife entered the abdomen of deceased, making an incision nine inches long, the entire length of the blade. *Held*, that a conviction would not be set aside.

In bank. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

James M. Neary was convicted of murder, and appeals. Affirmed.

Bart Burke, Charles B. Younger, and Reddy, Campbell & Metson, for appellant. Carl E. L. Lindsay, Dist. Atty., Wm. H. H. Hart, Atty. Gen., and Charles H. Jackson, Dep. Atty. Gen., for the People.

McFARLAND, J. Appellant was charged by information with the murder of his wife, Catherine Neary, and was convicted of murder in the second degree. He appeals from the judgment, and from an order denying his motion for a new trial.

1. Appellant objected to being required to plead upon the ground that he had not been arraigned, because there was not read to him at the time of his alleged arraignment a list of witnesses. Assuming that the point sought to be presented can be raised upon such an objection without moving to set aside the information, still, as there is no requirement that the names of witnesses shall be indorsed upon an information, section 943, Pen. Code, applying only to indictments, the "list of witnesses" mentioned in section 988 can apply only to an arraignment in a case where there has been an indictment. See People v. Sherman (Cal.) 32 Pac. 879.

2. The court did not err in denying appellant's challenge to the panel on the alleged ground of the disqualification of the officer who summoned the jurors. Waiving all other questions, the evidence on the point was not of such a character as to give us warrant to declare that the court erred in holding it insufficient to establish the disqualification of the officer.

3. The court did not err in overruling appellant's objection to the testimony of the coroner as to a certain statement made to him by appellant touching the cause of his wife's death. In the first place, the statement was not a confession, and therefore not subject to the rule that a confession must first be shown to have been made freely and voluntarily, etc.; and, in the second place, it was the same statement that was made to several other persons, and does seem to have been made freely and voluntarily.

4. We see no prejudicial error committed by the court in giving or refusing instructions to the jury. The court had the right to tell the jury that there had been evidence offered "tending" to show ill will between appellant and deceased, and threats by the former against the latter, for there certainly was some evidence that had that tendency. Moreover, the court made the statement clearly for the purpose of warning the jury against attaching much importance to such evidence, and immediately proceeded to impress that warning in language that occupies nearly two pages of the printed transcript. Evidently, appellant was not prejudiced by this part of the court's charge. We do not think that the part of the charge pointed out in point 5 of appellant's original points and authorities can be construed as telling the jury that appellant could be convicted solely upon his own admissions. Appellant objects to a certain part of the charge in which the word "demonstrate" is used. This part of the charge was also intended to be and was favorable to the appellant. The court, having stated the rule laid down in section 1105, Pen. Code, that, the commission of the homicide by appellant being shown, the burden was upon him of proving circumstances which would mitigate, justify, or excuse, used this language: "But you will observe in this connection that the burden of proof thus cast upon defendant is not used in any literal sense. It is not necessary that defendant shall in this matter, any more than in any other, prove affirmatively that he did not intend such consequences. It is sufficient that he demonstrate to your understanding, by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that, notwithstanding the burden so cast upon him, there still exists in your mind a reasonable doubt of his guilt. In the trial of every criminal case, the law, at the outset, clothes the defendant with the presumption of innocence until his guilt is proven beyond a reasonable doubt; and this presumption attaches at every stage of the case and to every fact essential to a convic-

tion." Moreover, at the request of appellant, the court gave other instructions upon this subject, and, among others, the following: "The commission of homicide by the defendant, if proved, does not cast on him the burden of proving circumstances of mitigation or excuse by a preponderance of evidence. If the evidence introduced, either on the part of the prosecution or the defense, creates in the minds of the jury a reasonable doubt as to whether the act was justifiable or excusable, or whether it was caused accidentally or feloniously, you should acquit the defendant." These instructions, notwithstanding the unhappy use of the word "demonstrate," state the law upon the point involved as favorably to appellant as could be reasonably expected, and go fully as far as People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549. We see no errors in the refusal of the few instructions asked by appellant which were refused. They were covered by the many instructions given. Neither were there any errors in the few amendments made by the court to the instructions asked. The court gave more than 30 instructions asked by appellant, and the charge of the court of its own motion was quite lengthy; and all the instructions, taken together, stated the law, not only fairly, but most favorably to appellant.

5. The only serious question in the case is whether the evidence was sufficient to justify the verdict, or, rather, whether it should be held here that the court below erred in not granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict. At the time the deceased received the wound which caused her death, there was no one present other than the deceased and the appellant. A few moments before it occurred, their little daughter had left them seated at a small table in a room of their house, at which they were eating, and had gone out to the well for some water. When she returned, she saw the deceased lying on the floor, and the appellant was taking her up. She died immediately. Neighbors soon came in, and the explanation of his wife's death which the appellant then gave, and which he always afterwards gave to others (he did not testify at the trial), was, substantially, that the deceased and himself had been out together somewhere, and had just returned home, and sat down to the table to eat supper; that a little altercation had taken place between them; that they had contradicted each other about some matters of difference; that he said, "That is not so," and threw a butcher knife which he had in his hand upon the table; and that the knife got out of his hand, and glanced or bounded from the table, and struck the deceased, making the wound which caused her death. It was amply shown that his character was good. The relations between him and the deceased had not been pleasant, although the trend of the testimony was to the point that she was of an unamiable and irritable disposition, and did most of the quarreling; he generally remaining silent when she found fault with him, at least when in the presence of others. However, he complained to a friend of the difficulty he had in getting along with her. It is contended strenuously by counsel for appellant that the evidence was not inconsistent with the theory of his innocence, and that, therefore, he should have been acquitted. But there were many things to be considered by the jury in determining whether or not his account of the homicide was true. His story, though not entirely impossible, was not probable. The knife, which entered the abdomen, made an incision into the person of the deceased 9 inches long,—the entire length of the blade of the knife. It passed through the skin, through fatty tissue from 1½ to 2 inches thick, through the muscles of the abdomen, and through the intestines, to the muscles of the back. Nothing appears in the record as to the sharpness of the knife, but the jury saw it. The character and direction of the wound, the relative positions of the parties when last seen, the disposition made of the knife after the occurrence, the prior feelings of the parties towards each other, the appearance and manner of the witnesses,—these and many other things, which cannot be pictured here as they were in the trial court, were legitimate matters to be considered by the jury in coming to their conclusion. Moreover, weight must be given to the denial of a new trial by the judge of the trial court, not only because he had the advantage of observing the witnesses and seeing the whole trial but because it is his province and duty to pass, in the first instance, upon questions involving the sufficiency of evidence. After carefully examining the whole case, and giving due weight to every consideration urged by counsel for appellant, we do not feel it our duty to disturb the denial of a new trial by the court below. Judgment and order affirmed.

We concur: BEATTY, C. J.; FITZGERALD, J.; HARRISON, J.; GAROUTTE, J.

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104 Cal. 260

TOON v. HUBERTY. (No. 18,299.)

(Supreme Court of California. Sept. 29, 1894.)

MARRIAGE—CONSENT WITHOUT SOLEMNIZATION.

Civ. Code, § 55, provides that mere consent, without solemnization or a mutual assumption of marital rights and duties, does not constitute a valid marriage. Civ. Code, § 75, provides for the signing and recording of a declaration of marriage by all persons married without a solemnization. *Held*, that such declaration does not constitute a valid marriage, in the absence of a mutual assumption of marital rights and duties.

Department 2. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Charles T. Toon against Mary Huberty, alias Mary Toon, to determine the validity of their marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

Snyder & Snyder and Colin Campbell, for appellant. Paul C. Morf, for respondent.

BEATTY, C. J. This is an action to obtain a decree adjudging and declaring that the plaintiff and defendant never were and are not husband and wife, and for the cancellation of a declaration of marriage. The defendant made default, and the court made and entered its judgment and decree in accordance with the prayer of the complaint. From this decree the defendant appeals, and the only question to be determined is whether the complaint makes a case for the relief granted. Appellant contends that the facts alleged in the complaint constitute a valid marriage. It appears that the parties united in a declaration of marriage, conforming in all respects to the requirements of section 75 of the Civil Code,[1] which was duly witnessed, acknowledged, and recorded; but, prior to and at the time of making said declaration, it was expressly and mutually agreed by the parties that they should never assume any marital rights, duties, or obligations, and should not cohabit as husband and wife, but should live separate and apart from each other, and they have ever since lived separate and apart and independent of each other.

Consent alone does not constitute marriage; it must be followed by solemnization, or by a mutual assumption of marital rights, duties, or obligations. Civ. Code, § 55. It is conceded that in this case there was never any assumption of marital rights, duties, or obligations, but appellant contends that the signing, acknowledging, and recording of the declaration of marriage was solemnization. The statute will not, in our opinion, bear this construction. Civ. Code, §§ 68–79. On the facts alleged and found, there was no marriage. Judgment affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

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[1] Civ. Code, § 75, provides that "persons married without the solemnization provided for in section 70 must jointly make a declaration of marriage showing: (1) The names, ages, and residence of the parties: (2) The fact of marriage: (3) The time of marriage: (4) That the marriage has not been solemnized."

104 Cal. 363

PEOPLE v. LANG. (No. 21,119.)

(Supreme Court of California. Oct. 4, 1894.)

CRIMINAL TRIAL—INSTRUCTIONS — ASSUMING FALSITY OF DEFENDANT'S TESTIMONY.

1. On a trial for burglary, where defendant testified that he spent the day on which the

crime was committed at the house of a certain person, and that he fixed the date from the fact that he and such person were thrown out of a buggy, and the person referred to testified that the buggy accident did not occur on the day of the burglary, but that on the day of the burglary the defendant was at his house "off and on, but, being busy, he could not say how long or when," and the defendant afterwards admitted that he was mistaken as to the day of the buggy accident, it was error for the court in its charge to assume that the defendant was not at the house of such person the whole of the day of the burglary.

2. In a criminal trial, in commenting on the evidence of the defendant, it is error for the court to charge that: "In looking at his testimony, you must remember it is the testimony of an accused man. Of course, he has a powerful motive to swear himself out of this charge. We all understand that. And while you are not to disbelieve him merely because he is in that situation, still you will not shut your eyes to the fact that he has that motive, and you will govern yourselves accordingly; that is to say, you will look at his testimony by the light of that fact. You may believe it after all. * * * The law invites your attention to the motives of the witnesses."

Department 1. Appeal from superior court, San Francisco county; William T. Wallace, Judge.

Robert Lang was convicted of burglary, and appeals. Reversed.

John T. Cary, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. Defendant was convicted of burglary in the second degree, and sentenced to the state prison for a term of five years. He appeals from the judgment and an order denying his motion for a new trial.

Several points are made for a reversal of the judgment, mostly based upon objections to the charge of the court.

1. The evidence of the prosecution tended to show that the burglary with which defendant was charged was committed by entering a dwelling house at 419 Baker street, in the city of San Francisco, on the 11th day of June, 1893, between the hours of 11 a. m. and 5 p. m. The defendant's main defense was an alibi. He testified that he did not commit the burglary; that he did not enter the house; was never near it in his life. He said: "I remember Sunday, the 11th of June last. I was at Mr. Carr's place. He keeps a saloon at the end of the Sutter street road, right at the corner. I went there between 8 and 9 o'clock Sunday morning, June 11th, and remained there until Monday about 12 o'clock. About 9 o'clock Sunday evening Mr. Carr asked me to come down town with him. He had a trotting horse. We went down town, and they were building a line at the time at Fifth and Mission, and the rails at this time were about this high [showing] above the pavement, and in going over it the buggy broke down. We had to leave the buggy, and go to a livery stable and hire another buggy, and put the horse in it, to go home with. That was on Sunday, June 11th, and that is the reason I remember the day." Mr. Carr, called as a witness on behalf of defendant, testified in substance as follows: "I live at the corner of Sutter and Central avenue. I am acquainted with the defendant. He was at my house the day the buggy broke down. The stable man says it was the 13th of June (Tuesday), this year. I have no means of knowing or telling the day of the week except by what the stable man says. I am sure it was not on Sunday. It was a week day. The day the buggy broke down he was out there, and wanted me to go on a bond for a friend of his. It was about two o'clock in the afternoon that we went down town in the buggy. The buggy broke down at Fourth street. It was not on Sunday the buggy broke down. He was out there two or three days before that. He was out there the Sunday before that. He was out there for two or three days before the day the buggy broke down. He was there Sunday, the 11th of June. I think he was there Saturday, Sunday, and Monday. I can't say how long he stayed, it is so long ago. Maybe an hour or two. He was there off and on. I was busy. Sunday is a busy day out there." Afterwards the defendant admitted that he was mistaken as to the day the buggy broke down. This was all the testimony introduced on the question of alibi. In this state of the evidence the court, in its charge to the jury, said: "Now, as to the matter of testimony, as I remarked to you before, the value of the testimony is entirely with you. You are the judges of that, but I will remind you that a witness false in one part of his testimony is to be distrusted in others; that is to say, a witness willfully false. Now, defendant took the stand, and he undertook to state that on the particular Sunday involved he was with a particular person the whole of the day. It turns out, it seems, that that was not so. Now, do you believe that he was willfully false in making that statement? It is said upon his part (and that is a matter to be considered) that as a matter of fact he was with this witness Carr, but he was simply mistaken as to the particular day; that he was honest in his statement. Of course, if you think he was, it would not come under this rule that I have read to you." It is urged, and we think justly so, that by this language the learned judge of the court below violated section 19 of article 6 of the constitution of the state, which provides "that judges shall not charge juries with respect to matters of fact." The court virtually tells the jury that the statement of the defendant that he was at the witness Carr's house during the whole of the time he testified he was, on Sunday, June 11th, was not true, but was false, and simply leaves it with the jury to say whether that statement was willfully false or only inadvertently so. The evidence upon the point is not necessarily open to such interpretation. It is true that it may be susceptible of such an inference, but that inference was for the jury, untrammeled by the views of the court upon

the subject. The defendant had stated that he was at Carr's during certain hours on that Sunday; that he remembered the day because of the accident to the buggy. Afterwards it turned out that the accident to the buggy occurred on a subsequent occasion, but it does not necessarily follow that because he was mistaken, or even intentionally misstated the incident about the buggy, his testimony was incorrect or false about being at the place indicated. In fact he is corroborated in part in the latter statement by Carr, who testified: "He was out there the Sunday before that. He was out there for two or three days before the day the buggy broke down. He was there Sunday, the 11th of June. I think he was there Saturday, Sunday, and Monday." It will thus be seen that the jury may well have seen fit, if left uninfluenced by the judgment of the court, to believe the defendant as to the time he was at Carr's house on the Sunday in question, notwithstanding the disparaging effect of the mistake as to the date of the buggy incident. What effect should be given to the latter when viewed in the light of all the evidence upon the fact in dispute was a question wholly committed to the jury, and the action of the court was, in effect, to withdraw it from their consideration. This was a plain invasion of the province of the jury and to the prejudice of defendant's constitutional right, for which the judgment must be reversed. People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Gordon, 88 Cal. 422, 26 Pac. 502.

2. In view of the fact that the case must go back for a retrial, we will notice one other point. Upon the question of the credibility of witnesses the court, in speaking of the evidence of the defendant, said: "In looking at his testimony, you must remember it is the testimony of an accused man. Of course, he has a powerful motive to swear himself out of this charge. We all understand that. And while you are not to disbelieve him merely because he is in that situation, still you will not shut your eyes to the fact that he has that motive, and you will govern yourselves accordingly; that is to say, you will look at his testimony by the light of that fact. You may believe it after all. That is for you, as I said before, and so it is with any other witness. The law invites your attention to the motives of the witnesses." It is contended that by this language the court clearly indicated to the jury that it was of opinion the defendant should not be believed; that the effect of this part of the charge on the ordinary mind would be "that the defendant might possibly be believed, but it was not at all probable that he would tell the truth under the circumstances." We are inclined to think this criticism not without merit, and that the learned judge transcended the proper limitation of the rule which has been established by this court. We cannot do better in this regard than to repeat what is said by Mr. Justice McFarland in People v. Murray, supra: "We think that the court went too far in cautioning the jury against believing the defendant and the two other persons charged with the crime, although we would not be prepared to say that the judgment should be reversed for that reason. In People v. Cronin, 34 Cal. 191, it was held not to be error for a court, speaking of the credibility of a defendant, who was a witness for himself, to tell the jury that: 'You should consider his relation and situation under which he gives his testimony, the consequences to him from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation.' That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already done."

There are several other points strongly urged by appellant, but, in view of the fact that they involve questions which will not necessarily arise upon another trial, we do not deem it necessary to consider them at this time. Judgment and order reversed, and cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

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4 Cal. Unrep. 821

SMITH v. FRATT et al. (No. 18,274.)

(Supreme Court of California. Sept. 29, 1894.)

PREFERENCE BY INSOLVENT—SUIT TO SET ASIDE.

In an action by an assignee in insolvency to recover the value of property transferred by an insolvent debtor to defendants, findings that defendants neither knew nor believed, nor had reasonable cause to believe, that the debtor was insolvent, or made the deed in contemplation of insolvency, are sufficient to support a judgment for defendants.

Department 1. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

Action by S. B. Smith, assignee, against F. W. Fratt and George F. Parker, to recover the value of property conveyed to the defendants before the assignment. Judgment for defendants, and plaintiff appeals. Affirmed.

D. E. Alexander, Albert M. Johnson, and Johnson, Johnson & Johnson, for appellant. Denson & Oatman, George A. Blanchard, L. S. Taylor, and S. Solon Hall, for respondents.

PER CURIAM. In January, 1887, James S. Meredith was adjudged to be an insolvent debtor, on petition of his creditors; and thereafter S. B. Smith, the plaintiff herein, was duly elected and appointed assignee of his estate. Smith qualified as such assignee, and the clerk of the court, by an instrument in writing, assigned and conveyed to him all the estate, real and personal, of the debtor.

Afterwards Smith, as such assignee, commenced this action to recover from the defendants the value of a stock of drugs and medicines alleged to have been sold and transferred to them by Meredith on December 9, 1886. The action was based upon the theory that, at the time of the transfer, Meredith was insolvent, and that it was made with a view on his part to give a preference to the defendants, who were then his creditors, and to prevent the property from coming to his assignee in insolvency, and being distributed ratably among his creditors, and that defendants, when they accepted the transfer, had reasonable cause to believe that he was insolvent, and that the transfer was made with a view to prevent his property from coming to his assignee in insolvency, and being distributed ratably among his creditors. The court found: That, at the time of the transfer, Meredith was indebted to Fratt, but not to Parker. That Meredith did not sell or deliver to Fratt the property described in the complaint, or any part thereof. That the transfer was made to Parker upon certain terms and conditions stated, and Meredith was at that time insolvent, and it was his desire to pay his debt due to Fratt in preference to other creditors, because it had been created in the purchase of this same stock of goods; "but neither Parker nor Fratt knew or believed that said Meredith was insolvent, nor did they or either of them believe, nor had either of them reasonable cause to believe, that Meredith entered into this agreement in contemplation of insolvency, or with the view of making Fratt a preferred creditor." "The defendant Parker did not purchase nor receive the transfer of said goods with the intention of giving or securing to Fratt any preference over other creditors of said Meredith, nor with intent to prevent said property from coming into the hands of the assignee of said Meredith, nor with intent to prevent the same from being distributed ratably among his creditors." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

Three points are made for a reversal: (1) The insufficiency of the evidence to support the findings; (2) error of law in excluding certain testimony; (3) the insufficiency of the findings to support the judgment.

The first point relied upon cannot be sustained. The record shows that there was evidence sufficient to justify and support each of the findings assailed. Under the well-settled rules of this court, therefore, the judgment cannot be disturbed on this ground.

Only one error of law is complained of. When Meredith was being examined as a witness, he was asked by counsel for plaintiff, "Whom did you intend to benefit in making that transfer?" The question was objected to, and excluded by the court on the ground that it called for an opinion of the witness and was incompetent. Now, conceding that the ruling was erroneous, still we fail to see how the plaintiff was or could have been in any way prejudiced by it. The evident purpose of the question was to prove by the witness that he intended to benefit Fratt by the transfer, and in effect the court found that this was his intention. If, therefore, the question had been answered, the plaintiff's case would not have been strengthened.

The third point does not require any extended notice. The action was brought to recover the value of property alleged to have been transferred in violation of the provisions of section 55 of the insolvent act. That section provides that a transfer is void, and an assignee may recover the value of the property, when the person receiving such transfer, or to be benefited thereby, has reasonable cause to believe that the person making it is insolvent, and that such transfer is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors. The findings here clearly negative the fact that either Fratt or Parker believed, or had reasonable cause to believe, that Meredith was insolvent when he made the transfer, or that it was made with a view to prevent the property from coming to his assignee, or being distributed ratably among his creditors. This being so, the findings were sufficient to show that the plaintiff had no cause of action, and to support the judgment. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

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104 Cal. 306

SANTA CRUZ FAIR-BUILDING ASS'N v. GRANT. (No. 15,488.)

(Supreme Court of California. Oct. 2, 1894.)

PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The court's action in refusing a preliminary injunction will not be reviewed unless it shall clearly appear that there was an abuse of its discretion.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by the Santa Cruz Fair-Building Association against John Grant, superintendent of streets, for a preliminary injunction restraining him from selling plaintiff's property to satisfy an assessment. From a denial of its motion, plaintiff appeals. Affirmed.

Chas. B. Younger, for appellant. Z. N. Goldsby, for respondent.

HARRISON, J. Under proceedings for the extension of Front street in the city of Santa Cruz, by virtue of the provisions of the act of March 6, 1889 (St. 1889, p. 70), the assessment had been confirmed by the city council, and placed in the hands of the superintendent of streets, and the defendant, who was such superintendent, was proceeding to collect it under the provisions of the act. The plaintiff, claiming to be the owner in fee of certain lands that had been assessed for the proposed improvement, commenced this action to obtain a judgment that the assessment was made without authority or jurisdiction on the part of the city, and that no lien upon its land was created thereby, and also that the defendant be enjoined from selling said lands to satisfy said assessment. In the complaint the plaintiff alleged, as the basis of its cause of action, that the city council had never passed any resolution describing the land deemed necessary to be taken for the extension of Front street, or specifying the exterior boundaries of the district to be affected by said improvement, and, after alleging the various steps taken under the above statute, further alleged that the defendant had advertised its lands described in the complaint for sale at public auction, and was threatening to sell the same for the purpose of satisfying said assessment. Prior to the issuance of the summons, the plaintiff moved the court upon the complaint that a preliminary injunction be granted at the time of the issuance of the summons, restraining the defendant, during the pendency of the action, from selling the land as described in the complaint. The court denied the application, and from this order the plaintiff has appealed.

The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case (High, Inj. § 11); and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of its discretion. Upon such application a court will consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; and if the court is satisfied, from the nature of the action and the threatened injury, that the rights of the plaintiff will be fully conserved by granting an injunction after a hearing upon the merits, while, in case the plaintiff should fail to sustain his complaint, the injury sustained by the defendant from the preliminary injunction could not be compensated, a wise discretion would dictate its refusal. Olmstead v. Koester, 14 Kan. 467. And in granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties. 1 Joyce, Inj. 497. Chancellor Walworth said, in Dyeing Establishment v. Fitch, 1 Paige, 98: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the case. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing, and the delay dangerous." See, also, Mayor, etc., v. Curtiss, Clarke, Ch. 340. "An injunction in limine is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to an injunction on final hearing." Akin v. Davis, 14 Kan. 143. A party seeking to enjoin a public officer from the performance of an official duty should show by distinct averments that the threatened acts of the officer will interfere with his rights to such an extent as to cause him some irreparable injury. In the present case, if the city council had no jurisdiction to authorize the extension of Front street, the assessment would create no lien upon the lands of the plaintiff, and a purchaser at the sale would acquire no title. These facts would be determined by the final decree in the action, and the rights of the plaintiff could be thereby fully protected. On the other hand, if the plaintiff should fail to sustain the allegations of the complaint, the delay in the improvement that would be caused by a preliminary injunction might work damage to the public, and injuriously affect others than the defendant. Moreover, although it is alleged in the complaint that the defendant has advertised the lands of the plaintiff for sale at public auction, it does not appear at what time the sale was to be made; and one of the grounds upon which the court denied the application was that it had "on the previous day tried and determined a case under the same assessment and involving the same points." The court may have concluded that the present action could be tried and determined before the day of sale; and it may also have been so well informed of the nature of the defense to the action as to justify it in denying the application for a preliminary injunction. Stoddart v. Vanlaningham, 14 Kan. 18. As the appellant has failed to show that the court in any respect abused its discretion, the order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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104 Cal. 321

COULTERVILLE & Y. TURNPIKE CO. v. STATE. (No. 18,277.)

(Supreme Court of California. Oct. 2, 1894.)

ACTION AGAINST STATE—ESTOPPEL OF STATE.

Where a turnpike corporation sued the state for an infringement upon an alleged exclusive grant, occasioned by a competitive legislative grant, the fact that the act of legislature conferring authority so to sue contained a recital in the introduction thereto that such exclusive privilege had been granted to the plaintiff will not preclude the state from availing itself of the defense of a denial of such grant, or of its validity, when it is clear from the language of the act that the legislature never so intended.

In bank. Appeal from superior court, Sacramento county; J. E. Prewitt, Judge.

Action under legislative authority by the Coulterville & Yosemite Turnpike Company against the state of California to recover for alleged infringement on their grant. From judgment for defendant, plaintiff appeals. Affirmed.

Mastick, Belcher & Mastick and James A. Waymire, for appellant. Atty. Gen. Hart, for the State.

FITZGERALD, J. This action was brought under the authority conferred by an act of the legislature approved March 31, 1891, and is entitled "An act to enable the Coulterville and Yosemite Turnpike Company, a corporation, to sue the state of California for the loss and damage suffered and sustained by said corporation by the construction of a road by the Yosemite Turnpike Road Company, under and by virtue of an act of the legislature of the state of California, entitled 'An act granting the right-of-way to the Yosemite Turnpike Road Company over the Yosemite grant,' approved February 17, 1874, and for the relief of said Coulterville and Yosemite Turnpike Company." The facts stated in the complaint as constituting plaintiff's cause of action are the same as those recited in the preamble of the act referred to, and are alleged as follows: "(1) That the commissioners to manage the Yosemite Valley and Mariposa Big Tree Grove, by their resolution adopted the 16th day of July, 1872, together with the written agreement dated the 13th day of August, 1872, agreed with plaintiff that plaintiff should have the exclusive right to construct and maintain a wagon road on the northerly or Coulterville side of the Merced river from a point on or near Crane Flat, past the line of survey of that reservation from the public lands of the United States known as the 'Yosemite Grant,' to and upon the level of the Yosemite valley, and should have the exclusive right to maintain a road on said side of the Merced river, and collect tolls thereon, for a term of ten years from the completion thereof; whereupon plaintiff, in consideration of said agreement, and in pursuance of said resolution and agreement, proceeded to construct said road, and the same was completed on the 18th day of June, 1874, and said commissioners, on the 3d day of July, 1874, accepted the same as so completed. (2) That in the year 1874 the legislature of the state of California passed an act entitled 'An act granting the right of way to the Yosemite Turnpike Road Company to construct a toll road over the Yosemite grant,' approved February 17, 1874; and under and by virtue of said act said Yosemite Turnpike Road Company constructed and completed a road on the northerly side of the Merced river, from a point near Gentry's Station to a point on the level of the Yosemite valley near El Capitan, which said road was completed in the month of July, 1874; and thereupon the said Yosemite Turnpike Road Company opened the said last-mentioned road for travel, and the same was continuously traveled by the public thereafter. (3) That the said last-mentioned road was on the northerly or Coulterville side of the Merced river, and conflicted with the exclusive privilege so granted to plaintiff; and, by reason of the construction and completion of the same, the said wagon road so completed by plaintiff became and was little used, and plaintiff suffered thereby, and by reason of the premises, great loss and damage, to wit, the sum of one hundred and twenty-five thousand dollars ($125,000)." The complaint was demurred to generally, upon the ground that it did not state facts sufficient to constitute a cause of action, and specially upon other grounds, but which, in the view that we have taken of the case, are not necessary to be considered. The demurrer was overruled by the court, and thereupon the defendant answered, setting up the following defenses: (1) A denial that the alleged exclusive privilege was ever granted to plaintiff; a denial that the road built by the Yosemite Turnpike Road Company conflicted with any exclusive privilege granted to plaintiff; and a denial of any damage. (2) That the Yosemite commissioners had no power to make the alleged agreement. (3) That the court had no jurisdiction of the person of the defendant, nor of the subject-matter of the action. (4) The statute of limitations. (5) That the said act under which this action was brought is unconstitutional. The case was tried by the court, without a jury, and judgment given for the defendant. Plaintiff appeals from the judgment and the order denying its motion for a new trial.

The questions raised by the record on this appeal, and upon which the conclusion we have reached is based, are: First. Whether the alleged exclusive privilege was ever granted to plaintiff by the agreement entered into between it and the said commissioners. Second. If it was not, is the defendant estopped from showing that fact by the recital to the contrary in the preamble to the act referred to? The first proposition is disposed of adversely to plaintiff by the finding of the court that the said commissioners did not agree with the plaintiff that it should have the exclusive right to construct or maintain a wagon road on the northerly side of the Merced river. This finding is fully justified by the evidence, and will not be disturbed, unless the defendant is concluded by the recital set forth in the preamble to the act stated in the second proposition. The sole object and purpose of that act was to empower the plaintiff to bring this action against the state; and, while it is true there is a recital in the introduction thereto that such exclusive privilege was granted to the plaintiff, yet it is perfectly clear from the reading of the act that the legislature never intended by this recital to preclude the state from availing itself of whatever defense it may have had against plaintiff's claim prior to the passage of the act. This is manifest from the language of the act itself, which provides that it shall be the duty of the attorney general "to defend said action and to interpose thereto such defenses, legal or equitable, as may exist, and which a private person under like circumstances might interpose." It is further provided that "if in said action a judgment shall be entered in favor of the plaintiff therein it shall be the duty of the attorney general to take an appeal therefrom to the supreme court of the state." If the act was susceptible of any other construction than the one we have given it, then the only question that could be determined on the trial of the case would be the amount of damages which plaintiff should recover. In disposing of the case upon these grounds, we do not wish to be understood as conceding that the commissioners had any authority whatever to grant the alleged or any other exclusive privilege. The remaining questions discussed by counsel orally and in their briefs are not necessary to be considered. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; McFARLAND, J.

4 Cal. Unrep. 850

EGGER v. RHODES. (No. 19,286.)

(Supreme Court of California. Oct. 3, 1894.)

EXPERT EVIDENCE.

One who has been a civil and hydraulic engineer for several years is qualified to testify as an expert in matters touching civil and hydraulic engineering.

Department 2. Appeal from superior court, San Bernardino county; John S. Campbell, Judge.

Action by F. W. Egger against C. H. Rhodes to rescind a contract for the sale of land. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. W. Allen, for appellant. H. C. Rolfe, for respondent.

PER CURIAM. This is an action to rescind a contract for the sale of land. Plaintiff had judgment, and defendant appeals.

1. The demurrer to the complaint was general, and was properly overruled. The facts stated were fully sufficient to constitute a cause of action.

2. It was shown that the witness F. C. Finkle was and had been a civil and hydraulic engineer for several years. This was a sufficient foundation to qualify the witness to testify as an expert in regard to the matters to which his attention was called. The objection that no opportunity was given defendant to question the witness as to his preparation for doing the work of a civil engineer, or as to any work done by him while claiming to be such, is not sustained by the record. So far as appears, no such questions, or any others, were asked or attempted to be asked by defendant for the purpose of testing the competency or skill of the witness.

3. It is earnestly insisted that the evidence was insufficient to justify the findings and decision of the court, but this point cannot be sustained. The findings cover all the issues, and are quite full and specific. To state the evidence in support of them would require a lengthy opinion, and no good would be accomplished by it. It is sufficient, in our opinion, to say that there was evidence sufficient to justify each of the findings assailed, and that the judgment cannot be reversed on this ground. We think the judgment and order appealed from should be affirmed, and it is so ordered.

104 Cal. 310

BLOOM v. HAZZARD. (No. 19,424.)

(Supreme Court of California. Oct. 2, 1894.)

CONTRACT—ACCEPTANCE—VALIDITY.

1. Where an offer is in writing, signed and delivered by the party making it, and is accepted, and acted upon by both parties, it is sufficiently executed to make it a binding obligation upon both, and will not be construed as a unilateral agreement.

2. An agreement by a constable to make a levy on execution issued, and to take less than his legal fees therefor, making, in his return, full charges, where the value of the property levied upon is presumably less than the judgment and fees, is not void as against public policy.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Lillian W. Bloom, as assignee of Charles M. Stetson, a constable, against George W. Hazzard, to recover certain fees. From judgment for defendant, plaintiff appeals. Affirmed.

H. S. Utley, for appellant. Carl Schutze, for respondent.

BELCHER, C. The plaintiff, as assignee of one Charles M. Stetson, brought this action to recover the sum of $844.90, balance alleged to be due and unpaid for services rendered by Stetson as constable in the levying upon and sale of certain real property under an execution issued upon a justice's court judgment in favor of the defendant. Before any services were rendered, Stetson executed and delivered to defendant an agreement in writing, reading as follows: "San Diego, Cal., Sept. 21, 1891. I, Charles M. Stetson, constable of San Diego township, California, agree that I will levy on the land herein described under the attached execution at the rate of $5 per day that I am actually employed at it; charging, however, in my return, the full charges and fees allowed by law. George W. Hazzard is, however, not to pay more for my work than said five dollars per day, and ten dollars for making the return. [Signed] Charles M. Stetson, Constable S. D. Township. Alfred E. Cowles, Deputy Constable." Stetson, by his deputy, made the levy and sale, and was engaged in the work 10½ days. The defendant bid in the property for $1,248.10, and the return shows that the constable's fees amounted to the sum of $928.90. On October 29, 1891, defendant paid to Stetson or his deputy $59.85, and of this sum $52.50 was to pay for said 10½ days' work at the agreed price of $5 per day, and $7.35 was to pay certain extra expenses. Afterwards, on November 2d, defendant paid Stetson $10, and received from him a receipt reading as follows: "San Diego, Cal., November 2, 1891. Received of George W. Hazzard the sum of $10 in full for fees in the case of George W. Hazzard vs. Santa Rosa Land and Improvement Company. Charles M. Stetson, Constable San Diego Township." The court found that " said Stetson received and accepted said several sums of money, aggregating in the whole the sum of $69.85, in full of all demands which he had against the defendant on account of his said services, and that said payments were made by defendant to said Stetson before said Stetson had made the assignment of his pretended claim to plaintiff, and that the defendant is not, and was not at the commencement of this action, indebted to plaintiff in any sum whatever." Judgment was accordingly entered that the plaintiff take nothing by her action, from which, and from an order denying a new trial, she appeals.

It is claimed for appellant that the agreement of September 21st was not a contract, and that at most it could only be considered a unilateral offer on the part of the constable, which required an unconditional acceptance to make it binding, and that "the writing as a contract in itself is void (a) because it is not executed by respondent,—that is, it does not show his assent; (b) because there is no second party to the instrument; (c) there is no mutuality of obligation or rights." The writing was more than a unilateral offer on the part of the constable. It was an agreement in writing signed and delivered by him to the defendant. It was accepted by defendant, and was acted upon by both parties. This was a sufficient execution to make the writing a binding obligation, and to meet all the objections above noted. Reedy v. Smith, 42 Cal. 245.

It is further claimed that the agreement was against public policy, and was therefore void. We fail to see any valid ground on which this claim can be sustained. The agreement was not intended to work any fraud or wrong upon any party; and, so far as appears, it cannot be classed as malum in se or malum prohibitum. It may be that the property to be levied on and sold was not worth enough to pay the judgment and the constable's legal fees for making the levy and sale, and if so there was no violation of public policy in his agreeing to take less than his legal fees. The property was not redeemed from the sale, and presumably because it was not worth what it was bid in for. It is admitted that it was orally understood that if the property should be redeemed, and the purchaser receive back the money bid, then he was to pay the constable the full amount of his fees. This was fair and just, and by the arrangement the law was in no way violated. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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104 Cal. 334

RECLAMATION DIST. NO. 542 v. TURNER. (No. 18,248.)

(Supreme Court of California. Oct. 3, 1894.)

RECLAMATION DISTRICT—INCORPORATION—COLLATERAL ATTACK.

1. A corporation organized to reclaim swamps and overflowed lands is of a quasi public character, and the proceedings leading up to its creation cannot be collaterally attacked.

2. Under Pol. Code, § 3454, providing that the trustees of a reclamation district shall have power to acquire, by purchase or condemnation, a right of way, and the right to take material for the construction of all works necessary to accomplish that object, including levees and embankments, the trustees of a reclamation district may acquire levees built by the owners of land for their own protection, where such levees are necessary to the reclamation of land within their district.

3. Where two of the three members of a board of trustees of a reclamation district are owners of different levees required for the purposes of the board, but have no interest in common therein, they are both disqualified to act in proceedings to acquire a levee belonging to either.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by reclamation district No. 542 against R. M. Turner to recover an assessment. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

H. V. Reardan, for appellant. Freeman & Bates, for respondent.

HAYNES, C. The plaintiff claims to be a public corporation, organized March 11, 1892, under the provisions of the Political Code, for the purpose of reclaiming swamp and overflowed lands, and brought this action against the defendant to recover the amount of an assessment made upon his lands within the district for the purpose of constructing the works necessary to reclaim the lands therein, together with certain incidental expenses connected therewith. The cause was tried by the court without a jury, and findings were filed, from which the conclusion was drawn that the defendant was entitled to judgment for his costs, and judgment was entered accordingly. The appeal is from the judgment upon the judgment roll alone.

1. The answer attacked the validity of the organization of the district as a corporation, and alleged that it had no capacity to sue. This court has repeatedly held that corporations similar to the plaintiff in this case are of a quasi public character, and that the legality and regularity of the proceedings leading up to their final creation cannot be attacked collaterally. This is the course attempted to be pursued here, and a long line of authority is opposed to it. See Quint v. Hoffman (Cal.) 37 Pac. 514, 777, and cases there cited.

The second and sixth findings of fact are as follows: "(2) That on or about the 11th day of March, 1892, plaintiff employed B. L. McCoy as engineer, as alleged in its complaint, and for the purposes therein alleged, and he, thereafter, as in said complaint alleged, did survey, plan, locate, and report a system of reclamation and an estimate of the cost of the work necessary for the reclamation of the lands in the district and of the lands needed for right of way, and the amounts estimated and reported by him were as stated in said complaint; that in such report said engineer stated that there were already existing within the district a line of old levees, which were adopted by him as a part of the system of reclamation, and which, at the date of such report, belonged to private persons, and were by such engineer reported to be thirty-eight thousand eight hundred (38,800) feet in length; and he reported that such old levees, from actual measurement, were worth $11,156.94, and that such sum ought to be paid therefor, of which sum he recommended that $7,987.92 be paid to persons acting as trustees of plaintiff, and that such sum be paid to the persons and in the amounts stated in defendant's answer; that said old levees are upon lands within said district, and were constructed prior to the taking of any steps for the organization of plaintiff, and were at the date of said report, and still are, the property of the persons on whose lands they are situated; that the said plaintiff has no means wherewith to purchase the title or the right to use said old levees, except by the levy and collection of an assessment upon the lands within the district; that the sum of $2,850, referred to in said complaint, was made up of the several items and amounts stated in subdivision 2 of defendant's answer; that at the time said report was made, and ever thereafter, J. M. Hoyl, William James, and E. White were trustees of plaintiff, and the said James and White were the owners of old levees adopted as part of the system of reclamation, but said James and said White had no interests in common in said old levees; that said report of said engineer was adopted by the unanimous vote of all three of said trustees." "(6) That it was at no time understood or agreed by or between plaintiff herein, or the trustees hereof, and the landowners within said district, that no landowner should receive or be entitled to any thing or sum in excess of the amount which should be assessed against his lands for benefits thereto; nor was there at any time an agreement between said plaintiff, or its trustees, and E. White that said White should not receive any sum in excess of the amount assessed against him for benefits." Section 3454 of the Political Code provides: "The board of trustees shall have power to elect one of its members president thereof; to appoint engineers and others to survey, plan, locate and estimate the cost of the works necessary for the reclamation of the lands of the district; to thereafter, at any time in its discretion, modify or change such original plan or plans, or adopt new, supplemental or additional plan or plans when, in its judgment, the same shall have become necessary; to acquire by purchase, condemnation or otherwise the right-of-way, and the right to take material for the construction of all works necessary for the accomplishment of that object, including drains, canals, sluices, bulk-heads, water-gates, levees and embankments, and to construct, maintain and keep in repair all works requisite and necessary to that end; and to do all other acts and things necessary or required for the reclamation of the lands embraced in the district." Here were more than seven miles of embankment already in existence. Assuming that new embankments where none existed would complete the reclamation of the entire district, the old embankments would, nevertheless, be in fact used for the accomplishment of that work. The old embankments were private property, however, built, doubtless, for the sole benefit and protection of the lands of the owner. It would therefore seem unjust that they should be used as part of an entire system for the benefit of others, as well as the owners, without being taken into the account, or that the owners should be assessed for the construction of new embankments covering the same space. We do not think it could have been the intention of the legislature that the existence of embankments within the district should prevent the full reclamation of all the lands within it, or that any part of the system should not be under the control of the corporation, as must be the case if the old embankments remain private property. If the embankments did not exist, it is clear that a right of way for their construction could be acquired by purchase or condemnation; nor do we see that the existence of the embankments constitutes any obstacle to the procurement of the right of way over the same ground, the embankments simply adding to the value of the right of way; or, if that be doubtful, we think it may fall within the "all other acts and things requisite or necessary" to the reclamation of the lands within the district, the words "necessary or requisite" including that which is expedient. How this can be equitably adjusted between the different land holders within the district is a question that is not before us.

2. The second point made by respondent,—viz. that two of the three trustees, being interested in the existing levees or embankments, which, according to the estimate of the engineer, constituted, in round numbers, one-half the entire cost of reclamation (aside from incidental expenses), were incapacitated by reason of their interest,—we think, must be sustained. The estimated value of the whole of the old embankments is $11,156.94, and of that owned by James and White, two of the trustees, $7,987.92. Appellant insists that, as James and White were not jointly interested in any part of the old levees, as to the value of the several interests of each, two of the trustees were disinterested and competent to act, and as to the report of the engineer, upon which the assessment was based, the board of supervisors acted, the latter board being wholly disinterested and independent, and that, therefore, the proceeding is unaffected by the personal interest of these trustees. It is not necessary to assume that the engineer was partial or prejudiced in favor of the trustees who employed him, nor that his estimate of the value of the embankments was unfair, nor that the trustees, if this assessment were collected, would pay more or less than the estimated value of these embankments. The rule involved is broader and deeper, and does not require the defendant to show that he would in fact be injured. The rule is that where the personal or individual interest of an officer or agent conflicts with that of his principal, whether such principal be an individual or the public or a corporation, he cannot, unless under special circumstances, bind his principal. Appellant is mistaken in supposing that the duties of the trustees are merely perfunctory. They employ the engineer, and such employment involves selection. He could not be selected and employed by the one disinterested trustee; and in this selection and employment the personal interests of these two trustees were involved, and were in conflict with the interests of the defendant and of all who were not the owners of embankments. Whether the embankments shall be ultimately acquired at a less cost than the value placed upon them by the engineer does not affect the assessment based upon his estimate, nor the judgment to be rendered against respondent if the proceedings should be held valid. It may be conceded that, if but one of the trustees was interested in the old embankment, the action of the others could be sustained in any purchase that might be made of them by the district; but it would be turning a very sharp corner for James to say to White, "You and Mr. Hoyl fix the value on my embankment, and buy it for the district, and he and I will buy yours," as each would be interested to increase the price of the other's property in order to increase the price of his own; and, if condemnation proceedings were resorted to, they would be defendants while prosecuting the proceedings on behalf of the district. If we are right in holding that the old embankments can be acquired by the district, and used as part of the reclamation works, we think it must follow that, since all in the district are not owners of embankments, at least a majority of the board of trustees must be composed of nonowners of such embankments.

Some other questions are made by respondent concerning the regularity of the assessment, but these do not now require notice. We would, however, in view of possible future proceedings, call attention to section 3466, Pol. Code, as amended in 1891 (St. 1891, p. 288), which seems to have been overlooked by counsel. Under this section the cause of action did not accrue until 20 days after the date of the order made by the trustees, whereas this suit was commenced in 15 days after the order was made; nor did the order require payment in installments, as provided by said amended section. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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104 Cal. 313

HUNT v. BRODERICK, Auditor. (No. 15,561.)

(Supreme Court of California. Oct. 2, 1894.)

CLAIM AGAINST COUNTY — MANDAMUS TO COMPEL AUDIT—APPEAL TO SUPERVISORS.

1. Mandamus lies to compel the county auditor to audit a valid claim against the county which has been allowed by the board of supervisors acting within their powers.

2. Consolidation Act, § 92, providing for an appeal to the board of supervisors from the rejection of a claim by the county auditor, does not apply to claims already passed on by the board, or which must be presented in the first instance for its sanction.

3. Act May 17, 1861, empowers the board of supervisors to allow a sum not exceeding $5,000 in any one fiscal year as counsel fees. Act Feb. 25, 1878, provides that the board shall not pay out in any one month more than one-twelfth of any claim allowed by law for the fiscal year,

and further provides that if, at the beginning of a month, any money remains which might have been expended in past months, it may be carried forward and expended in any succeeding months. *Held*, that the board may properly allow at one time a counsel fee of $2,000.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Mandamus, on the relation of John Hunt, executor of the will of George F. Sharp, deceased, against William Broderick, county auditor, to compel the auditing of a claim against the county. From a judgment granting the writ, defendant appeals. Affirmed.

H. T. Creswell, for appellant. E. G. Knapp, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment of the superior court in a mandamus proceeding, by which the defendant, as auditor, was required to audit, allow, etc., a certain claim and demand of plaintiff against the city and county of San Francisco which had been duly passed and allowed by the board of supervisors of said city and county. The appeal is upon the judgment roll and a bill of exceptions. We see no good reason for disturbing the judgment of the court below. There is no doubt from the evidence that the demand of respondent's intestate, Sharp, was a just one. The defenses and the points made here for reversal are in their nature technical; that is, they are based upon alleged irregularities committed by said Sharp, deceased, in presenting his demand and in prosecuting the appeal, and upon certain statutory provisions claimed to be obstructions which shut out his right of recovery.

1. Appellant objects to the form of demand, because it does not so specify the items thereof as to sufficiently comply with section 84 of the consolidation act. The demand was for legal services rendered by Sharp as an attorney in a protracted litigation, which resulted in the recovery by the city of valuable real property, viz. city slip lot No. 43. In his original petition to the board, Sharp, in reciting the history of his services, mentioned certain disbursements which in the course of the litigation he had paid out of his own pocket; and, if these are to be considered part of the demand finally allowed by the board, they were, perhaps, not sufficiently itemized. But we think the court was justified by the evidence in finding "that the said demand was and is for counsel fees alone, and was so treated and regarded, and as such allowed and approved by both the judiciary committee and the finance committee of the said board of supervisors, and as such was ordered paid by said board of supervisors, and as such allowed and approved by the mayor of said city and county, the ex officio president of said board, as such demand for counsel fees;" and there was certainly a sufficient specification of the counsel fees.

2. Where the board of supervisors have not exceeded their powers in allowing a demand, and the latter is a valid and legal claim against the county, it is the duty of the auditor to audit it, and mandamus will lie to compel him to do so. Gaslight Co. v. Dunn, 62 Cal. 589; Wood v. Strother, 76 Cal. 545, 18 Pac. 766, and cases there cited; Sweeny v. Maynard, 52 Cal. 468; Railroad Co. v. Stockton, 51 Cal. 328; Babcock v. Goodrich, 47 Cal. 488; Enkle v. Edgar, 63 Cal. 188.

3. Appellant contends that respondent should have appealed from the refusal of the appellant to audit his claim to the board of supervisors, under section 92 of the consolidation act, and that his failure to do so bars his right to a writ of mandate; and this point is the one most discussed in the briefs of counsel. The point seems to have been necessarily decided by this court in several cases adversely to the contention of appellant; but it has not been expressly mentioned in any opinion of the court to which our attention has been called. In Weed v. Maynard, 52 Cal. 460, Enkle v. Edgar, 63 Cal. 188, Gaslight Co. v. Dunn, 62 Cal. 580, and Welch v. Strother, 74 Cal. 413, 16 Pac. 22, and other cases, writs of mandate to the auditor have been sustained, or granted here originally, where no appeal had been taken to the board of supervisors, although the matter was not alluded to in the opinions; and we have not examined the transcripts and briefs in those cases to see if the point was raised. But, apart from authority, we are satisfied that where a valid legal demand has been regularly considered, passed, and allowed by the board, and the auditor has refused to audit it, he may be compelled so to do by mandamus, although the claimant has taken no appeal to the board. In the first place, if the appeal mentioned in section 92 was intended to apply to a case where the board had already passed upon and allowed the demand, the appeal would not afford a plain, speedy, and adequate remedy. In fact, it would afford no remedy at all. The board would have no more power to enforce its order after a second approval than before. "To supersede the remedy by mandamus, a party must not only have a specific adequate remedy, but one competent to afford relief upon the very subject-matter of his application." Babcock v. Goodrich, 47 Cal. 508. The board could not compel the specific act to be done by which alone respondent can obtain his rights. But, furthermore, we do not think that said section 92 was intended to apply, or does apply, to a case where the demand has once been passed upon by the board, and which must, in the first instance, be presented to and determined by the board itself. There is no necessity of such a construction of the section as will present the anomaly of an appeal to a tribunal of the very thing which it has already deliberately and finally determined. There are many instances where various officers of the city

and county have power, in the first instance, and without any previous action of the board of supervisors, to allow or reject demands. The auditor, for instance, is given power to allow or reject many and various kinds of demands which need not to be first presented to the board (see sections 82–85); and it is with respect to these latter demands that said section 92 provides that "if any person feels aggrieved by the decision of the auditor, or any other proper officer or officers of said city and county, except the board of education, in the rejection of, or refusal to approve or allow any demand upon the treasury presented by such person, he may appeal, and have the same passed upon by the board of supervisors, whose decision thereon shall be final." Clearly, this refers to a demand "presented" in the first instance to "the auditor or other proper officer," and which has not already been "passed upon by the board of supervisors." This construction makes the system harmonious, and gives to every claimant the right, at some time to have his demand considered by the board of supervisors, who are the final, and, as was said in Babcock v. Goodrich, supra, "the real, auditing power." Falk v. Strother, 84 Cal. 544, 22 Pac. 676, and 24 Pac. 110, cited by appellant, is not in point. Moreover, in that case the demand in question was first approved by the board of election commissioners, and, after rejection by the auditor, went to the board of supervisors for the first time on appeal.

4. The point is also made, though not very strenuously insisted on, that respondent's demand was invalid under the act commonly known as the "One-Twelfth Act."[1] We confess that we hardly see how that act can under any view be successfully applied to a case like the one at bar. By the act of May 17, 1861, the board is given the power to allow, out of the general fund, not exceeding $5,000 in any one fiscal year for the employment of special counsel; and it seems to be argued that because $2,000, the amount of the demand in the case at bar, is more than one-twelfth of $5,000, therefore it could not be properly allowed. How, then, could counsel ever be employed where the services would be worth more than one-twelfth of $5,000? If the board be held as restricted to $5,000 a year in the aggregate for counsel fees, it could not expend more than that amount in any fiscal year; but no such question arises here. The one-twelfth act provides that if, at the beginning of a month, any money remains which might have been expended in past months, it may be carried forward and expended in any succeeding months; and we may assume that the court properly found that the $2,000 was not more than the one-twelfth of the fund under such act. The evidence presented in the bill of exceptions may be assumed to be only that necessary to illustrate the exceptions taken, which did not include the point as to said one-twelfth act.

There is no other point necessary to be noticed. The judgment is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

104 Cal. 326

VISALIA GAS & ELECTRIC LIGHT CO. v. SIMS et al. (No. 18,268.)

(Supreme Court of California. Oct. 3, 1894.)

CONTRACT—CONSIDERATION—CORPORATIONS—LEASE OF FRANCHISE.

1. Where one party to a contract acquired possession of the property of the other by means of it, and induced that other party to forego for a period its possession and use, there was a sufficient consideration for the contract.

2. Where a corporation secures a franchise, by municipal grant, to operate gas and electric works, and to supply the inhabitants with the product, it becomes its legal duty so to do; and a lease of its works and privileges is ultra vires, and void as against public policy.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Visalia Gas & Electric Light Company against J. F. Sims and W. B. Morris, sureties for its lessee, Lynch. Verdict for plaintiff. Defendants appealed. Reversed.

Wm. H. H. Hart (A. R. Cotton and Nowlin & Fassett, of counsel), for appellants. N. O. Bradley and Bradley & Farnsworth, for respondent.

TEMPLE, C. The complaint charges that plaintiff leased to one Lynch, June 24, 1887, certain premises, including the plant of the Electric Light & Gas Company, for the term of two years from June 1, 1887; that Lynch agreed to take possession, manage, control, and operate the same, and to pay said company every three months during the term all the receipts of said gas and electric light business, after paying all necessary charges and expenses incurred in carrying on said business, and further agreed that the amount so paid should be sufficient to enable it to pay an annual dividend to its stockholders of 5 per cent. upon its capital stock of $28,000, and in case of deficiency he would pay to such company every three months such further sums as would enable it to pay such dividend; that defendants became sureties by signing an agreement indorsed on said agreement of lease, whereby they agreed, if said Lynch failed to pay plaintiff such sums, or any sums which might be due, they would pay the same; that Lynch took possession of the demised property, and retained it until June 1, 1889, without paying plaintiff any sums of money as rents or receipts from said business; that on the 1st of June, 1888, there became due plaintiff on said agreement $1,400, and on the 1st of June, 1889, the sum of $1,400; that no part of said sums has been paid. The answer contains several defenses. (1) It denies that Lynch held possession for two years, and avers that plaintiff ejected him August 1, 1888. (2) There was no consideration for Lynch's agreement. (3) No consideration for the agreement to pay sums additional to the receipts from the business. (4) Receipts did not exceed the expenses. There was therefore a failure of consideration. (5) The contract of defendants was without consideration. (6) Failure of consideration for sureties' agreement. (7) Want of consideration again pleaded. (8) Plaintiff was incorporated to furnish gas and electricity to the inhabitants of Visalia for illuminating purposes. The alleged lease was therefore ultra vires. (9) The contract is ultra vires, and against public policy. A defense by amendment sets up the incorporation of plaintiff for specific purposes of furnishing light to the inhabitants; an ordinance procured by it from the city, authorizing it to lay pipes in the streets, and to erect masts for electric lights; the acceptance of the franchise; the construction of the works; the duty of the corporation to furnish gas and electric lights in consideration of the privileges; and its undertaking that the works shall not constitute a nuisance,—and again charges that the lease to Lynch was against public policy and void. The findings and judgment are for plaintiff. Nevertheless, the court found that the receipts from the demised property were insufficient to pay running expenses; that plaintiff was incorporated for the purpose of manufacturing coal gas, and to sell such gas and electricity to the inhabitants of Visalia, and was by ordinance authorized to lay down and maintain gas pipes in the streets of said city, and through such pipes supply the inhabitants with gas, and to erect and maintain poles, masts, and wires to conduct electricity through said city; that prior to the making of said agreement it had accepted said franchise, and had laid its pipes in the streets of said city, and erected the poles, masts, and wires, and when the lease was made was in the possession of and using said plant and said franchises; that among other restrictions imposed by such ordinance was the requirement that the works should be so constructed and used as not to become a nuisance; that no authority was conferred by said ordinance upon plaintiff to lease or assign such franchise.

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[1] Act Feb. 25, 1878, provides "that it shall not be lawful for the board of supervisors to authorize, pay or render payable in any one month, any demands against said treasury which shall in the aggregate exceed one twelfth part of the amount allowed by laws existing at the time of such contract, authorization or payment, to be expended within the fiscal year of which said month is a part."

1. Defendants contend that the lease and their undertaking as sureties are void, because not supported by a valuable consideration. The lease is supposed to be unsupported by a valuable consideration, because it, in terms, binds the lessee to pay over to the lessor all moneys received, over and above running expenses. Therefore, it is said, there was no chance for a profit to the lessee. His agreement to take care of and manage the works, and to guaranty a certain profit, was gratuitous. The contract bound him to do it for nothing. We need not inquire what induced Lynch to enter into a contract so one-sided. He may have had a motive which is not apparent. As matter of law, however, the contract was supported by a sufficient consideration. This may as well consist in detriment to the lessor as in profit to him. By the contract he acquired possession of the property for two years, and induced plaintiff to forego for the same period its possession and use. Who can say that plaintiff could not and would not have realized a profit from the property, but for the lease?

2. The main defense, however, is that the lease is ultra vires, and against public policy. The real question presented is not that the lease is ultra vires as to the corporation, but that, plaintiff having availed itself of the franchise granted it by the city of Visalia, it became its legal duty to operate its gas and electric works, and to supply the inhabitants with gas and electricity, and it was therefore against public policy to lease those works and privileges to Lynch, and thus disable itself for the time from performing its duty. This proposition is clearly maintained in Thomas v. Railroad Co., 101 U. S. 71. That was the case of a lease of a railroad and franchise. The court said, speaking through Mr. Justice Miller: "Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions,—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes,—is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in Railroad Co. v. Winans, 17 How. 30. * * * 'This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation, to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these

were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature.'" This case was cited and approved in Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 198, 2 Sup. Ct. 221, and in Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409. So, too, the customers are interested in having a responsible party to deal with. The city has provided such a party in its contract with the corporation, for such it has been held to be. People v. Chicago Gas-Trust Co., 130 Ill. 268, 22 N. E. 798; Gibbs v. Gas Co., 130 U. S. 411 9 Sup. Ct. 553. The same conclusion is reached upon the principle that they cannot delegate functions and powers given to them. "Delegatus non potest delegare." The subject is extensively discussed in Mor. Priv. Corp. §§ 656, 1114, 1116, 1129. In the last section he says that the principle applies to gas companies. The author's conclusions accord with the cases above cited. In fact, respondent has furnished no cases to the contrary.

It is said, however, that when a contract which was ultra vires has been performed by one party the other is then estopped to plead that the contract was ultra vires. Here, however, the contract was void because against public policy. In such cases, courts will not give relief to either party. Respondent contends that the rule is different as to corporations, and some cases seem to sustain the claim. It is impossible to see why there should be a difference in such cases because one party is a corporation. It is sometimes said, however, that a contract of a corporation is against public policy when it is simply ultra vires, because it is against public policy that a corporation should assume to exercise powers not granted. In such case it is simply an executed ultra vires contract. But it may also be an attempt to do that which is unlawful without reference to the corporate franchise, —a contract which would be unlawful in a natural person. In such case the contract of the corporation is subject to the same rule which obtains in the case of individuals. But it would make no difference here. The lessee, it is found, made nothing from the lease. The rule is the same that it would have been had the corporation been sued. Says Morawetz (section 715): "If money or property is given to a corporation under a contract which is void because the agent assuming to represent the corporation in the transaction had no authority to bind it, the corporation is liable to account for the money or other property received. * * * Thus, in Burges and Stock's Case, 2 Johns. & H. 441, the directors of a life assurance company had issued policies of marine insurance, and applied the premiums to the use of the company. Upon winding up the company the holders of the policies were held not to be entitled to prove for losses, but were allowed the amount of the premiums paid. Vice Chancellor Page-Wood said: 'They had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received.'" So, he says, a corporation cannot be charged with a loan of money made by its directors without authority, but if any portion of the money has been applied to the proper uses of the company it may be held liable to that extent at least. It is said: "The liability of the company does not, in such case, arise from the contract entered into by the directors, but from the equitable right of the lender to recover his money, which has gone to swell the company's assets." I think this is the principle which underlies most of the cases upon this subject, although forced to admit that some are not consistent with it. This action is on the contract to recover an amount of money which the lessee guarantied the property would pay, but which it did not. It is not for any amount of benefit which he received from the contract. It is found that he received no benefit upon it. The fact that there was a consideration which would prevent the contract from being a nudum pactum for the want of it does not make a case of benefits to be paid for, where a contract is ultra vires; and the contract, being against public policy, should not be enforced. I recommend that the judgment be set aside, and judgment on the findings ordered for defendants.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is set aside, and judgment on the findings ordered for defendants.

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104 Cal. 272

Ex parte ROACH. (No. 21,117.)

(Supreme Court of California. Sept. 29, 1894.)

INTOXICATING LIQUORS—LICENSE FROM CITY—COUNTY SUPERVISORS.

A person carrying on the liquor business within a city, who has received a license from the city, and is acting in conformity with its ordinances, cannot be prosecuted for a failure to observe the provisions of an ordinance of the supervisors of the county in which the city is situated, requiring liquor stores to be closed at a certain hour.

In bank.

Application by William M. Roach for a writ of habeas corpus. Writ allowed.

Horace L. Smith, for petitioner. S. Solon Holl, for respondent.

HARRISON, J. The petitioner is held by the sheriff of Kings county under a warrant of arrest issued by a justice of the peace of Lucerne township, in that county, upon a complaint charging him with having on the 13th of April, 1894, sold at his saloon, in the city of Hanford, certain intoxicating liquor, in violation of an ordinance of the board of supervisors of Kings county. The ordinance which the petitioner is charged with violating is entitled "An ordinance for the purpose of regulation, relating to saloons and other places where intoxicating liquors are sold, given away, or in any manner disposed of," and makes it unlawful for any person to sell any intoxicating liquor at a saloon between the hours of 10 o'clock p. m. and 5 o'clock a. m. of the succeeding day. The city of Hanford is a municipal corporation of the sixth class, organized under the municipal government act of March 13, 1893, and had prior to the 13th of April, 1894, passed an ordinance providing for the issuance of licenses for the sale of intoxicating liquors. The petitioner had complied with the provisions of this ordinance, and had received from the city of Hanford a license to carry on the business of retailing liquor within that city, which was in force at the time of his arrest. It is contended on the part of the petitioner that he is illegally held, for the reason that the supervisors of Kings county are without any police authority within the city of Hanford; that the ordinance passed by that body under which he was arrested is limited in its operation to those portions of the county not included within the boundaries of any municipality therein.

A municipal corporation can exercise only such powers as have been expressly or by necessary implication conferred upon it by law. These powers are to be found in its charter, or in some provision of the statute or constitution of the state wherein it is organized. Any ordinance passed by it within the scope of the authority expressly conferred upon it has the same force within the corporate limits as a statute passed by the legislature itself has throughout the state. 1 Dill. Mun. Corp. § 308; Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480. Each derives its authority from the same source, and is an exercise of legislative power which has been conferred by the people. In the one case the power is exercised directly by the legislature, and in the other it is the exercise of a delegated power which has been authorized by the constitution, but in both cases the source of the power is the same. Any inconsistency between the two is to be resolved in favor of the ordinance, upon the principle that of two statutes containing inconsistent provisions that which is later in date is a repeal by implication of the earlier one, and upon the further principle that a statute making particular provision for a designated object or district will be deemed to contain the legislative will for that object or district, and will prevail over a general law applicable to the state at large. State v. Clarke, 54 Mo. 17; State v. Clarke, 25 N. J. Law, 54; St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571; Daw v. Board, 12 C. B. (N. S.) 161; Suth. St. Const. § 140. The adoption of the ordinance, being the exercise of a delegated legislative power, is to be construed with the same effect as if it had been adopted by the legislative power itself. Upon this principle, ordinances passed by a municipality whose territory is included within a county will supersede any ordinance of the county upon the same subject. Each being the exercise of a legislative power derived from the same source, is to be construed as though each had been the exercise of that power by the legislature itself.

Section 6 of article 11 of the constitution provides: "Corporations for municipal purposes shall not be created by special laws; but the legislature by general laws shall provide for the incorporation, organization and classification in proportion to population of cities and towns, which laws may be altered, amended or repealed." Under this authority the legislature, in 1883 (St. 1883, p. 93), adopted a municipal government act for the incorporation and organization of cities. Section 1 of this act provides: "Any portion of a county containing not less than five hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may be hereafter conferred by law, upon municipal corporations of the class to which the same may belong." By virtue of this act the city of Hanford has been carved out of the territory of Kings county, and organized into a city with the powers conferred by the act. Section 11 of article 11 of the constitution provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The power to make these regulations is by this section conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the lawmaking power which the people through their constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the constitution than if it had been conferred immediately through an act of the legislature. The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws." As this limitation applies equally to regulations of the county and the city, it cannot be held by the terms of the limitation that the regulation of either of these bodies is a general law for the other; and it is held that an ordinance passed by a county is not a "general law," within the meaning of this section of the constitution. Ex parte Campbell, 74 Cal. 25, 15 Pac. 318. The constitution recognizes the division of the state into counties, and has authorized the legislature to establish for them a uniform system of government; but it has also authorized the creation of other municipalities within the boundaries of the several counties, and has given to such municipalities the same power of legislation upon these enumerated subjects as is conferred upon the counties themselves; and the power thus conferred by the constitution is to be construed, if possible, in such a way as to give full effect to its exercise by each of the designated bodies. It is no more necessary that there be a conflict between the power thus to be exercised by the county and the city than if the authority of each had been derived through an act of the legislature. It is not to be supposed that it was the intention of the people, through their constitution, to authorize a county to exercise the same power within the territory of the city as the city itself could exercise, or to confer upon the county the right to interfere with or impair the effect of similar legislation by the city itself. Mr. Dillon says (section 184): "There cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdictions, and privileges." Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own particular boundaries. By the organization of a city within the boundaries of a county, the territory thus organized is withdrawn from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convincing of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confined to its control. In Ex parte Wolters, 65 Cal. 269, there was nothing in the record to indicate whether the ordinance then under consideration was for the purpose of revenue or regulation, or for both. In their brief, counsel for the petitioner expressly stated that the purpose of the writ was to test the question of the power of the board of supervisors to exact from persons transacting business in the county a license tax for revenue purposes. The right of the county of Butte to exercise within any city in the county the police power conferred by section 11 of article 11 of the constitution was not presented or considered by the court, and counsel expressly disclaimed any intention to argue that question. It did not even appear that the sale of the liquor for which the defendant was under arrest was made within the limits of any city. In Ex parte Campbell, 74 Cal. 25, 15 Pac. 318, where an ordinance of the city of Pasadena prohibiting the sale of wines or liquors in saloons and barrooms was under consideration, it was held that any regulations of the county of Los Angeles could not have the power to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. In re Lawrence, 69 Cal. 608, 11 Pac. 217, presented the single question whether the county as well as the city had the right to collect a license tax for the business of selling liquor, and did not involve any question of the exercise of a police power. We are clearly of the opinion that the ordinance of the board of supervisors of Kings county is inoperative within the city of Hanford, and that the petitioner is illegally restrained of his liberty, and must be discharged; and it is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; VAN FLEET, J.

Ex parte SCHERRER. (No. 21,160.)

(Supreme Court of California. Sept. 29, 1894.)

In bank.

Application by George Scherrer for a writ of habeas corpus. Writ allowed.

William A. Bowden, for petitioner.

PER CURIAM. Upon the authority of Ex parte Roach (No. 21,117) 37 Pac. 1044, this day decided, the petitioner is discharged.

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104 Cal. 390

JOHNSTON v. BOARD OF SUP'RS OF GLENN COUNTY. (No. 13,295.)

(Supreme Court of California. Oct. 5, 1894.)

HIGHWAYS—REPORT OF VIEWERS.

Pol. Code, § 2688, provides that, after hearing the report of viewers in the laying out of a highway, the supervisors must declare the report to be approved or rejected in whole or in part. *Held*, that where, under a bill of review directed to a board of supervisors, it appears that a viewers' report is regular on its face, and the only question raised is whether the report was true, the action of the supervisors in approving the report will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Seth Millington, Judge.

Application by Mary S. Johnston for a bill of review commanding the board of supervisors of Glenn county to return proceedings laying out a road. The writ was dismissed, and the petitioner appeals. Affirmed.

Charles L. Donohoe, for appellant. Geo. D. Dudley and F. C. Lusk, for respondent.

VAN CLIEF, C. On the petition of plaintiff the superior court of Glenn county issued a writ of review to the defendant board, commanding it to certify and return to that court all its proceedings in laying out and establishing a public road upon plaintiff's land. It is not disputed that the defendant obeyed the writ by returning certified copies of all matters of record, and all matters required to be recorded, relating to the laying out and establishing of said road, showing among other things that the board duly appointed three persons, Stockwell, Knock, and Armstrong, as viewers of the proposed road, a majority of whom—Armstrong and Knock—reported to the board that they had viewed and surveyed the proposed road, and that they recommended that it be established and opened. The board approved the report of the viewers, and ordered the road "to be opened as a public road according to law," and declared the amount of damages awarded to each nonconsenting landowner, and that the amount awarded to plaintiff for damages was $1,010. The court below found that in the matter of laying out the road the defendant had not, in any respect, exceeded its lawful jurisdiction, and thereupon dismissed the writ.

For the alleged purpose of showing that the report of the viewers was null and void, the plaintiff, on the trial, offered as evidence the ex parte affidavit of W. H. Sale, clerk of the board, to the effect that, on the hearing of the report of the viewers by the board, he heard Armstrong, one of the signers of that report, testify under oath that he (Armstrong) did not "survey or lay out, or help to view or survey or lay out, said road, as contained in the report of the viewers upon which said board of supervisors was acting." This affidavit was objected to by defendant on several grounds. The court sustained the objection, and plaintiff excepted. Whether or not the court erred in excluding Sale's affidavit is the only question properly presented for decision on this appeal. The bill of exceptions shows, however, that, after Sale's affidavit was ruled out, plaintiff "offered to prove" by additional affidavits and by parol testimony that Armstrong did not view the road, and that the official written report of the viewers was false in that respect; but it does not appear that any witness or additional affidavit was produced or offered for this purpose, nor that there was any ruling by the court, or exception by plaintiff, relating to this offer. The bill of exception shows that a day was fixed for hearing the report of the viewers, and notice thereof given, in full compliance with section 2688 of the Political Code, which section, in addition to requiring a day for the hearing to be fixed, and notice thereof to be given, further provides: "The board must, on the day fixed for the hearing, or to which it may be postponed or continued, hear the evidence offered by parties interested for or against the proposed alterations or new road, and must ascertain and by order declare the amount of damage awarded to each non-consenting land-owner over whose land they shall order the road to be opened, whether known or unknown, and declare the report of the viewers to be approved or rejected, in whole or in part." I think it clearly appears that by virtue of this provision of the Code the board acquired jurisdiction to hear and determine all questions relating to the report of the viewers, and to approve or reject that report either wholly or in part. That report was regular and valid upon its face, and the only question raised in regard to it was whether or not it was true,—a question of fact to be resolved according to the weight of evidence. If, as contended, the conclusion or finding of the board upon this issue was contrary to the evidence, it was merely an error committed in the exercise of unquestionable jurisdiction, and is therefore beyond the reach of a writ of review. Central P. R. Co. v. Placer Co., 34 Cal 361, 46 Cal. 670; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Farmers' & Mechanics' Bank v. Board of Equalization, 97 Cal. 327, 32 Pac. 312. But, even if such an error could have been corrected upon a writ of review, all the evidence applicable to the issue must have been brought before the court of review, in some officially authenticated form, as part of the record of the board. In this case it does not appear that any part of the testimony of the 10 witnesses that appear to have testified before the board was reduced to writing; and though the clerk of the board, W. H. Sale, whose affidavit was rejected, certified that his official return to the writ of review was "a full, true, and correct copy of the original proceedings of the board of supervisors of Glenn county, * * * as the same remain of record and on file in my office," yet no part of the testimony of witnesses is contained in that return; and the court was not asked to order any amended or additional return, but only to make Sale's unofficial affidavit as to what one of the 10 witnesses testified a part of the record which he had officially certified to be full, true, and correct. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

HARRISON, J. I concur in the judgment. Upon the face of the return to the writ the proceedings of the board of supervisors were regular, and nothing to the contrary is suggested by the appellant. The only point urged by her as error is the refusal of the court to allow the return to be amended by an ex parte affidavit that there was testimony before the board of supervisors to the effect that one of the signers of the report did not view or lay out the road. The affidavit did not purport to state that the viewer did not act, but that some persons had stated that he did not act. It needs no argument to show that a return cannot be amended in this manner. Whether the board of supervisors acquired jurisdiction of the proceedings is a question which is not presented by the record before us, and upon which no opinion should be expressed. I am not prepared to hold that the mere fact of giving the notice required by the statute vests the board of supervisors with such jurisdiction over the proceedings as to preclude the right to show that the purported report, upon which their right to give such notice rests, was false. This is entirely different from attempting to show that after the jurisdiction had been acquired they decided erroneously upon the evidence before them (Central P. R. Co. v. Placer Co., 34 Cal. 361), or that evidence was improperly received by them (Id., 46 Cal. 670).

(104 Cal. 302)

CHAPMAN et al. v. HUGHES. (No. 18,246.)[1]

(Supreme Court of California. Oct. 2, 1894.)

PARTNERSHIP—WHAT CONSTITUTES—DISSOLUTION—FIRM PROPERTY.

1. Where persons entering into a joint business enterprise contract to do all that in law is necessary to constitute a partnership, they are a partnership inter se, though they did not expressly intend to create such relationship.

2. Under Civ. Code, §§ 2401–2403, providing that property contributed by the partners shall be partnership property, the fact that they agree to retain the "title" in themselves separately is immaterial.

3. Where three persons enter into a partnership for the sale of land, the assignment by two of the partners of their interest in the partnership property to the third, and the entering into of another agreement for the division of the proceeds, is a dissolution of the partnership.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by W. S. Chapman and another against Thomas E. Hughes. There was a judgment for defendant, and plaintiffs appeal.

Maxwell, Dorsey & Soto, for appellants. L. L. Cory, for respondent.

VAN FLEET, J. This is an action for an accounting with reference to certain real-estate transactions in which plaintiffs claim to be interested with defendant as partners, and in which it is alleged large profits were made, and appropriated by defendant, who refused to account. Findings were in favor of defendant upon all the issues, upon which judgment was entered in his favor, and plaintiffs appeal upon a bill of exceptions. The pleadings and findings are voluminous, but, from the view we take of the questions involved, no extended statement of the facts is required.

1. On the question whether the 5,120-acre tract was bought by Hughes for himself, or for joint account of himself and the plaintiffs as copartners, and held in trust for the partnership, the court finds "that the defendant and plaintiffs were not at any time the owners or seised in fee of any of the pieces, parcels, or tracts of land described in paragraph 3 of the amended complaint, or any portion thereof, as copartners; that no portion of any of said land stood at any time in the name of Thomas E. Hughes for the use and benefit of the plaintiffs, and no portion of said property at any time stood in the name of the defendant, Thomas E. Hughes, in trust or otherwise for the parties to this action as copartners, or in any other way,—the fact being that Thomas E. Hughes was the owner and entitled to the sole and absolute possession of the whole thereof in fee simple." A careful examination satisfies us that the evidence upon this question, while possibly preponderating to some extent in favor of plaintiffs, is substantially conflicting, and the finding cannot, therefore, be disturbed. This finding being sustained, the entire claim of plaintiffs based upon the contention that there existed between the parties a partnership in this particular tract, independently of the syndicate agreement, must fall to the ground.

2. The syndicate agreement did, in our judgment, constitute a partnership, within the definition of section 2,395 of the Civil Code. It created an association of three persons for the purpose of carrying on together the business of selling the lands, and dividing the profits of that business between them. It contemplated united action in advertising and otherwise in promoting sales, and a joint expense to be incurred thereby, and further expressly provided for the payment to the syndicate of commissions on sales of other lands than those put into the syndicate. This was sufficient to constitute the relation that of partnership. Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established although the parties may not expressly intend to create such relationship. Pars. Partn. p. 86; Duryea v. Whitcomb, 31 Vt. 395. The respective parcels of land embraced in the syndicate were contributed by the respective partners, and thereby became partnership property. Civ. Code, §§ 2401–2403. This was not affected by the agreement that each partner should retain his title; they held the legal title in trust for the partnership use.

But the court finds that the relationship of the parties under the syndicate agreement was in effect dissolved, and their rights thereunder determined, by the subsequent agreement entered into between the defendant and each of the plaintiffs, separately, in 1883; and this, we think, was their substantial effect.

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[1] For dissenting opinion, see 38 Pac. —.

The mere assignment by one partner to another partner of his interest in the partnership property does not, it is true, dissolve the partnership (Civ. Code, § 2450); and the two agreements of 1888, so far as they operated merely to convey the land, did not, therefore, dissolve the partnership. But as these two agreements operated to vest in defendant the whole beneficial ownership of the land contributed by the plaintiffs to said partnership. and provided for the distribution of the proceeds in a manner different from, and inconsistent with, that provided by the syndicate agreement, the defendant became thereby the owner of the whole capital originally contributed by the plaintiffs, and those agreements must, therefore, be deemed a dissolution of the partnership so far as the plaintiffs are concerned. Plaintiffs are therefore not entitled to any profits made after that time, so far as the syndicate agreement is concerned, and, as the court finds that no profits were made prior to that time, they must be remitted to their rights under their separate agreements, under which it was found all the sales were made. Those rights are not involved in this action, and cannot, therefore, be determined herein. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

104 Cal. 298

BARNETT v. BARNETT et al. (No. 18,303.)

(Supreme Court of California. Oct. 2, 1894.)

CONSTRUCTION OF DEED—LIFE ESTATE—HEIRS OF THE BODY—HABENDUM CLAUSE—EFFECT.

1. Under Civ. Code, § 779, providing that "when a remainder is limited to the heirs or heir of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to it by virtue of the remainder so limited, and not as mere successors of the owner for life," a deed, in printed form, purporting to "give, grant, alien, and confirm to the party of the second part, and to his heirs (and assigns, forever)" certain lands, to have and to hold "unto the party of the second part (his heirs and assigns, forever) for and during his natural life, and to the issue and heirs of the body of the said party of the second part," in which the words in parentheses were erased, and all following the last parenthesis was added in writing, conveys a life estate only to the grantee.

2. Where from the whole deed it appears that the grantor intended by the habendum clause to restrain, limit, or enlarge the estate named in the granting clause, the habendum prevails over the granting clause.

3. The use of the word "heirs" in a granting clause is not repugnant to a habendum clause creating a life estate, since by Civ. Code, § 1072, the same estate would pass whether the word was inserted or omitted.

4. Civ. Code, § 763, providing that "every estate which at common law would be adjudged to be a fee tail is a fee simple," does not apply to an instrument conveying only a life estate, though at common law it would convey a fee tail.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by F. Joseph Barnett against Lena Barnett and others to establish a fee-simple estate under a certain conveyance, and to restrain defendants from claiming any interest therein. Judgment for defendants, and plaintiff appeals. Affirmed.

Stanton & Carter and E. D. Edwards, for appellant. J. W. Knox and S. S. Wright, for respondents.

HARRISON, J. March 14, 1890, B. B. Barnett executed to the plaintiff herein a deed of conveyance of certain lands in Fresno county, by which he purported to "give, grant, alien, and confirm unto the said party of the second part, and to his heirs (and assigns, forever), all those certain lots, pieces, or parcels of land, * * * to have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part (heirs and assigns, forever), *for and during his natural life, and to the issue and heirs of the body of the said party of the second part.*" The instrument was upon a printed form, and the above words in parentheses were erased therefrom, and the words in italics were inserted in writing. The defendant Lena Barnett is the daughter and sole issue of the plaintiff, and the other defendants are his brothers and sisters. The plaintiff claims that, by the aforesaid instrument, the lands therein described were conveyed to him in fee; and as the defendants claim that he took thereby only a life estate, and that at his death the heirs of his body will take the fee, he brought this action to procure a judgment in accordance with his said claim, and to restrain the defendants from making any claim thereto. A demurrer to the complaint was sustained by the court below, upon the ground that it failed to state a cause of action, and from the judgment entered thereon the plaintiff has appealed.

At the common law, by what is commonly called the "Rule in Shelley's Case," the above instrument would undoubtedly be construed as giving to the plaintiff the fee in the lands, and, if it had been executed prior to the adoption of the Civil Code, would have received the same construction in this state. Norris v. Hensley, 27 Cal. 439; Estate of Utz, 43 Cal. 200. Section 779 of the Civil Code, however, provides: "When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to it by virtue of the remainder so limited to them, and not as mere successors of the owner for life." The effect of this section is to abrogate the rule in Shelley's Case, and, with other sections in the Civil Code, to furnish the rules by which to determine the estate or interest in the lands which the plaintiff took by virtue of the grant. Civ. Code, § 4. Section 1105 declares that "a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended;" and, if it does appear from the grant that a lesser estate was intended, no such presumption exists. A grant is to be interpreted in the same manner as any other contract (section 1066), so as to give effect to the intention of the parties, if that intention can be ascertained (section 1636); and, for the purpose of ascertaining that intention, "the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (section 1641). The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and, in case of a grant, the habendum, as well as any other portion of the instrument, is to be considered. The ordinary use of the habendum is to define or limit the quantity of interest, or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. Montgomery v. Sturdivant, 41 Cal. 290. The rule that, if the habendum is repugnant to the premises, it is to be disregarded, is only another form of the rule that, "if several parts of a grant are absolutely irreconcilable, the former part prevails." Civ. Code, § 1070. The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but, for the purpose of ascertaining this intention, the entire instrument, the habendum as well as the premises, are to be considered; and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause. Faivre v. Daley, 93 Cal. 670, 29 Pac. 256; Pelissier v. Corker (Cal.) 37 Pac. 465. "It is in such case to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904.

Taking into consideration the whole of the instrument under discussion, it is clear that it was the intention of the grantor that the habendum should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body. The use of the word "heirs" in the granting clause creates no repugnance between that clause and the habendum, since the same estate would pass to the plaintiff whether this word were inserted or omitted (Civ. Code, § 1072); and the subsequent limitation in the habendum shows that the grantor did not intend by its use to create an estate in fee in the plaintiff. Henderson v. Mack, 82 Ky. 379. No present estate would pass to the "heirs" (Hall v. Leonard, 1 Pick. 27); and at common law the use of this word would have had the effect merely to create a fee, instead of a life estate. By section 779, Civ. Code, the term "heirs" is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Id. § 690), and therefore denominated a "future interest," is, nevertheless, an estate in the property capable of being transferred in the same manner as a present interest (Id. § 699).

Counsel for appellant states in his brief that the only question on this appeal is "whether the deed in question conveyed an estate in fee simple to plaintiff, or a life estate to plaintiff, with remainder in fee to the issue and heirs of his body;" and we therefore limit our decision to this proposition, and hold that by the instrument in question a life-estate only was conveyed to the plaintiff. Section 763 of the Civil Code has no application. This section provides that "every estate which would be at common law adjudged to be a fee tail is a fee simple." It does not provide that every instrument which at common law would be construed to create an estate tail shall be construed to create a fee simple, but that the "estate" which would be adjudged a fee tail is a fee simple. The rule of construction is defined in section 4 of the Civil Code; and we have seen that, upon a proper construction of the instrument in question, only a life estate was conveyed to the plaintiff. Being a life estate only, it is not an estate of inheritance, and hence cannot be an estate tail. As was said in Bodine v. Arthur, 91 Ky. 56, 14 S. W. 904, with reference to a similar statute: "To construe the statute as raising this life estate to the dignity of a fee-simple estate would be absurd, and would wholly defeat the object of the grantor." The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

104 Cal. 340

PORPHYRY PAVING CO. v. ANCKER.

(No. 19,423.)

(Supreme Court of California. Oct. 3, 1894.)

STREET IMPROVEMENTS—POSTING OF NOTICE.

Act March 18, 1885, as amended March 31, 1891, referring to work upon streets, provides that a resolution of intention by the city council shall be posted and published for a period of two days, and that "thereupon" the street superintendent shall post a more particular notice along the line of the contemplated improvement. *Held*, that "thereupon" is not used in the sense of "immediately thereafter," and it is sufficient if the latter notice be posted within a reasonable time.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by the Porphyry Paving Company against L. Ancker to enforce a street assessment. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles R. Gray, for appellant. C. T. H. Palmer and F. W. Gregg, for respondent.

VANCLIEF, C. Action to enforce a street assessment against defendant's land situate in the city of San Bernardino. The judgment of the lower court was in favor of the plaintiff, and the defendant has appealed therefrom, and from an order denying a new trial.

1. Appellant contends that the court erred in overruling his demurrer to the complaint on the grounds that it does not state a cause of action, and that it is ambiguous and contradictory. The complaint appears to be neither ambiguous nor contradictory, and I think it states a cause of action. But it is contended by counsel for appellant that it is deficient in several respects, only one of which, however, is sufficiently plausible to merit special consideration. The third section of the act of March 18, 1885, "To provide for work upon streets, lanes, alleys," etc., as amended March 31, 1891 (St. 1891, p. 196), provides: "Before ordering any work to be done * * * the city council shall pass a resolution of intention so to do, and describing the work, which shall be posted conspicuously for two days on or near the chamber door of said council, and published by two insertions in one or more daily, semiweekly or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement * * * notices of the passage of said resolution. * * * He shall also cause a notice, similar in substance, to be published for six days," in designated newspapers. It is properly alleged in the complaint that the resolution of intention was posted and published for two days in the manner required, "said posting being continuous from January 6, 1892, to January 16, 1892, * * * said publication being on the sixth, seventh, and eighth days of January, 1892; * * * and that upon the 26th day of March, 1892, the street superintendent of said city caused to be posted, along the line of said contemplated work," the notice required to be posted by him, and caused a similar notice to be published in a newspaper, etc. The point made by appellant is that it should have been alleged that the street superintendent posted and published the notice required to be posted by him immediately after the expiration of the two-days publication of the notice posted on the chamber door of the council, whereas it is alleged that the notices required to be posted and published by him were posted and published March 26, 1892,—more than two months after the two-days publication. It is contended that the word "thereupon," in the sentence, "The street superintendent shall thereupon cause to be conspicuously posted," etc., means "immediately;" that is, immediately after the two-days publication. The Century Dictionary defines the word as follows: "(1) Upon that. (2) In consequence of that; by reason of that. (3) Immediately after that; without delay; in sequence, but not necessarily in consequence." Webster's definitions are: "(1) Upon that or this. (2) On account of that; in consequence of that. (3) Immediately; at once; without delay." No doubt the word is much oftener used in the sense of the first and second of these definitions than in that of the third, as indicated by the order in which they are given; but which of these senses was intended by its use in any particular case is to be determined almost entirely by reference to its context. It is sometimes used to express the succession of events in the order of time, regardless of the length of the period intervening; and it has been held to refer to the consideration upon which a promise was made. In Bean v. Ayers, 67 Me. 487, the question was whether the declaration alleged a consideration for a promise. The allegation was that plaintiff delivered certain spruce and hemlock logs to defendants at their request, and that "thereupon" the defendants delivered their agreement to the plaintiff, etc. The defendants contended that the word "thereupon" was used merely to mark the succession of facts in the order of time; but the court said: "The word 'thereupon' undoubtedly has different meanings. We think, however, it may fairly be considered as referring to the reason of the promise of the defendants."

The third section of the street law under consideration requires a resolution of intention and notice thereof to be posted and published for a period of two days as necessary conditions precedent to the publication and posting of a more particular notice by the superintendent of streets for a period of six days, since the latter publication would be of no avail without prior publication of the former. As used in that section, under these circumstances, the word "thereupon" refers to the conditions precedent, and means that the publication by the street superintendent is to be made upon those precedent conditions, and necessarily implies that the publication by the superintendent of streets must follow the resolution of intention and the publication thereof, in order of time. But there is nothing in the context or in the subject-matter indicating that the six-days publication by the superintendent must immediately follow the two-days publication. That it should follow within a reasonable time is the most that should be claimed. It will hardly be contended that a delay of five, or even ten, days would vitiate all prior proceedings, and necessitate a commencement thereof de novo. What would be an unreasonable delay in one case might be reasonable in another, under different circumstances. To sustain a general demurrer to the complaint on the ground of such delay (if it could be done in any case), the unreasonableness of the delay must conclusively appear on the face of the complaint; for, if the delay is mere matter of defense, the reasonableness of which is to be determined by evidence at the trial, it is not a ground of demurrer at all. Does it conclusively appear from the complaint alone that two and a half months' delay of the publication of notices by the superintendent was unreasonable? I think not. The two-days publication of the notice of intention to do the work expired early in January, which is ordinarily followed by two or three of the most inclement months of the year. Who can say, from aught that appears in the complaint, that it was not reasonable, or not even advisable, to postpone the commencement of grading the street until April. See Hart v. Plum, 14 Cal. 155.

2. On the appeal from the order denying a new trial, appellant contends that the evidence does not justify the findings by the court. I have carefully examined all the points under this head presented by appellant's counsel, with the result that, in my opinion, the evidence clearly justifies the findings excepted to. I therefore think the order and judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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